Easter Term
[2018] UKSC 22
On appeal from: [2017] EWCA Civ 153

JUDGMENT

Newcastle upon Tyne Hospitals NHS Foundation Trust (Appellant) *v* Haywood (Respondent)

before

Lady Hale, President
Lord Wilson
Lady Black
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

25 April 2018

Heard on 20 November 2017

Appellant	*Respondent*
John Cavanagh QC Holly Stout (Instructed by Samuel Phillips)	Caspar Glyn QC Tom Brown (Instructed by Irwin Mitchell LLP (Birmingham))

LADY HALE: (with whom Lord Wilson and Lady Black agree)

1. If an employee is dismissed on written notice posted to his home address, when does the notice period begin to run? Is it when the letter would have been delivered in the ordinary course of post? Or when it was in fact delivered to that address? Or when the letter comes to the attention of the employee and he has either read it or had a reasonable opportunity of doing so?

2. Given the vast numbers of working people who might be affected by this issue, it is perhaps surprising that it has not previously come before the higher courts. This Court, in *Gisda Cyf v Barratt* [2010] UKSC 41; [2010] ICR 1475, held that the "effective date of termination" for the purpose of unfair dismissal claims under the Employment Rights Act 1996 was the date on which the employee opened and read the letter summarily dismissing her or had a reasonable opportunity of doing so. But the Court was careful to limit that decision to the interpretation of the statutory provisions in question. The common law contractual position might be quite different, as indeed the Court of Appeal had said that it was: [2009] EWCA Civ 648; [2009] ICR 1408.

3. There is nothing to prevent the parties to a contract of employment from making express provision, both as to how notice may or must be given and for when it takes effect, as happened in *Geys v Société Générale, London Branch* [2012] UKSC 63; [2013] 1 AC 523, but that was not done in this case. We are considering, therefore, the content of a term which must be implied into the contract of employment. The employer contends that notice is given when the dismissal letter is delivered to the employee's address (which by statute is deemed to be when the letter would be delivered in the ordinary course of post unless the contrary is shown). The employee contends that notice is not given until the letter comes to the attention of the employee and she has had a reasonable opportunity of reading it.

The facts

4. The essential facts are very simple. Mrs Haywood was continuously employed by various bodies in the NHS for many years. On 1 November 2008, she began employment with the Newcastle and North Tyneside Community Health PCT. On 1 April 2011, her employment transferred to the Newcastle-upon-Tyne NHS Foundation Trust ("the Trust") on the same terms and conditions as before. Section 19 of her contract of employment with the PCT provided that "Unless there is mutual agreement that a different period should apply, this employment may be

terminated by you or NPCT by the notice period as set out in section 1 …". Section 1 gave the "Minimum notice period from you or NPCT" as 12 weeks.

5. Very shortly after the transfer, the Trust identified Mrs Haywood's post as redundant. As both parties knew, if her employment terminated by reason of redundancy on or after her 50th birthday on 20 July 2011, she would be entitled to claim a non-actuarially reduced early retirement pension. If it terminated before that date, she would not. At a meeting to discuss her possible redundancy on 13 April 2011, Mrs Haywood informed the Trust that she had booked two weeks annual leave from Monday 18 April, was going to Egypt, and would be due back at work after the extended bank holiday weekend on 3 May 2011. The period of leave had been recorded on the Trust's records.

6. Mrs Haywood asked that no decision be taken while she was away, but the Trust did not agree to that. On 20 April 2011, it issued written notice (in fact dated 21 April) of termination of her employment on the ground of redundancy. The Trust maintained that the letter was sent by three methods: by email to her husband's email address; by recorded delivery; and by ordinary first class post. However, the Trust sought (unsuccessfully) to recall the notice sent by email that same day. The trial judge was satisfied that only two notices had been sent - by email and by recorded delivery (para 37(xii)). The email is not relied on by the Trust. Hence the letter which is relevant in this appeal is the one sent by recorded delivery.

7. The crucial date was 27 April. Notice given on or after that date would expire on or after Mrs Haywood's 50th birthday. Notice given before that date would expire earlier. Mrs Haywood and her husband were away on holiday in Egypt from 19 to 27 April. They asked Mr Haywood's father, Mr Crabtree, to look after the house while they were away. He went daily to check that it was secure, remove mail from the doormat to the hall table and water the plants. A recorded delivery slip was left at their home on 21 April. On 26 April, Mr Crabtree found the recorded delivery slip, collected the letter from the local sorting office and left it at their home. Mr and Mrs Haywood arrived back there in the early hours of 27 April. Mrs Haywood opened and read the letter later that morning.

8. Mrs Haywood made various Employment Tribunal claims in respect of her dismissal, which were not pursued. In these High Court proceedings, she claims that her 12 weeks' notice did not begin until 27 April, when she received and read the letter, and therefore expired on 20 July, her 50th birthday, and accordingly that she is entitled to the early retirement pension.

9. The claim was tried by His Honour Judge Raeside QC, sitting as a High Court Judge, in January 2014. He handed down a "partial judgment" on 27 May 2015:

Case No 3BM30070. He held that it was necessary to imply a term that Mrs Haywood had a right actually to be informed, either orally or in writing, of her dismissal; she had to have a reasonable opportunity actually to look at the letter (paras 70, 71). He declared that Mrs Haywood was still employed by the Trust on 20 July 2011 and made various orders relating to the payment of her pension, both in the future and in arrears. But he granted a stay of those provisions pending a possible appeal and they have remained stayed ever since.

10. The Trust's appeal to the Court of Appeal was dismissed by a majority: [2017] EWCA Civ 153. Proudman J held that "the contents of the letter had to be communicated to the employee" (para 57). Arden LJ held that the letter had to be "received" (para 130(2)); where it has been delivered to the party's address, there is a rebuttable presumption that it has been received (para 136); but that presumption had been rebutted by the judge's finding that Mrs Haywood did not receive the letter until 27 April - there was no need for her to have read the letter but she had to have received it (para 149). Lewison LJ dissented: "notice is validly given under the contract when a letter containing the notice actually arrives at the correct destination, whether the recipient is there to open it or not" (para 124).

The agency point

11. Before turning to the major issue of principle, which divided the Court of Appeal and also divides this Court, it is convenient to mention a point which was raised for the first time in the Court of Appeal by Lewison LJ. This is that Mr Crabtree, "By taking it upon himself to collect and sign for the letter, … must, in my judgment, be taken to have been acting as Mrs Haywood's agent" (para 84). Arden LJ disagreed: "There was no argument on this at the hearing or finding by the judge. [Mr Crabtree's] witness statement is consistent with his having acted on his own initiative" (para 134). In their Grounds of Appeal, the Trust argued that Lewison LJ was right to hold that Mr Crabtree was acting as Mrs Haywood's agent and that delivery to him was therefore delivery to her. It is fair to say that very little time was devoted to this ground in the hearing before us. On its own, it does not raise a point of law of general public importance for which permission to appeal would be granted and arguably would require a finding of fact by the trial judge. At all events, in my judgment (with which I understand that all my fellow Justices hearing this case agree), on the evidence that was available to the court, Arden LJ was correct to hold that, in acting as he did, Mr Crabtree was not acting at Mrs Haywood's agent for the receipt of the letter.

The issue of law

12. The Trust argues that there is a common law rule, principally derived from some historic landlord and tenant cases, which supports its case that notice is given when the letter is delivered to its address. Mrs Haywood argues that the common law rule is not as clear cut as the Trust says that it is. Furthermore, there is a consistent line of Employment Appeal Tribunal (EAT) authority which supports her case that, in the absence of an express contractual provision to the contrary, there is an implied term that a notice served by an employer upon an employee takes effect only when it has actually been received by the employee and the employee has either read or had a reasonable opportunity of reading it. It is convenient, therefore, to look first at the non-employment cases principally relied upon by the Trust and then at the employment cases principally relied upon by Mrs Haywood.

The non-employment cases

13. The Trust relies on a line of cases dating back to the 18th century, almost all in the landlord and tenant context, holding that delivery of a notice to the tenant's (or landlord's) address is sufficient, even though it has not actually been read by the addressee. Some of these are in the context of an express statutory or contractual provision that service may be effected by post.

