Michaelmas Term
[2010] UKSC 41
On appeal from: 2009 EWCA Civ 648

JUDGMENT

Gisda Cyf (Appellant) v Barratt (Respondent)

before

Lord Hope, Deputy President
Lord Saville
Lord Walker
Lady Hale
Lord Kerr

JUDGMENT GIVEN ON

13 October 2010

Heard on 19 July 2010

Appellant
Paul Greatorex

(Instructed by Richard C
Hall & Partners)

LORD KERR (delivering the judgment of the court)

1. Determining what is the effective date of the termination of a person's employment has fundamental implications for any claim for unfair dismissal. This case illustrates the substantial penalty that will be paid by an employee who fails to recognise its significance, for the effective date of the termination of employment is the effective date on which time begins to run on the short period within which an employee must launch his or her claim for unfair dismissal.

The facts

2. On 19 October 2006 the respondent, Lauren Barratt, was suspended from her employment with the appellant, a small charitable organisation. It was alleged that she had behaved inappropriately at a private party. A disciplinary hearing was held on 28 November 2006. At the end of the hearing Ms Barratt was told that she could expect to receive a letter on Thursday, 30 November. This would inform her of the outcome of the hearing. Ms Barratt knew that she was at risk of dismissal. It was an important time for her, therefore. As is so often the case in human affairs, however, this episode coincided with another significant event in her life. She has a sister who had given birth to a baby a week earlier. This was a happy circumstance for she had lost an earlier baby. Naturally, Ms Barratt wanted to see her sister and the baby and to give what help she could so, at 8 am on 30 November, she left her home to travel to London. Later on the same day a recorded delivery letter arrived for her. It was signed for by the son of Ms Barratt's boyfriend. She had not left instructions for it to be opened or read and so it was left, unopened and unread, awaiting her return.

3. Ms Barratt did not return home until late on Sunday evening, 3 December. She did not open the envelope containing the letter that evening. Indeed, it was not until the following morning that she asked her boyfriend and his son whether any post had arrived. The son remembered that he had signed for a recorded delivery item. He found it among his school homework and handed it to Ms Barratt who, on reading the letter, discovered that she had been summarily dismissed for gross misconduct.

4. An internal appeal against the dismissal existed and, unsurprisingly, Ms Barratt availed of it. She was unsuccessful in her appeal. It was dismissed on 19 December 2006. Thus it was that on 2 March 2007 a claim for unfair dismissal and sex discrimination was presented on her behalf to an Employment Tribunal. Depending on the view that one takes of the date on which Ms Barratt's

employment was brought to an effective end, her complaint was lodged either just within or just outside the period of three months from that date. This is of pivotal importance to the question of whether she is able to maintain her claim to have been unfairly dismissed.

The relevant statutory provisions

5. The effective date of the termination of employment is a term of art that has been used in successive enactments to signify the date on which an employee is to be taken as having been dismissed. The fixing of the date of termination is important for a number of purposes. These include, but are by no means confined to, the marking of the start of the period within which proceedings for unfair dismissal may be taken. In the present case the relevant definition of the term, "effective date of termination", is contained in section 97 (1) of the Employment Rights Act 1996. This definition largely mirrors the meaning given to the same term by section 55 (4) of the Employment Protection (Consolidation) Act 1978, by paragraph 5 (5) of the First Schedule to the Trade Union and Labour Relations Act 1974 and by section 23 (5) of the Industrial Relations Act 1971. So far as is relevant, section 97 (1) of the 1996 Act provides: -

> "(1) … in this Part 'the effective date of termination'—
>
> > (a) 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,
> >
> > (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect …"

6. Ms Barratt had been dismissed without notice and her case was therefore governed by sub-paragraph (b) of the subsection. The simple but crucial question therefore is, when did the termination of her employment take effect? Was it when her employer decided to terminate the employment? Alternatively, was it when the letter was sent or on the day that it was delivered? Was it when Ms Barratt read the letter or should the termination be regarded as having taken effect when she had a reasonable opportunity of learning of the contents of the letter? If so, when did that reasonable opportunity arise?