14. In *Jones d Griffiths v Marsh* (1791) 4 TR 464; 100 ER 1121, it was held that delivering a notice to quit to the tenant's maidservant at his house (which was not the demised premises) was sufficient. Personal service was not necessary in every case, although it was in some. Kenyon CJ remarked that "in every case of the service of a notice, leaving it at the dwelling house of the party has always been deemed sufficient". *Doe d Neville v Dunbar* (1826) Moot M 9; 173 ER 1062 was to the same effect. Abbott CJ had no doubt as to the sufficiency of a notice served at the tenant's home, even though the tenant was away: "were it otherwise, a landlord would have no means of determining a tenancy, if his tenant happened to be absent from his house at the time when it was necessary to serve the notice". In *Papillon v Brunton* (1860) 5 H & N 518; 157 ER 1285, a tenant served notice to quit by posting it to his landlord's agent. The jury found that it arrived that same day, after the agent had left, but there ought to have been someone there to receive it. The judges agreed that this was good service. In *Tanham v Nicholson* (1872) LR 5 HL 561, delivery to the tenant's adult children at the property was held sufficient. But Lord Westbury pointed out that, in *Jones*, Lord Kenyon had limited his remarks to notices affecting property, such as notices to quit, and not those notices which are intended to bring an individual into personal contempt (p 573). As Lady Black's much fuller treatment demonstrates, each of these cases could be seen as service upon an agent authorised to accept it.

15. The other landlord and tenant cases relied on by the Trust are less helpful, because they involved express statutory and/or contractual terms. *Stidolph v American School in London Educational Trust Ltd* [1969] 2 P & CR 802 concerned the requirements for terminating a lease of business premises under the Landlord and Tenant Act 1954 and the Landlord and Tenant (Notices) Regulations 1954. The Act expressly provided that notice could be served by registered post in a letter addressed to the tenant's last known place of abode. The landlord's solicitors had sent, by registered post, an unsigned notice to quit accompanied by a letter signed by them. This was held sufficient. But Lord Denning observed that "I do not think that a tenant can avoid the effects of a notice like this which is properly sent by registered post to him by saying that he did not take it out of the envelope or read it" (p 805). And Edmund Davies LJ said this (pp 805-806):

> "Based upon considerations mainly of business efficacy, there is a long-standing presumption in our law that a letter, duly addressed, pre-paid and posted, which is not returned to the sender has in fact been received by the addressee - unless he can establish the contrary. The usefulness of a presumption of this kind would be destroyed if the addressee could nevertheless be heard to say: 'Although I received the postal packet quite safely, I did not read the contents,' or 'I did not examine the postal packet to see that I had extracted all that it contained'."

Both observations are as consistent with Mrs Haywood's case as they are with the Trust's.

16. In *Stephenson & Son v Orca Properties Ltd* [1989] 2 EGLR 129, the deadline for giving notice of a rent review to the tenant was 30 June. The notice was posted recorded delivery on 28 June, but it was not received and signed for until 1 July. The issue was whether it was deemed, under section 196(4) of the Law of Property Act 1925 (see para 34(2) below), to have been delivered "in the ordinary course of post" on 29 June. Scott J held that that would have been the case with an ordinary registered letter, but a recorded delivery letter was not received until signed for. So the notice was out of time.

17. *Wilderbrook Ltd v Olowu* [2005] EWCA Civ 1361; [2006] 2 P & CR 4, also concerned a rent review notice sent by recorded delivery, received and signed for at the demised premises. The lease incorporated the statutory presumption as to service in section 196(4) of the Law of Property Act 1925 (see para 34(2) below). The Court of Appeal rejected the argument that it was not "received" in accordance with the contract until the tenant had actually seen it. Carnwath LJ quoted Lord Salmon in *Sun Alliance & London Assurance Co Ltd v Hayman* [1975] 1 WLR 177, at p 185:

> "Statutes and contracts often contain a provision [that] notice may be served upon a person by leaving it at his last known place of abode or by sending it to him there through the post. The effect of such a provision is that if notice is served by any of the prescribed methods of service it is, by law, treated as having been given and received."

Once again, this does not help us to determine what term as to service is to be implied into an employment contract, to which section 196(4) does not apply.

18. With the exception of the employment case of *London Transport Executive v Clarke* (dealt with below at para 29), the only case outside landlord and tenant law relied on by the Trust is *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, CA. One issue was when the owners' notice withdrawing the vessel from hire, sent by telex, had been received by the charterers. It was held effective when it arrived at the charterers' machine during business hours and not when it was actually read. Megaw LJ said this, at pp 966-967:

> "With all respect, I think that the principle which is relevant is this: 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 himself or his servants to act in a normal business like 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."

19. Cairns LJ made this general observation, at pp 969-970:

> "In my opinion, the general rule is that notice must reach the mind of the charterer or of some responsible person on his behalf. There must clearly be exceptions to this rule: for example, if the charterer or his agent deliberately keeps out of the way, or refrains from opening a letter with a view to avoiding the receipt of notice. How much further than this do exceptions go? I feel little doubt that if an office were closed all day on an ordinary working day, though without any thought of a notice of withdrawal arriving, such a notice delivered by post on that day must be regarded as then received."

20. These statements can scarcely be seen as a ringing endorsement of the Trust's case, as their starting point is receipt. Notices delivered during normal working hours to an office which can reasonably be expected to be staffed to receive and deal with them properly may be in a different category from notices delivered to a private home.

The employment cases

21. Mrs Haywood relies upon a line of EAT cases dating back to 1980, holding in a variety of contexts which do not all depend upon the construction of the employment protection legislation, that written notice does not take effect until the employee has read it or had a reasonable opportunity of doing so.

22. In *Brown v Southall & Knight* [1980] ICR 617, the issue was whether the employee had the 26 weeks' continuous employment, ending with "the effective date of termination", then required to bring an unfair dismissal claim. The letter summarily dismissing him was sent by post after he had left to go on holiday. His period of employment was less than 26 weeks on the date that it would have been delivered to his home but more than that on the date when he arrived back and read the letter. The EAT (Slynn J presiding) held that he had the necessary 26 weeks' employment, for the reasons given at p 628:

> "It seems to us that it is not enough to establish that the employer has decided to dismiss a man or, indeed, has posted a letter saying so. That does not itself, in our view, terminate the contract. Nor, in our view, is it right, in looking at the matters as the industrial tribunal did in considering the reasonable steps taken by the employer, to look solely at what the employer does and to ask whether that constitutes the taking of reasonable steps. In our judgment, the employer who sends a letter terminating a man's employment summarily must show that the employee has actually read the letter or, at any rate, had a reasonable opportunity of reading it. If the addressee of the letter, the employee, deliberately does not open it or goes away to avoid reading it he might well be debarred from saying that notice of his dismissal had not been given to him. That, however, did not happen in this case."

23. The same approach was adopted by the EAT (Morison J presiding) in *McMaster v Manchester Airport plc* [1998] IRLR 112, another case of a dismissal letter arriving while the employee was away from home. This too was a case about the "effective date of termination", but for the purpose of the time limit for making

a complaint of unfair dismissal. It was common ground that any dismissal had to be communicated, whether it was summary or on notice. The tribunal commented, at para 9:

> "It seems to us that, as a matter of principle, unless compelled to take a different view, the doctrine of constructive or presumed knowledge has no place in the private rights of parties to contracts of employment, and questions as to whether a dismissal has been communicated or not, save in an evidential sense only."

24. When the *Gisda Cyf case*, referred to in para 2 above, which concerned a summary dismissal by letter, came before Bean J sitting alone in the EAT ((UKEAT 0173/08, unreported), he agreed with all that Morison J had said - it was laying down a clear and workable principle. He drew a distinction between delivery to a large commercial concern during business hours and delivery to a person's home.

25. *Edwards v Surrey Police* [1999] IRLR 456 also concerned the effective date of termination for the purpose of the time limit for bringing an unfair dismissal complaint. But the issue was whether the employee's resignation took effect when the employee decided that she could not continue working for the employer or when that decision was communicated to the employer. The EAT (Morison J presiding) held that before a contract of employment can be terminated "there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is indeed at an end" (para 14).

26. In *George v Luton Borough Council* (EAT 0311/03, unreported) the EAT (Judge Serota QC presiding), agreed that the acceptance of the employer's repudiatory breach had to be communicated, but held that there might be a distinction between cases of an employee giving notice and cases where an employer is seeking to terminate the employment, in which case the employee must know and actually have the termination communicated to him. Receipt of the employee's letter accepting the breach by the Council was sufficient (para 14). To the same effect was *Potter v RJ Temple plc* (2003) UKEAT/0478/03/LA), where the EAT (Judge Richardson presiding) held that an employee's notice was effective when received by his employers even if it had not been read.

27. *Brown v Southall & Knight* was followed in an entirely different context in *Hindle Gears Ltd v McGinty* [1985] ICR 111, and this time to the employees' disadvantage. During a strike, employers were exempt from unfair dismissal claims only if they dismissed an entire striking workforce. They were not entitled to dismiss only those strikers who were "unwanted elements". So if there were striking

employees who were not dismissed, or who were re-engaged within three months, those who were dismissed could bring claims. The employer sent out letters dismissing all the strikers, but two of them had left home to report for work early in the morning of the day after the letters were posted, before the letters were actually received. The Industrial Tribunal held that the two employees had been dismissed but then re-engaged that morning, with the result that the 39 striking employees could bring complaints of unfair dismissal. The EAT (Waite J presiding) held that the two employees had not been dismissed before they returned to work; therefore they had not been re-engaged that morning; and they were not part of the striking workforce on the relevant date. This was because, at p 117:

> "Communication of the decision in terms which either bring it expressly to the attention of the employee or give him at least a reasonable opportunity of learning of it is in our view essential."

28. Most recently, in *Sandle v Adecco UK Ltd* [2016] IRLR 941, the EAT (Judge Eady QC presiding) upheld the employment tribunal's decision that an agency worker had not been dismissed because, although the firm to which the agency had assigned her had terminated the assignment, the agency had done nothing to communicate her dismissal:

> "… dismissal does have to be communicated. Communication might be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware." (para 41)

29. Two other employment cases were relied upon by the Trust. In *London Transport Executive v Clarke* [1981] ICR 355, the employee had taken unauthorised leave to go to Jamaica. After sending two letters to his home address asking for an explanation and giving an ultimatum, the employers wrote on 26 March saying that his name had been permanently removed from their books on that day. When he returned they refused to reinstate him. The majority of the Court of Appeal held that a contract of employment was not terminated until the employers had accepted the employee's repudiatory breach, which they did when he was dismissed on 26 March. The issue was whether his dismissal was unfair. There was no issue as to the precise timing, or as to when the employee became aware of the contents of the letter. The most that can be said on behalf of the Trust is that the majority assumed that posting the letter was sufficient.

30. The other case is the decision of the Court of Appeal in the *Gisda Cyf case*: [2009] EWCA Civ 648; [2009] ICR 1408. The majority, Mummery LJ with whom Sir Paul Kennedy agreed, approved the decisions in *Brown v Southall & Knight* and *McMaster v Manchester Airport plc*, but expressly on the basis that they were construing the statutory definition of "the effective date of termination" in section 97(1) the Employment Rights Act 1996 or its predecessor, for the purpose of unfair dismissal claims, rather than applying the law of contract; it did not follow that the correct construction of the statute was controlled by contractual considerations: para 33. Lloyd LJ dissented: in his view resort should first be had to the general law on contracts of employment. The EAT cases cited above had distinguished between those where the employee had given notice to the employer and those where the employer had given notice to the employee. In the first category were *George v Luton Borough Council* and *Potter v RJ Temple plc* (see para 26 above), where it was held that an employee's notice was effective when received by his employers even if it had not been read. In the second category were all those cases where an employer's notice had been held only to take effect when the employee had received and read, or had a reasonable opportunity to read, them. He took the view that the latter category of cases was wrongly decided and the same rule should apply to both.

31. In the Supreme Court, the approach of the majority was upheld. The Court emphasised that it was interpreting a statutory provision in legislation designed to protect employee's rights, so that "the general law of contract" should not even provide a preliminary guide, let alone be determinative (para 37). However, Lord Kerr (giving the judgment of the Court) was careful to say that the judgment should not be seen as an endorsement of the employer's argument as to the effect of common law contractual principles (para 38). The case was an unusual one, in that the employee was not represented before the Supreme Court and so there had been no argument to the contrary. For that reason, although this case is determinative of the meaning of the "effective date of termination" in section 97(1) of the Employment Rights Act 1996, it is of no assistance in the determination of the issue in this case.

32. The last employment case to mention is *Geys v Société Générale, London Branch* (see para 3 above). The Bank purported to exercise its contractual right to terminate the employee's employment by making a payment in lieu of notice. The severance payment due depended on the date of termination: was it when the Bank repudiated the contract of employment, or when it made a payment in lieu of notice into the employee's bank account, or when, in accordance with an express term in the contract, the employee was deemed to have received the Bank's letter telling him that it had exercised its right to terminate with immediate effect and made a payment in lieu of notice? The Supreme Court held that the repudiation was not effective unless and until accepted by the employee (which it was not); that the mere payment of money into a bank account was not sufficient notification to the employee that he was being dismissed with immediate effect; so that the date of

termination was the date on which he was deemed to have received the letter. Apart from the repudiation point, most of the case depended upon the express terms of the contract, which included a term as to when a written notice sent by post was deemed to have been received. For present purposes the case is relevant only insofar as it stresses the need for notification of dismissal (or resignation) in clear and unambiguous terms, so that both parties know where they stand - whether or not the employee is still employed and when he ceased to be employed (paras 57-58). Baroness Hale of Richmond (with whom Lord Hope of Craighead, Lord Wilson and Lord Carnwath agreed) cited with approval, at para 56, the following passage from *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, per Dyson LJ, at para 36:

> "It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."

Policy

33. Both parties have placed great weight on what they see as the policy considerations favouring their solution. Mr Cavanagh QC, for the Trust, points out that, as there was no express term stating how notice was to be given and when it was to be taken to have effect, some term has to be implied into this contract. That being so, as stated in *Crossley*, policy questions are relevant. There should be no special rule for employment cases. There should be as much certainty and clarity as possible. The Trust's approach is more certain than the employee's. Under the employee's approach, it would not be possible for a letter giving notice to state with certainty the date on which the employment would end. It is also fairer to give the benefit of the doubt to the sender of the letter, because there will usually be more objective evidence of when it was sent. If there are several dismissals, all will take effect on the same day, and not on different days depending on when the letter was received. The employee's approach does not necessarily work for the benefit of employees, who might be keen for the employment to end. There must be the same rule for employers and employees.

34. He also argues that the Trust's approach - delivery to the home address - is consistent with or more favourable than many statutory provisions about notice. He cites, in ascending order of severity, the following examples:

(1) By the Interpretation Act 1978, section 7 (replacing a provision to like effect in the Interpretation Act 1870), service of a document by post, where

authorised or required, is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. However, in *Freetown Ltd v Assethold Ltd* [2012] EWCA Civ 1657; [2013] 1 WLR 701, at para 37, Rix LJ pointed out that this changed the common law, which required receipt; it introduced a rebuttable presumption; and required the sender to prove that the letter had been properly addressed, prepaid and posted.

(2) By the Law of Property Act 1925, section 196(4), notices required to be served on a lessee or mortgagor are sufficiently served if sent by post in a registered letter addressed to the person to be served by name, at his place of abode or business, and the letter is not returned undelivered; "and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered".

(3) By the Misuse of Drugs Act 1971, section 29(4) certain notices sent by registered post or recorded delivery "shall be deemed to have been effected at the time when the letter containing it would be delivered in the ordinary course of post" and section 7 of the 1978 Act is disapplied.