7. When, by whatever means, the effective date of the termination of employment is established, section 111 of the 1996 Act comes into play. Subsection (2) of this section is the relevant provision. It is in these terms: -

> "(2) … an [employment tribunal] shall not consider a complaint [of unfair dismissal] unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

8. The dispensing provision contained in section 111 (2) (b) is not available to Ms Barratt. Current jurisprudence suggests that that provision is to be narrowly construed and sparingly invoked. One need not embark on an examination of that issue, however, for, whatever the possible scope of the sub-paragraph, Ms Barratt could not have demonstrated that it was not reasonably practicable for her to present a claim within the three-month period.

9. Establishing the effective date of the termination of employment is also important in relation to the availability of interim relief in unfair dismissal claims. This subject is dealt with in section 128 of the 1996 Act, as amended by section 1 of the Employment Rights (Dispute Resolution) Act 1998. The relevant provisions of the section are these: -

> "(1) An employee who presents a complaint to an employment tribunal—
>
> (a) that he has been unfairly dismissed by his employer,
> …
>
> may apply to the tribunal for interim relief.
>
> (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date)."

10. If the effective date of termination is taken to mean the date on which an employer decides to summarily dismiss an employee or the date on which a letter is dispatched to inform the employee of that decision, it can be seen that the period provided for in this subsection might either expire completely before the employee would become aware of the need to have recourse to it or be unrealistically shortened. For reasons which I shall develop, this consideration militates strongly against the interpretation of section 97 (1)(b) for which the appellants contend.

The history of the proceedings

11. Having received the complaint, the employers (who are the appellant in the present appeal) argued during a pre-hearing review that both claims were out of time. The Employment Judge, Mr J C Hoult, held that both claims were in time. He also held, however, that if he had been of the view that the unfair dismissal claim had not been made in time, he would not have found in Ms Barratt's favour on the issue of reasonable practicability. In respect of the sex discrimination claim he held that, if it had not been made in time, he would have exercised his discretion in her favour under the provisions of the Sex Discrimination Act 1975 (which, in section 76(5) allows a court or tribunal to consider a complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so).

12. Before the Employment Judge the case for the employers appears to have been put solely on the basis that Ms Barratt had had a reasonable opportunity to discover the contents of the letter and that, on that account, the effective date of the termination of her employment was more than three months before the presentation of her claim. Mr Hoult rejected this argument in the following passages of his judgment:

> "The Claimant clearly had the opportunity to make enquiries about any letter having been received and, had she have discovered that one had [been], she could have learnt the contents. Had she have made an enquiry by the telephone this would not have given her a reasonable opportunity to read it but of course she could have discovered the contents.
>
> …
>
> I did not accept that the Claimant had gone away deliberately to avoid reading the letter. I was satisfied that given the circumstances

> of her sister that the reason for the visit to London was genuine it was to help her sister with housekeeping and looking after her child.
>
> …
>
> It was clear that she left for London without knowing the decision. In my view the Claimant did not have a reasonable opportunity of reading the letter of dismissal until 4 December 2006. Whilst she may have been able to ask someone to read the letter over to her she did not and this did not seem to be an unreasonable position to adopt given the reason for her absence from the home."

13. The employers' appeal against the decision of the Employment Judge was confined to the single issue of whether he had been right to find that the unfair dismissal claim had been brought in time. No challenge was made to his finding in relation to the sex discrimination claim nor to his indication that he would not have found in Ms Barratt's favour on the matter of the extension of time for the bringing of the unfair dismissal claim, if that had been in issue before him.

14. The case for the employers before the EAT was more broadly based than it had been before the Employment Judge. It was argued that whether a contract of employment remained in force should not depend on an examination of what a claimant did or on an investigation of what he or she had the opportunity to do. A contract could be terminated by one party without the other party actually being aware of the termination. It was so terminated when the communication could be expected "in the normal course of things" to have come to the other party's attention. The same approach should be followed in determining the effective date of termination under section 97 of the 1996 Act.