(4) By the Public Health Act 1875, section 267, notices and other documents served by post "shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the notice order or other document was properly addressed and put into the post".

35. However, as Mr Glyn QC for Mrs Haywood points out, it does not follow that any of these differing statutory provisions reflects the common law as to the term to be implied into an employment contract. Their purpose was to lay down a rule which might well be different from what would otherwise be the common law position.

36. He also cites the judgment of the Supreme Court in *Gisda Cyf*, at para 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."

37. Furthermore, if an employer wants greater certainty, he can either make express provision in the contract, or tell the employer face to face, handing over a letter at the same time if the contract stipulates notice in writing. Large numbers of employees are not sacked on a whim. The employer knows when employees are going on leave and can make arrangements to ensure that they are notified beforehand. All the notices can be stated to expire on the same specified date. There is no prohibition on giving more than the prescribed minimum period of notice. Nor is it usually necessary to give a prescribed period of notice before a particular date, as it is with notices to quit.

38. The rule established in the EAT from 1980 onwards has survived the replacement, by the Employment Rights Act 1996, of the legislation which applied in *Brown* and there have been several other Parliamentary opportunities to correct it should it be thought to have caused significant difficulty. It has not been confined to the interpretation of the "effective date of termination" for the purpose of Part X of the 1996 Act and has been applied in several different contexts. It was only in *Gisda Cyf* that the possibility was raised that the common law and statutory rules might be different. But it makes obvious sense for the same rule to apply to all notices given by employers to employees.

Conclusion

39. In my view the approach consistently taken by the EAT is correct, for several reasons:

> (1) The above survey of non-employment cases does not suggest that the common law rule was as clear and universal as the Trust suggests. Receipt in some form or other was always required, and arguably by a person authorised to receive it. In all the cases there was, or should have been, someone at the address to receive the letter and pass it on to the addressee. Even when statute intervened in the shape of the Interpretation Act, the presumption of receipt at the address was rebuttable. There are also passages to the effect that the notice must have been communicated or come to the mind of the addressee, albeit with some exceptions.

(2) The EAT has been consistent in its approach to notices given to employers since 1980. The EAT is an expert tribunal which must be taken to be familiar with employment practices, as well as the general merits in employment cases.

(3) This particular contract was, of course, concluded when those cases were thought to represent the general law.

(4) There is no reason to believe that that approach has caused any real difficulties in practice. For example, if large numbers of employees are being dismissed at the same time, the employer can arrange matters so that all the notices expire on the same day, even if they are received on different days.

(5) If an employer does consider that this implied term would cause problems, it is always open to the employer to make express provision in the contract, both as to the methods of giving notice and as to the time at which such notices are (rebuttably or irrebuttably) deemed to be received. Statute lays down the minimum periods which must be given but not the methods.

(6) For all the reasons given in *Geys,* it is very important for both the employer and the employee to know whether or not the employee still has a job. A great many things may depend upon it. This means that the employee needs to know whether and when he has been summarily dismissed or dismissed with immediate effect by a payment in lieu of notice (as was the case in *Geys*). This consideration is not quite as powerful in dismissals on notice, but the rule should be the same for both.

40. I would therefore dismiss this appeal. It was only on 27 April 2011 that the letter came to the attention of Mrs Haywood and she had a reasonable opportunity of reading it.

LADY BLACK:

41. The foundation of the Trust's argument is that there is a common law rule that written notice of termination of a contract is given when the notice document is delivered to the recipient's address, and that there is no need for the recipient to have sight of the document or the envelope containing it, or even to be present at the time. Mrs Haywood disputes that such a common law rule exists. In order to decide who is right, it is necessary to look in some detail at a line of old authorities on the giving of notice. Lord Briggs, like Lord Justice Lewison in the Court of Appeal, concludes from it that there has been, for over two centuries, a term generally implied by law

into "relationship contracts" terminable on notice, that written notice is given when the relevant document is duly delivered by hand or post to the address of the recipient, irrespective of whether/when the recipient actually gets the notice. Lady Hale does not consider that the old authorities establish this proposition. I agree with Lady Hale's judgment, and, in the light of the disagreement between her and Lord Briggs, merely wish to set out here, in a little more detail, the reasons why, in my view, the old line of authorities are not to the effect that the Trust suggests.

42. I am indebted to Lady Hale and Lord Briggs for having introduced and analysed the authorities, albeit that their analyses differ, as I am able to build on what they have already said (see paras 13 and 14 of Lady Hale's judgment, and paras 84 et seq of Lord Briggs' judgment).

43. In considering the authorities, I have found it helpful to keep in mind that there are different sorts of service, increasingly personal in nature. Putting a notice document into a post box might be said to be at one end of the spectrum. This is the point at which, where the postal rule applies, an acceptance of a contractual offer would take effect, for example. However, no one has contended in this case that notice could have been given at such an early stage. At the other end of the spectrum is the communication of the contents of the document to the mind of the recipient. In between, various possibilities exist, from which I would pick out service of the notice on an agent of the intended recipient who is authorised to receive such communications, and "personal service". When I speak of personal service in this context, I mean, following what it seems to me is the practice of the older authorities, ensuring that the notice actually reaches the recipient's hands.

44. It is also helpful to keep in mind when approaching the authorities that presumptions feature prominently in them and that presumptions come in various guises too, the most obvious distinction being between the rebuttable presumption and the irrebuttable presumption.

45. The starting point for an examination of the old authorities is *Jones d Griffiths v Marsh* (1791) 4 TR 464. This is the case in which a notice to quit was served on the tenant's maidservant at the tenant's house, the contents being explained to her at the time, but (as the report puts it) "there was no evidence that it ever came to the defendant's hands, except as above". The tenant argued that this was not sufficient for a notice to determine an interest in land, especially as the service had been at a house which was not the demised premises. The summary of the decision of Lord Kenyon CJ, and Buller J reads:

> "Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit

> to his servant at the dwelling house is strong presumptive evidence that the master received the notice."

46. In deciding that the tenant had been served with due notice to quit, Lord Kenyon and Buller J expressed their decisions in rather different ways. The reports of their judgments are so short that it is worth setting them out in full. Lord Kenyon said at p 465:

> "This is different from the cases of personal process: but even in the case alluded to of service on the wife [of a declaration in ejectment], I do not know that it is confined to a service on her on the premises; I believe that if it be served on her in the house, it is sufficient. But in every case of the service of a notice, leaving it at the dwelling house of the party has always been deemed sufficient. So wherever the Legislature has enacted, that before a party shall be affected by any act, notice shall be given to him, and leaving that notice at his house is sufficient. So also in the case of an attorney's bill, or notice of a declaration being filed: and indeed in some instances of process, leaving it at the house is sufficient; as a subpoena out of the Court of Chancery, or a quo minus out of the Exchequer. In general, the difference is between process to bring the party into contempt, and a notice of this kind; the former of which only need be personally served on him."

47. Buller J said at pp 465-466:

> "Ex concessis personal service is not necessary in all cases. Then what were the facts of this case? It was proved that this notice was delivered to the tenant's servant at the dwelling-house of the tenant, and its contents were explained at the time; and that servant who was in the power of the defendant was not called to prove that she did not communicate the notice to her master; this was ample evidence, on which the jury would have presumed that the notice reached the tenant."

48. Lord Briggs takes this case as a clear statement of already settled law to the effect that a notice left at the intended recipient's dwelling house is valid from the point of delivery. He would reject the argument that this was a decision about service on the maidservant as the tenant's agent, taking the view that the judgments turn on the leaving of the document at the house rather than it being given to anyone there. I do not share his confidence about this, but before explaining why, I will look at the

whole line of authority up to and including the important case of *Tanham v Nicholson* (1872) LR 5 HL 561, because later cases shed light on the issue, in my view. Lady Hale says of the main authorities in this line that they could be seen as cases concerning service upon an agent authorised to accept it (para 14). I agree that that is a fair reading of them, although all is not perfectly clear and uniform, not least because the old reports are sparing in detail, and not all the cases address specifically the issues that are of interest to us, with our 21st century perspective.