15. This argument was rejected by the EAT in a judgment delivered by Bean J. Mr Greatorex (who by then was appearing for the employers) had relied on a decision of the Court of Appeal in *The Brimnes* [1975] QB 929, [1974] 3 WLR 613, [1974] 3 All ER 88. In that case the owners of a ship sent a telex to the charterers at 5.45 pm on 2 April 1970 purporting to withdraw the vessel on the ground of late payment of the hire charge. The charterers' normal business hours ended at 6.00 pm. The telex was not seen until the morning of 3 April, although it had arrived in the charterers' office at 5.45 pm on 2 April. Brandon J found that the notice must be regarded as having been received by the charterers before 6.00 pm on 2 April. The Court of Appeal upheld that decision, Megaw LJ stating what Bean J took to be the correct principle of law in the following passage at pages 966-967:

> "… if a notice arrives at the address of the person to be notified, at such a time and by such a means of communication that it would in the normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal businesslike manner in respect of taking cognisance of the communication so as to postpone the effective time of the notice until some later time when it in fact came to his attention."

16. Bean J rejected the purported analogy with *The Brimnes* decision, saying in para 17 of his judgment:

> "It is one thing to say that the owners or charterers of a ship, or similar large commercial concerns, must be taken to receive and read documents sent to them during normal business hours. It is quite another thing to say that the same principle of constructive knowledge should apply to individuals to whom a letter is sent at their home address. What of the person who lives alone and goes on holiday? What of the commercial traveller? What of the student who lives at university during term time and at the family home in the holidays? What of the individual fortunate enough to have a second home to which he or she goes at weekends? There is no principle equivalent to that enunciated in *The Brimnes* that an individual is expected to be at home to receive and open the post when it arrives or in the evening when he or she gets home, or that some arrangement must be made for someone else to open what may well be confidential correspondence in the recipient's absence."

17. The argument before the Court of Appeal followed the course that it took before the EAT. It was submitted that the Employment Tribunal ought to have concluded that Ms Barratt had a reasonable opportunity of reading the dismissal letter before 3 December 2006. Mr Greatorex argued that the Tribunal had erred in law in looking at the reasonableness of Ms Barratt's conduct rather than whether she had a reasonable opportunity to know of her dismissal before 3 December 2006.

18. What the Court of Appeal rightly called the more substantial and radical ground was contained in counsel's second argument. It was to the effect that earlier decisions of the EAT (such as *Brown v Southall & Knight* [1980] IRLR 130 EAT and *McMaster v Manchester Airport plc* [1998] IRLR 112 EAT), which suggested that the effective date of termination was when the employee had actually read the letter and knew of the decision or, at any rate, had a reasonable opportunity of reading it, had been wrongly decided and should be overruled.

19. By a majority, the Court of Appeal, [2009] IRLR 933, (Mummery LJ and Sir Paul Kennedy, Lloyd LJ dissenting) dismissed the appeal. As to the first argument, it was unanimously held that the Tribunal had not erred in law. Mummery LJ stated that it was open to the Employment Tribunal to conclude on the evidence that the claimant had not gone away deliberately to avoid reading the letter, that she had left for London without knowing the decision and that she did not have a reasonable opportunity of reading the letter of dismissal until 4 December. Lloyd LJ agreed with the appellants' argument that, in principle, an opportunity to "read" the letter could include an opportunity to have it read over to the addressee on the telephone, or to have its contents communicated in some other way but he did not agree that the tribunal's judgment on this issue involved an error of law.

20. On the second argument, the majority of the Court of Appeal accepted that Gisda's contractual analysis was a possible "starting point" in the approach to the proper interpretation of section 97(1). The contractual analysis proffered by the appellant had been that since the effective termination of an employment contract may predate the employee's actual knowledge of the summary dismissal, and since there was no principle of contract law that required an employer to communicate the termination of the contract to the employee for the termination to take effect, it was wrong to fix the date of summary dismissal as the date of the employee's actual knowledge of the dismissal or the date on which he or she had a reasonable opportunity to learn of the dismissal.

21. The majority dismissed this argument for a number of reasons outlined by Mummery LJ in paras 34-38 of his judgment. Those reasons may be broadly summarised as follows: -

(i) The expression "effective date of termination" is not a term of contract law but a statutory construct specifically defined for the purposes of a legislative scheme of employment rights based on a personal contract.