49. Although not cited to us, the next relevant case chronologically seems to me to be *Doe d Buross v Lucas* (1804) 5 Esp 153. The action was one of ejectment, to recover possession of premises. The brevity of the report makes it difficult to be sure of the precise facts. The tenant had died, leaving his widow as his executrix. The notice to quit was given by leaving it at the house where he had lived during his lifetime, but there was no evidence of it having come into his widow's hands. It was argued that this was not a legal notice to quit, that service at the house where the tenant lived was never sufficient, and that there had to be delivery to the tenant, his wife or a servant, with (in the case of a servant) evidence that the notice came into the tenant's hands. The plaintiff asserted, relying on *Jones d Griffiths v Marsh*, that the mere service of the notice at the house was sufficient. Rejecting the plaintiff's argument, the Lord Chief Justice, Lord Ellenborough, said:

> "that case was different from this; in that case, the notice was delivered at the tenant's dwelling house, and explained to the servant. The objection was then taken, that the servant was not called, who might have accounted for the notice, and stated whether it had been delivered or not; and that not being called, it was strong presumptive evidence, that her master had received the notice, and should be left to the jury: but here there was no such evidence offered. The tenant might be turned out of possession by a trick."

50. From this, it seems that Lord Ellenborough considered that mere delivery at the house was *not* enough, and that he saw *Jones v Marsh* as a case of notice received by the tenant himself, because there had been no evidence to rebut the presumption that arose from the delivery of the notice to his servant.

51. Next in time is *Walter v Haynes* (1824) Ry & Mood 149 which is one of the few examples we were given from outside the field of residential property. An action of assumpsit was brought upon a bill of exchange. A notice of dishonour had been posted in a letter addressed to "Mr Haynes, Bristol". This was held not to be sufficient proof of notice. Setting out why, Lord Abbott CJ spoke in terms which made it plain that what was required was that the letter did in fact come into the hands of the person for whom it was intended. Normally, the post was sufficiently

reliable for posting a letter to be tantamount to delivery into that person's hands, but the address on this communication was not sufficiently precise for that to be presumed. Lord Abbott said at pp 149-150:

> "It is, therefore, always necessary, in the latter case [of a letter addressed generally to AB at a large town], to give some further evidence to shew that the letter did in fact come to the hands of the person for whom it was intended."

52. I come then to *Doe d Neville v Dunbar* (1826) M & M 9. This was another notice to quit case. Two copies of the notice to quit were served at the defendant's house, one on the servant and the other on a lady at the house. The defendant complained that this was not good enough. His argument can be gleaned from the following summary in the report at p 11:

> "It was attempted to shew that both the lady and the servant on whom notices were served were dead; and it was argued that in that case, as the defendant would be unable to call them to prove that they did not communicate the notice to him by the [relevant date], according to the course suggested by Buller J in *Jones d Griffiths v Marsh*, 4 TR 464, and as the sufficiency of the notice was treated, both in that case and in *Doe d Buross v Lucas*, 5 Esp 153, and in *Doe d Lord Bradford v Watkins*, 7 East, 553, as depending on the presumption that it came to the tenant's hands, there would be no sufficient evidence that it did so, to entitle the plaintiff to a verdict."

53. An interesting feature of this passage is the assertion that the sufficiency of the notice in *Jones d Griffiths v Marsh* depended on the presumption that it came to the tenant's hands. This is in line with Lord Ellenborough's view of it in *Buross v Lucas* and, to my mind, might be taken to indicate that *Jones d Griffiths v Marsh* was not treated, in the 30 years or so after it was decided, to be clear and established authority that mere delivery at the address constituted notice.

54. Lord Abbott CJ, had no doubt, however, that the notice in *Neville v Dunbar* was sufficient. The brevity of the report makes it difficult to gain a full understanding of the reasoning. It could be read as endorsing mere delivery to the house as sufficient (as Lord Briggs reads it), but the decision might equally have been based upon the proposition that service on the servant was sufficient whether or not the notice reached the master, or upon the proposition that service on the servant raised a presumption (not rebutted on the evidence) that the master had received the notice. In order to make sense of what Lord Abbott said, it is necessary

to note that, immediately after the passage I have just quoted from the argument, there is the statement: "The proof however failed as to the servant." It seems, therefore, that it was not established that the servant was in fact dead, from which it followed that the defendant could have called him or her to give evidence that he or she had not communicated the notice to him, but had not done so. In that context, Lord Abbott said:

> "I have no doubt that the service of the notice was sufficient. The question does not arise here, for the servant might be called: but I have no doubt of the absolute sufficiency of the notice; were it to be held otherwise, a landlord would have no means of determining a tenancy, if his tenant happened to be absent from his house at the time when it was necessary to serve the notice."

55. *Doe d Lord Bradford v Watkins*, the third of the three cases referred to in the argument in *Neville v Dunbar*, seems to have concerned a notice to quit served on one of two tenants holding under a joint demise of premises. It seems that it was left to the jury to determine whether the notice had reached the other defendant, but it is not easy to get a great deal of assistance from the report.

56. *Papillon v Brunton* (1860) 5 H & N 518 is the next case requiring consideration. Lord Briggs takes the view that this makes it "even clearer" that the principle in play is not dependent upon personal delivery to an agent. It is the case in which a notice to quit was posted by the tenant to the landlord's agent's place of business, that is to say the landlord's solicitor's chambers. It should have arrived the same day, but the solicitor only found it when he went in the next day. It was held to be good notice on the day of posting.

57. In attempting to arrive at a proper understanding of *Papillon v Brunton*, it must be noted that the trial judge had left it to the jury to say whether the letter arrived at the solicitor's chambers on the day of posting or on the morning of the next day, and the jury found that it arrived on the day of posting after the solicitor left, and said that they thought he ought to have had somebody there to receive it. Pollock CB's judgment includes the following passage at p 521:

> "… we think that in the case of a notice to quit the putting it into the post-office is sufficient, and that the party sending it is not responsible for its miscarriage. As this letter was posted in London between nine and ten o'clock in the morning, the probability is that it arrived immediately after the agent left his chambers. Indeed it is possible that it may have arrived in the

> due course of post, but by some accident. was overlooked - either not delivered by the servant to the clerk or in some way mislaid. Besides it did not appear that it was not delivered before seven o'clock in the evening; and the jury considered that the agent ought to have had some one in his chambers at that time. A notice so sent must be considered as having reached the agent in due time, and the same consequences must result as if he had actually been there and received it. In my opinion the finding of the jury was right, and the notice was delivered at the agent's place of business in sufficient time to inform him, if he had been there, that the tenancy was to be determined at the time specified. For these reasons I think there ought to be no rule."

58. Whilst this passage commences with a rather general observation, suggesting that mere posting of a notice is sufficient, that thought is not continued throughout the remainder of it. As the reasoning develops, it seems to turn, at least to some extent, not on the mere fact of the notice arriving at the agent's chambers, but on the fact that it probably arrived on the day of posting and the solicitor ought to have had someone at the chambers to receive it. In highlighting the opportunity for the agent to have had the information had he arranged matters as he should have done, the approach bears some resemblance to the approach taken to termination of employment in the statutory context in cases such as *Gisda Cyf*, namely that the effective date of termination is when the employee reads the letter or has had a reasonable opportunity of reading it.

59. Martin B simply concurred with Pollock CB, but Bramwell B and Wilde B provided short judgments agreeing there should be no rule. It is difficult to ascertain precisely what was of most importance to Bramwell B, although the jury's finding that the agent should have had someone at his chambers when the notice arrived had clearly impressed itself upon him. Wilde B said he took the same view as Bramwell B, and expressed himself in one further sentence, which might be supposed to encapsulate what had weighed particularly with him, and was as follows:

> "The jury have found that the notice arrived at the agent's place of business at a time when someone ought to have been there to receive it."

60. So we come to the decision of the House of Lords in the Irish case of *Tanham v Nicholson* (1872), which I see as important. There is nothing to suggest that the fact that it was an Irish case makes any difference to the law applicable in relation to notices to quit, and the cases cited included familiar ones such as *Jones d Griffiths v Marsh*, *Neville v Dunbar* and *Papillon v Brunton*. The notice was delivered by

hand to the tenant's house where it was given to his daughter. It was sufficient to entitle the landlord to maintain ejectment against the father.

61. Lord Briggs interprets the case as one about agency, rather than about service by post at the recipient's home, but considers it to contain relevant dicta supporting the existence of a common law rule that delivery of an "ordinary civil notice" to the home of the intended recipient operates to transfer the risk to the recipient at that point, with the necessary corollary, I think, that it is at that point of physical delivery that the notice is given. I see the case rather differently.

62. A little background is required as to the history of the case and the arguments being advanced by the parties. The trial judge had left to the jury the question, "Whether, in fact, the notice to quit ever reached [the tenant], or became known to him?" The jury found it did not. The judge considered that there had still been sufficient service in law and directed that a verdict be entered for the landlord. The matter proceeded through various levels of court to the House of Lords. The tenant conceded that he was living in the house where the notice was served and that the house was part of the demised premises, but he argued that to be sufficient, the notice had to be received by the tenant himself or by his duly appointed agent, which his daughter was not. The landlord argued that there was no rule that required personal service of a notice to sustain an ejectment and that service at the house was sufficient. In any event, said the landlord, the tenant's daughter and sons were agents of the tenant and service on them was amply sufficient.

63. Although all arriving at the same result, that there had been sufficient service of the notice, their Lordships differed in their reasoning. For the Lord Chancellor, Lord Hathersley, the solution lay in agency. He introduced the problem as follows (p 567):

> "The sole question in the case is an extremely short one, and it is simply this, whether or not the delivery of a notice to quit on one who, undoubtedly, according to the evidence, was a servant of the tenant, at the house of the tenant, that house being on the demised property, is to be taken as a good and effectual service of that notice, so as to subject the person to whom it is addressed to the consequence of being ejected upon the termination of the notice."

64. At p 568, in a passage which is worth quoting in full, he set out his view that if the servant is constituted an agent for receiving service of the document in question, service on the agent is service on the principal:

> "I apprehend that the real point in the case, when you come to consider it, is this; not whether or not the person you have constituted your agent, by your line of conduct, to receive any document that may be left at your house, has performed that which is his or her duty, but whether or not you have constituted that person your agent. Because, if once you have constituted your servant your agent for the purpose of receiving such a notice, the question of fact as to whether that servant has performed his duty or not, is not one which is any longer in controversy. When once you constitute your servant your agent for that general purpose, service on that agent is service on you - he represents you for that purpose - he is your *alter ego*, and service upon him becomes an effective service upon yourself."

65. So, said the Lord Chancellor, when the law has said "in repeated cases" that the effective service of notice on a servant at the dwelling house situated upon the demised property is a service upon the tenant, it has proceeded upon the basis that "the law considers that servant to be an implied agent of the tenant for that particular purpose." The tenant could rebut that by showing that the agency was not correctly implied on the facts, but there could be no inquiry as to whether the agent did his duty by the tenant in dealing with the notice. Having "brought [the notice] home to the agent of the person ... you have brought it home to the tenant himself" (p 571). By the conclusion of his speech, the Lord Chancellor had refined the case to one question, "namely, whether this woman was an agent of the tenant or not". As she *was* an agent qualified to receive a notice, that was an end of it.

66. Lord Westbury thought the law on the service of notices to quit to be in an unsatisfactory state. Lord Briggs has quoted (at para 91) what he said about the undue burden on a landlord deprived of the benefit of due service by things beyond his control. Lord Westbury noted the "suggestion", which he said was to be found in "the judgments given by some other Judges", that receipt of the notice by the tenant's servant at his dwelling house was not absolutely sufficient, but only prima facie evidence of delivery to the master, rebuttable by evidence proving that the notice never reached him. He contrasted this with *Jones d Griffiths v Marsh*, where he said that Lord Kenyon CJ had laid down that in every case the service of a notice to quit by leaving it at the dwelling house of the tenant is sufficient, and with what Lord Abbott CJ had said (possibly in *Neville v Dunbar*, although Lord Westbury does not specify).

67. Although it is possible to interpret Lord Westbury's apparently approving reference to Lord Kenyon in *Jones d Griffiths v Marsh* as endorsing a principle that mere delivery at the tenant's house was sufficient, I do not think that that interpretation withstands a reading of Lord Westbury's speech as a whole. It will be recalled that in *Jones d Griffiths v Marsh*, the notice had not just been left at the

premises, but had been served on the tenant's maidservant, and this would have been in Lord Westbury's mind. Apart from anything else, the employment of a domestic servant was commonplace in those days. Furthermore, it is noteworthy that Lord Westbury's examples of the things that might unfairly deprive the landlord of the benefit of service commence with the wilful act of the servant or the servant's incapacity, although they do of course include also "any accident that might befall the notice after it has been received in the dwelling house of the tenant".

68. When Lord Westbury spoke of the uncertainty and doubt that had come into the law (see the passage quoted at para 93 of Lord Briggs' judgment), I do not think that he was complaining that there had been a principle (whether or not derived from Lord Kenyon) that mere physical delivery to the tenant's address was sufficient, which had now been put in doubt. I think what he had in mind was what he saw as a clash between, on the one hand, Lord Kenyon and Lord Abbott, who considered service on the tenant's servant was conclusively sufficient, and, on the other, "some other Judges" who held that it simply gave rise to a rebuttable presumption that the notice had been served. It is noteworthy that, having expressed the hope that the uncertainty and doubt could be cleared up, he did not then return to *Jones d Griffiths v Marsh* and declare the principle to be that mere delivery to the premises was enough, even though that would have been a simple way through on the facts of the case, the notice undoubtedly having arrived at the tenant's address. Instead, he went on to consider what was to be made of receipt by a servant. Even then, he did not go so far as to say that delivery to the tenant's servant would be *conclusively* sufficient. What he in fact went on to do, in the very next paragraph following his lament about the uncertainty, was to deal with the case on the assumption that delivery to the servant was only prima facie evidence of delivery to the master ("the lower ground", see p 574). He found there to be no evidence to contradict this prima facie evidence and, indeed, all the evidence pointed to the father having knowledge of the notice. The jury's conclusion that the father did not know was "so utterly unwarranted by the facts", in Lord Westbury's view, that it ought not to have prevented judgment being entered for the landlord. Accordingly, he did not need to resolve the clash of authority between Lord Kenyon and "some other Judges", if clash it was.

69. Lord Westbury introduced his final paragraph with the view that "the matter is left, by certain expressions used in former decisions, in a state of some embarrassment". Whilst he expressed the hope that the judgment in the case may "tend to relieve cases of this kind in future", I do not think that his own speech provided any such relief, as he then summarised his conclusion in terms which left open whether or not delivery to the servant was conclusive or merely gave rise to a rebuttable presumption, saying:

> "*if* it were open to contradiction, on the ground that it might be proved that the tenant had no knowledge of the notice, that

> proof has not been given, but the contrary conclusion has been in fact established." (Emphasis supplied)

70. No relief came from Lord Colonsay either. His speech revolves around agency. He began it by observing (p 576) that, "[i]t is held in law that notice given to the servant of the party residing in the house is a service of notice on the master". He then went on to consider whether evidence had been adduced to rebut that "rule or presumption of law", "if the question was in a condition in which it could be rebutted." He found no circumstances "sufficient to rebut the legal inference that the person to whom the notice was given, standing to the party in the relation of servant, was not a legal agent to receive that notice" (sic, but I think the "not" is an error). He too concluded that the judge was right to hold the notice was sufficient.