(ii) The critical act triggering the time limit is that of the employer. When and how the summary dismissal is notified is outside the employee's control. If the employer chooses to communicate the summary dismissal by post rather than in a face-to-face interview, it is reasonable that he should accept that until the employee either knows of the dismissal or has a reasonable opportunity to learn of it, it will not be effective.

(iii) The employment protection legislation is designed to achieve fairness in the dismissal process. An employee cannot reasonably be expected to take action until informed of the dismissal on which action is to be taken. The

legislation gives the employee three months, not three months less a day or two, in which to make a complaint.

(iv) The rule that the effective date of termination was when the employee actually knew of the decision or had a reasonable opportunity of discovering it had been established and followed for nearly 30 years without challenge. While it was not binding on the Court of Appeal, considerations of certainty in practice and consistency in approach dictated that it should not be lightly cast aside.

(v) Finally the rule had been in existence for a considerable period without legislative amendment, "even though there have been Parliamentary opportunities to eliminate legal error, manifest injustice or practical inconvenience from the operation of employment protection laws".

22. Lloyd LJ considered that, since "at first sight" employment was a matter of contract, the termination date was to be determined according to the general law of contract "as it applies to employment contracts". In principle, therefore, the quest to discover the date on which the termination of the employment contract took effect should begin with the general law of contracts of employment. This was the first opportunity for the Court of Appeal to pronounce on the subject and Lloyd LJ considered that the court should not be deterred from striking out on a different course simply because the opportunity to do so had not arisen since 1980. He expressed his conclusions on the appeal in the following passage from para 77: -

> "… the correct view of the law is that an employment contract is brought to an end by a dismissal letter sent by or on behalf of the employer to the employee at his or her address, and delivered to that address, and that it comes to an end on the date of such delivery, regardless of whether or not the employee was there at that time or later on that day, or did not see the letter, for whatever reason, until a later date …"

The appeal

23. In a submission of conspicuous ability, Mr Greatorex renewed the arguments that he had presented so forcefully to the Court of Appeal. He asserted that it was fundamentally wrong to link the termination of the contract to knowledge (or the reasonable opportunity to obtain it) on the part of the employee that employment had been brought to an end. Even if this was a correct approach, however, "reasonable opportunity" should be given a much narrower interpretation

than that which it had been traditionally afforded. Section 97 (1) was, in its essence, a jurisdictional provision. As a matter of principle the question of jurisdiction should not be determined by examining the reasonableness of the behaviour of the person who sought to establish it. If the concept of "reasonable opportunity" had any part to play in determining the effective date of termination, it should be objectively assessed. The examination should focus on whether there was *in fact* an opportunity to learn of the dismissal, not whether, in failing to avail of the opportunity, the employee could be considered to have acted reasonably.

24. On the more substantial issue Mr Greatorex contended that, by reason of her misconduct, Ms Barratt had repudiated the contract of employment and that this repudiation had been accepted by the employer. He acknowledged that, conventionally, acceptance of repudiation normally takes the form of communication of the decision to accept or "an unequivocal overt act which is inconsistent with the subsistence of the contract" – *State Trading Corporation of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286. Where, as in this case, there was no unequivocal overt act, the question of what is required by way of communication predominates. Relying again on *The Brimnes*, Mr Greatorex argued that, where an employer had done all that could reasonably be required of him to communicate his decision to accept the employee's repudiation of the contract of employment, the termination has occurred.

25. In advancing this argument, counsel accepted that the contractual analysis route to the application of section 97 had not been followed by the EAT in *Brown v Southall & Knight* [1980] ICR 617 and *McMaster v Manchester Airport plc*. But, he submitted, these decisions represented an unacceptable deviation from the normal application of contractual principles in the field of employment law. They also provided a different and unfairly onerous rule for termination by employers from that of termination by employees. Mr Greatorex pointed out that other decisions in employment law cases could be seen to cleave to common law contractual principles. *London Transport Executive v Clarke* [1981] ICR 355, [1981] IRLR 166 and *Kirklees Metropolitan Council v Radecki* [2009] ICR 1244, for instance, were examples of the courts recognising that actions by employers can constitute an unequivocal overt act which is inconsistent with the subsistence of the contract of employment. These actions were sufficient to bring those contracts to an end. It was submitted that there was no justification for abandoning common law contractual principles where communication of the acceptance of the repudiatory breach was the issue rather than an unequivocal overt action which terminated the contract.

26. On the question of bringing a contract of employment to an end by communication, Mr Greatorex referred to two cases where, he suggested, ordinary contractual principles were applied. In *Potter v RJ Temple plc (in liquidation)* [2003] All ER (D) 327 (Dec) the employee sent a letter of resignation by facsimile

transmission to his employer. The EAT held that the effective date of termination was when the fax was received, regardless of when it had been read or acted upon. And in *George v Luton Borough Council* (EAT/0311/03) [2003] All ER (D) 04 (Dec) the EAT held that the effective date of termination of the contract was when the employee's posted letter of resignation was date stamped as having been received. Whether it had been read was neither here nor there.

27. Finally, Mr Greatorex argued that the adoption of contractual principles would lead to greater certainty in the application of section 97. It would obviate the need for protracted hearings inquiring into the reasonableness of the opportunity to learn of the contents of a letter of summary dismissal and it would restore the necessary balance between the duties cast on employers and employees in relation to communications about the termination of employment.

28. The respondent was not represented on the appeal to this court and we are therefore particularly grateful to Mr Greatorex for his comprehensive and scrupulously fair examination of the arguments that lie on both sides of the debate on how section 97 should be interpreted.

The narrow issue

29. In examining the question whether Ms Barratt had the opportunity to learn of the contents of the letter, should the focus be on the reasonableness of her behaviour in failing to avail of the chance to discover what it contained, or should it be on the existence of the opportunity to do so? The Employment Judge, the EAT and all the members of the Court of Appeal were unanimous in the view that to include consideration of the behaviour of the respondent in an assessment of whether she had a reasonable opportunity to find out what the letter contained was not an error of law. We agree.

30. The circumstances of the present case exemplify the need to be mindful of the human dimension in considering what is or is not reasonable to expect of someone facing the prospect of dismissal from employment. To concentrate exclusively on what is practically feasible may compromise the concept of what can realistically be expected. The prospect of summary dismissal for gross misconduct (which Ms Barratt apparently entertained) is a fairly unenviable one. That she should wish to read the letter in which that prospect materialised is not in the least surprising. If it contained details of the findings made against her, it is entirely to be expected that, at least in the first instance, she would wish to absorb these alone. She is not to be condemned, therefore, for failing to give instructions that the letter should be opened and read to her during the weekend that she spent with her sister.

31. Of course, the fact that it would have been possible for her to have found out over the weekend what the letter contained is not to be left out of account in deciding when she had a reasonable opportunity to discover its contents but the fact that she chose to wait until she could read the letter herself should not be regarded as irrelevant to the reasonableness of the opportunity to be informed of her summary dismissal. In common with all the judges who have pronounced on this issue hitherto, we consider that taking into account the actions – and omissions – of the respondent in relation to finding out what the letter contained was not erroneous in law. The examination of the reasons for not having learned of the contents of the letter should not be a protracted affair. It is to be expected that in the vast majority of cases, the reasons for not having done so can be shortly stated and equally shortly evaluated.

The substantial issue

32. The genesis of the "reasonable opportunity to discover" test is to be found in the decision of the EAT in *Brown v Southall & Knight*. In that case it was held that where dismissal is communicated to an employee in a letter, the contract of employment does not terminate until the employee has actually read the letter or has had a reasonable opportunity of reading it. It was not enough to establish that the employer had decided to dismiss a person or had posted a letter saying so. If, however, the employee deliberately did not open the letter or if he went away to avoid reading it, he might well be debarred from saying that notice of his dismissal had not been given to him.