71. Two features of *Tanham v Nicholson* strike me as particularly significant. First, none of their Lordships resolved the case by the simple route of holding that delivery of the document at the tenant's address was sufficient notice, even though that seems to have been argued by the landlord. There was no dispute about the arrival of the notice at the premises, so that solution would have been open to them if delivery was all that was required and, if they had thought *Jones d Griffiths v Marsh* was properly to be interpreted in that way, they could have drawn support from what Lord Kenyon said there. But instead of taking that approach, each looked at the implications of delivering the notice to the daughter. The Lord Chancellor was satisfied that that was service on the tenant, because service on his agent was tantamount to service on him. Lord Westbury and Lord Colonsay were perhaps more generous to the tenant, allowing for the possibility that service on the servant gave rise only to a rebuttable presumption of service on the tenant. None of the speeches provides support for the proposition that agency is simply irrelevant in connection with a service of a notice. Secondly, it is clear from the speeches that the law on the service of notices to quit was thought to be in a rather unsatisfactory state, a state which gave rise to different reasoning from each of their Lordships. This is hardly a promising foundation for a submission that the common law has long been settled in relation to the requirements for service of a notice and requires only that it be duly delivered to the home of the intended recipient.

72. I need only refer to one further Victorian case, and then only for completeness. This is the decision of the Court of Appeal in *Hogg v Brooks* (1885) 15 QBD 256. A lease of a shop contained a provision for the landlord to terminate the demise by delivering written notice to the tenant or his assigns. The lessee mortgaged the premises by way of underlease and disappeared. Written notice to determine the tenancy was sent to him at his last known address but returned without having reached him and he could not be found. Notice was also given to the mortgagee and the occupier of the premises. The Court of Appeal held that the landlord was not entitled to recover possession of the premises. The termination clause in the lease had to be construed according to the ordinary meaning of the

English language. There were no assigns of the tenant, so notice could only be given by serving it on the tenant himself and it had not been served on him.

73. I need not add to what Lady Hale has said about the other non-employment cases upon which the Trust relies (commencing at para 15 of her judgment). I share her view of them and of what is said in the employment cases about the common law position. In short, I do not think that it has been shown that there is a clear and long-standing common law rule that service of what Lord Briggs describes as an "ordinary civil notice" occurs when the notice is delivered to the recipient's address. In so far as any clear principle emerges at all from the older cases, it seems to me, particularly in the light of *Tanham v Nicholson*, to revolve around delivery to the recipient's agent, who might be the recipient's household servant, professional agent, or (in certain circumstances, such as those in *Tanham v Nicholson*) family member. In each case, the agent appears to have been someone who, as part of their role, would be expected to take in communications of the type concerned for the intended recipient. For the purposes of service, the agent was (to quote the Lord Chancellor in *Tanham v Nicholson*, in the passage set out at para 64 above) "the alter ego" of the intended recipient so that, as he said, "service on that agent is service on you". What the courts might have said had they been called upon to consider the same questions in the modern world in which there are no longer domestic servants, is unknown, and irrelevant. For present purposes, what matters is that the clear common law rule for which the Trust contends does not, in my view, emerge from the old cases.

74. My unease about the suggested general common-law rule is compounded by the concentration within a narrow field of the cases upon which the Trust relies. It may be that a great deal of research has been done into other areas with no relevant result, and we have been spared the trouble of trawling through the underlying material. However, I would have been interested to know, for example, what the position is, and was before the Partnership Act 1890, about the service of notices terminating a partnership, and to have seen some other examples drawn from contractual situations other than notices relating to property. As Lord Briggs says, relationship contracts come in many varieties.

75. Absent a common law rule of the type for which the Trust contends, I see no reason for a term to that effect to be implied into an employment contract. Indeed, as Lady Hale explains, there is every reason why the term implied into an employment contract should reflect the position consistently taken by the EAT from 1980 onwards.

LORD BRIGGS: (dissenting) (with whom Lord Lloyd-Jones agrees)

76. I would have allowed this appeal. The question is whether the term which must be implied into a contract of employment terminable on notice so as to identify, where necessary, the time of the giving of postal notice of termination, is that notice is given at the time when the document is duly delivered to the employee's home address, or at some later time, such as the time when it actually comes to the attention of the employee, or when the employee has had a reasonable opportunity to read it. The question arises in this case in relation to termination "on notice", by which I mean termination by a document which brings the relationship to an end at a specified date in the future, rather than immediately or, to use the jargon of the law of employment contracts, summarily. The essence of termination on notice is that there is a period, usually called the notice period, between the giving of the document, also confusingly called the notice, and its taking effect.

77. The precise identification of the time when notice is given is not invariably, or even usually, necessary in order to determine when the employment actually terminated. This will usually be the time (almost always the date) specified in the document. But sometimes a notice is expressed to take effect a specified number of days or weeks after it is given, so that the date of its giving is a vital element in determining the date of termination. Sometimes notice is given for a specified date, but with only the contractual (or statutory) minimum notice period allowed before it takes effect, and issues then arise as to whether notice was given in sufficient time before it is expressed to take effect. The notice in the present case was an amalgam of both those types, because it was expressed both to give a specific period of notice (12 weeks), and to take effect upon a specified day in the future (15 July 2011).

78. The question is not whether any term as to the time of the giving of notice should be implied, but rather what that term is. It is common ground that the term is one which the law implies into a whole class of contract, rather than one which is context specific. Nor is the question what that term should be. The task of this court is not to fashion, for the first time, a new implied term to fit a new situation, with a free rein to choose between available alternatives on modern policy grounds. Rather it is to examine the common law authorities to find out what that implied term already is. Contracts of employment determinable on notice have been around for hundreds of years, and there must be many millions extant in the common law world at this moment which must be taken to have had such an implied term embedded in them from the moment when they were made. The use of the post to give such notice has been an accepted method for well over a century, even if recent advances in information technology may well mean that it has only a few more years of useful life. It has not been suggested that any recent changes in the modes or efficiency of the postal service call for some revision of the implied term, by comparison with the term which the law has implied since Victorian times.

79. Contracts of employment are only a sub-species of a much larger group of what may be described as relationship contracts terminable on notice. They include contracts between landlord and tenant, licensor and licensee, contracts of partnership, service contracts not constituting employment, and many kinds of business contract such as commercial agencies, distributorship agreements and franchises. In most of them there will be provision for termination on notice, which permits notice by post to a party's home or business address, and the need to be able, when the occasion requires, to ascertain the time when notice is given calls for the law to imply a term for that purpose.

80. Nor do the particular facts of this case call for an anxious re-examination or development of the previous law, even though the financial consequences for the parties are, because of an unusual fact (the approach of the pension threshold on the employee's 50th birthday), large indeed. The essential (and sufficient) facts which give rise to the question before the court are only that the letter containing the notice was only duly delivered on the last available day (from the employer's perspective) but the employee was not at home until the following day. Absence of the recipient from home (or from the office) on the day of delivery is a common feature of the cases in which this question has already been addressed.

81. In my judgment there has been for over two centuries a term generally implied by law into relationship contracts terminable on notice, namely that written notice of termination is given when the document containing it is duly delivered, by hand or by post, to the home (or, if appropriate, business) address of the intended recipient, rather than, if later, when it actually comes to the recipient's attention, or when the recipient, absent at the time of delivery, has returned home and has had a reasonable opportunity to read it. That term is clearly identified by the common law authorities as the correct one. Although there has been a different approach taken to the identification of the "effective date of termination" of employment for statutory purposes connected mainly with the running of time for bringing proceedings for unfair dismissal, contracts of employment are not otherwise an exception to the legal principle applicable generally to relationship contracts, as the courts dealing with the statutory question have been at pains to emphasise. True it is that many of the old cases in which the common law rule has been laid down have concerned the landlord and tenant relationship, but the reasoning in those cases is not specific to that relationship. Nor are the consequences of the loss of a home or place of business necessarily of a lesser order than those following from the loss of a job.

82. I would add that there are in my view sound reasons of policy why the implied term should be as I have described, to some of which I will refer in due course. But these do not amount even collectively to a ground for my conclusion, save in the negative sense that the existing law is not so defective in policy terms that it needs now to be changed. Rather, my conclusion is based simply upon an analysis of what the reported cases show that the law already is on this question. My analysis accords

closely with the reasoning to be found in the dissenting judgment of Lewison LJ in the Court of Appeal.