33. This decision has not been challenged (at least so far as reported cases are concerned) since it was promulgated. It was followed in *McMaster v Manchester Airport plc*. In that case Mr McMaster was summarily dismissed while he was on sickness leave. A letter informing him of this arrived at his home on 9 November 1995. He did not see the letter that day, however, because he was on a day trip to France. He returned home the following day when he read the letter. His unfair dismissal complaint was received by the industrial tribunal on 9 February 1996. Accordingly, if the effective date of termination of his employment was 9 November when the letter arrived at his home, his complaint was presented one day out of time. If, on the other hand, his employment did not effectively terminate until the following day when he read the letter, his complaint was in time. The EAT held that the effective date of termination of a contract of employment could not be earlier than the date on which an employee received knowledge that he was being dismissed. The doctrine of constructive or presumed knowledge had no place in questions as to whether a dismissal had been communicated, save only in the evidential sense that an industrial tribunal would be likely to assume that letters usually arrive in the normal course of post and that people are to be taken, normally, as opening their letters promptly after they have arrived.

34. Underlying both decisions (although not expressly articulated in either) is the notion that it would be unfair for time to begin to run against an employee in relation to his or her unfair dismissal complaint until the employee knows – or, at least, has a reasonable chance to find out – that he or she has been dismissed. This is as it should be. Dismissal from employment is a major event in anyone's life. Decisions that may have a profound effect on one's future require to be made. It is entirely reasonable that the time (already short) within which one should have the chance to make those decisions should not be further abbreviated by complications surrounding the receipt of the information that one has in fact been dismissed.

35. These considerations provide the essential rationale for not following the conventional contract law route in the approach to an interpretation of section 97. As Mummery LJ said, it is a statutory construct. It is designed to hold the balance between employer and employee but it does not require – nor should it – that both sides be placed on an equal footing. Employees as a class are in a more vulnerable position than employers. Protection of employees' rights has been the theme of legislation in this field for many years. The need for the protection and safeguarding of employees' rights provides the overarching backdrop to the proper construction of section 97.

36. An essential part of the protection of employees is the requirement that they be informed of any possible breach of their rights. For that reason we emphatically agree with the EAT's view in *McMaster* that the doctrine of constructive knowledge has no place in the debate as to whether a dismissal has been communicated. For the short time of three months to begin to run against an employee, he or she must be informed of the event that triggers the start of that period, namely, their dismissal or, at least, he or she must have the chance to find out that that short period has begun. Again, this case exemplifies the need for this. During the three months after Ms Barratt's dismissal, she pursued an internal appeal; she learned that she was unsuccessful in that appeal; she sought advice in relation to the lodging of a complaint of unfair dismissal; and she presumably required some time to absorb and act upon that advice. Viewed in the abstract, three months might appear to be a substantial period. In reality, however, when momentous decisions have to be taken, it is not an unduly generous time.

37. We do not consider, therefore, that what has been described as the "general law of contract" should provide a preliminary guide to the proper interpretation of section 97 of the 1996 Act, much less that it should be determinative of that issue. With the proposition that one should be aware of what conventional contractual principles would dictate we have no quarrel but we tend to doubt that the "contractual analysis" should be regarded as a starting point in the debate, certainly if by that it is meant that this analysis should hold sway unless displaced by other factors. Section 97 should be interpreted in its setting. It is part of a charter protecting employees' rights. An interpretation that promotes those rights,

as opposed to one which is consonant with traditional contract law principles, is to be preferred.

38. For these reasons we reject the thesis that cases such as *London Transport Executive v Clarke*, *Kirklees Metropolitan Council v Radecki*, *Potter v RJ Temple plc* and *George v Luton Borough Council* represent a general acceptance that statutory rights given to employees should be interpreted in a way that is compatible with common law contractual principles, if indeed they are as they have been represented to be. (On this latter point, we have not received contrary argument on the common law position and we wish to make clear that this judgment should not be taken as an endorsement of the appellant's argument as to the effect of those principles). Of course, where the protection of employees' statutory rights exactly coincides with common law principles, the latter may well provide an insight into how the former may be interpreted and applied but that is a far cry from saying that principles of contract law should dictate the scope of employees' statutory rights. These cases do no more, in our opinion, than recognise that where common law principles precisely reflect the statutorily protected rights of employees they may be prayed in aid to reinforce the protection of those rights.

39. The need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutorily conferred rights is fundamental. The common law recognised certain employment rights, but the right at common law not to be wrongfully dismissed is significantly narrower than the statutory protection against unfair dismissal. The deliberate expansion by Parliament of the protection of employment rights for employees considered to be vulnerable and the significance of the creation of a separate system of rights was recognised by the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518. In that case the employee had succeeded in an unfair dismissal claim but, because of the statutory cap on compensation, sought to bring a claim at common law for breach of an implied term of trust and confidence during the dismissal process. The House of Lords refused to permit the supplanting of the legislative scheme by entertaining a second claim at common law. The leading judgment of Lord Hoffmann recognised the deliberate move by Parliament away from the ordinary law of contract as governing employer/employee contractual relations. At para 35 of his opinion Lord Hoffmann said: -

> "… At common law the contract of employment was regarded by the courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has

> been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament. The Employment Rights Act 1996 consolidates numerous statutes which have conferred rights upon employees …"

40. In an earlier case, essentially the same message was delivered. In *Redbridge London Borough Council v Fishman* [1978] ICR 569, EAT, at 574 Phillips J described the difference between the contractual cause of action of wrongful dismissal and the statutory regime of unfair dismissal thus:

> "The jurisdiction based on paragraph 6 (8) of Schedule 1 to the Trade Union and Labour Relations Act 1974 has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrariwise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by paragraph 6(8), they are not of the first importance."

41. The essential underpinning of the appellant's case, that conventional principles of contract law should come into play in the interpretation of section 97, must therefore be rejected. The construction and application of that provision must be guided principally by the underlying purpose of the statute *viz* the protection of the employee's rights. Viewed through that particular prism, it is not difficult to conclude that the well established rule that an employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him is firmly anchored to the overall objective of the legislation.

42. The fact that this rule has survived, indeed has been tacitly approved by, successive enactments merely reinforces the conclusion that it is consonant with the purpose of the various provisions relating to time limits. As Mummery LJ so pithily and appositely put it, the legislation is designed to allow an employee three months – not three months less a day or two – to make a complaint of unfair dismissal. When one considers that the decision to lodge such a complaint is one not to be taken lightly, it is entirely to be expected that the period should run from the time that the need to make such a decision is known to the employee.

43. There is no reason to suppose that the rule in its present form will provoke uncertainty as to its application nor is there evidence that this has been the position hitherto. The inquiry as to whether an employee read a letter of dismissal within the three months prior to making the complaint or as to the reasons for failing to do so should in most cases be capable of being contained within a short compass. It should not, as a matter of generality, occupy a significantly greater time than that required to investigate the time of posting a letter and when it was delivered. In any event, certainty, although desirable, is by no means the only factor to be considered in determining the proper interpretation to be given to section 97. What will most strongly influence that decision is the question of which construction most conduces to the fulfilment of the legislative purpose. And, of course, an employer who wishes to be certain that his employee is aware of the dismissal can resort to the prosaic expedient of informing the employee in a face-to-face interview that he or she has been dismissed.

44. On that issue, it appears to us that the matter is put beyond plausible debate when one considers the effect that the appellant's suggested interpretation of section 97 would have on the availability of the relief provided for in section 128 of the 1996 Act. An application for interim relief may well prove in certain cases to be an immensely important facility. In the case of a whistleblower, for instance, the opportunity to forestall a recriminatory dismissal or one designed to frustrate the intentions of the conscientious employee may be of vital consequence. But this right would be severely attenuated, and in many cases wholly eliminated, if the appellant's interpretation of section 97 is accepted.

45. Sensibly recognising the significance of this point, Mr Greatorex sought to minimise its importance by pointing out that applications for interim relief are made in a very small percentage of cases. But, as we have indicated, the true importance of this remedy lies not in the number of cases in which it might be invoked but in the nature of the few cases where it may be crucial. No dispensing provision is available to extend the period within which an application for interim relief might be made. It is therefore, in our view, inconceivable that Parliament would have intended that section 97 should be interpreted to mean that seven days only would be available for the making of such an application, regardless of whether the applicant was aware of the dismissal within that period. Yet that is the inevitable consequence of interpreting section 97 in the manner that the appellants suggest. Of all the reasons that this interpretation cannot be right, this is perhaps the most strikingly obvious.

Conclusion

46. The appeal must be dismissed.