83. I gratefully adopt Lady Hale's summary of the facts. Although the date upon which the termination notice was duly delivered was postponed because of the absence of anyone at Mrs Haywood's home to sign for recorded delivery, the helpful intervention of Mr Crabtree in going to the sorting office and collecting it meant that, for present purposes, it was duly delivered on 26 April, just in time for it to expire before Mrs Haywood's 50th birthday if giving notice is effective at the time of due delivery. But Mrs Haywood did not return home from her holiday abroad until the following morning, so it did not come to her attention until then, nor did she have a reasonable opportunity of reading it before her return.

The Common Law Cases on Notices

84. I am also content largely to follow my Lady's summary of the authorities, although I will need to say a little more about the reasoning in some of them. The earliest is *Jones d Griffiths v Marsh* (1791) 100 ER 1121. The issue in that case was as to the validity of service of a notice to quit premises let to a tenant on a periodic tenancy. The notice was hand-delivered to the tenant's home (not the premises demised by the lease) and given to the tenant's servant, with an explanation of its contents. Lady Hale has cited the relevant dictum of Kenyon CJ: "in every case of the service of a notice, leaving it at the dwelling house of the party has always been deemed sufficient". The context shows that he was speaking in the widest possible terms, about the services of notices generally, rather than just about notice to quit. He gave, as examples, notices of any kind required to be served by statute, service of an attorney's bill, service of a declaration, service of legal process and even service of a sub-poena. The only exception was what we would now call a penal notice, where non-compliance might expose the recipient to imprisonment for contempt of court, which required personal service. That was not a case about timing, because there was no evidence that the notice to quit ever reached the tenant himself, although Buller J was prepared to infer that it had done. Nonetheless it is inherent in a conclusion that the notice was valid upon due delivery to the tenant's home that it was given then, and not at the time when it might have come to the tenant's attention. It is to be noted that Kenyon CJ was not purporting to decide the point for the first time. He took it to be settled law, of the widest application to notices required to be served.

85. I would not agree with the submission for Mrs Haywood that the case was one about service upon an agent of the tenant, although it was given to a servant. The judgments make no mention of agency, and service was said to be effected by leaving the notice at the tenant's house, rather than by giving it to anyone. In 1791

it may be doubted whether houses generally had letter boxes, so there may have been no alternative than to knock on the door and give the notice to someone.

86. The very short report of *Doe d Buross v Lucas* (1804) 5 esp 153 does seem to suggest a different analysis from that laid down by Kenyon CJ in *Griffiths v Marsh,* for the reasons set out by Lady Black in her judgment. But it is important to bear in mind that in that case the tenant had died before the notice to quit was given, and the tenancy had by then become vested in the deceased tenant's widow. The report does not indicate whether she was living at the property when the notice was served. I would for my part be reluctant to treat the common law rule as validating the giving of notice by delivery only to the home of a deceased former tenant.

87. With respect to Lady Black I do not consider that *Walter v Haynes* (1824) Ry & M 149 is of any real assistance. That was a case in which the plaintiff sought to prove service of a notice of dishonour of a bill of exchange by evidence only that she had posted it, addressed to "Mr Haynes, Bristol". It was rejected as sufficient evidence because Bristol was a large town, which might contain any number of residents by the name of Haynes. It is true that Abbott CJ used language about proving that the notice had come into the hands of the intended recipient, but this was not a case about the distinction between delivery to the person's home, and personal delivery into his hands. On the contrary, had there been a sufficiently detailed address on the letter, so that it appeared to be directed to his home, proof of posting would have been sufficient.

88. *Doe d Neville v Dunbar* (1826) Moot M 9; 173 ER 1062 is the earliest case cited to us about the timing of service, again of a notice to quit. The relevant lease required two quarters' notice to quit. Notice to quit on the September quarter day needed to be given by 25 March. Two copies were hand-delivered to the tenant's home (again, not the demised premises) on 22 March by the landlord's attorney and given to a servant and an otherwise unidentified lady there. But the attorney was told that the tenant was absent and would not return home until 26 March. Nonetheless the notice was held to have been given in good time. This case has an interesting similarity with the present case, since Mrs Haywood had informed the Trust that she was going abroad for a holiday, and was still away when the termination letter was duly delivered. The very short judgment of Abbott CJ, following the *Griffiths v Marsh* case, included the dictum: "were it otherwise, a landlord would have no means of determining a tenancy, if his tenant happened to be absent from his house at the time when it was necessary to serve the notice". Again, there is no indication that the court was treating this as a case of personal service upon an agent of the tenant. The emphasis is all on delivery to the home of the person to be served. The underlying theme of the judgment is to recognise that where a contract is terminable by a period of notice, it must be interpreted in a way which makes it possible for the person seeking to terminate to give that notice at the appropriate time, even if the other party is absent.

89. Lady Black notes in her judgment that both counsel and the judge referred to a presumption of due delivery where the recipient's agent is given the notice, and is not called to prove that she did not inform her master in good time. But it is hard to see how such a presumption could have operated to save the notice in that case, because the landlord's attorney was told that the tenant was away and would not be returning until the day after the last available date for service. In the absence of telephones, it is hard to see how the tenant could have been informed in good time. However that may be, I consider that Abbott CJ was seeking to make it clear that, regardless of any such presumption, notice was duly given, by being delivered to the tenant's house in good time.

90. *Papillon v Brunton* (1860) 5 H & N 518; 157 ER 1285 makes it even clearer that the principle is not dependent upon personal delivery to an agent. It is also the earliest case about postal service. Again, service of the notice to quit had to be given by the tenant by the March quarter-day, and it was proved that it had been duly delivered by post to the landlord's agent's business premises late on that day, between six and seven o'clock in the evening, after the agent had left for the day. It only came to his attention on the following morning. Pollock CB said that the notice was duly delivered on the quarter-day. He said: "… the notice was delivered at the agent's place of business in sufficient time to inform him, if he had been there, that the tenancy was to be determined at the time specified". It is implicit in that finding that it was not necessary for the notice actually to have come to the agent's attention on that day, or for him to have been at the address at all on the date of due delivery. In one sense this is a case about service on an agent, but the ratio is that timely service at the business address of the agent is sufficient, regardless whether it comes to the attention of the agent in good time. The case is therefore on all fours with those described above, save that it related to business premises rather than to the home of the person to be served. Furthermore Pollock CB said (during argument) that leaving a notice at the landlord's dwelling while he was away abroad would have been good and therefore timely service. Baron Bramwell said that:

> "if a person tells others that a particular place is his place of business where all communications will reach him, he has no right to impose on them the obligation of finding out whether he sleeps at his place of business or elsewhere. I doubt whether, in the absence of any express limitation by the agent, it is necessary that the notice should be given within the hours of business."

The message to be taken from that observation, (with which Baron Martin agreed) coupled with Baron Pollock's observation during argument is that, if a person nominates an address (home or business) for delivery of notices under a contract, without limiting the time when a notice may be delivered there, they take the risk that it arrives when they (or their agent) are not actually there. That which is true

about the time of day is in my judgment equally applicable to any longer period of time. For as long as the intended recipient holds out an address as the place to which to deliver a notice, then that person takes the risk that, at the time of delivery, there will be no-one there to read it. Applied to the present case, Mrs Haywood knew that she planned to be away from home on a holiday at a time when her employers might wish to terminate her employment by notice. She could have supplied them with an alternative means (or place) of delivery of notice to her while away, such as the address of her hotel or her email address, but she did not. Her notice period was a long one, and it is not therefore at all surprising that she did not do so, and certainly not a matter for criticism. However long her holiday, she would be back home to read her incoming mail long before her employment actually ended. But her address remained the place at which such a notice could be delivered, even if she might not be there to receive it.

91. The question reached the House of Lords in *Tanham v Nicholson* (1872) LR 5 HL 561 on an Irish appeal. It was about personal service of a landlord's notice to quit upon an agent of the tenant at the tenant's home, which formed part of the demised premises. The agent then destroyed it, so that the tenant never received it. It was therefore a case about agency, rather than merely service by post at the recipient's home. Nonetheless there are some relevant dicta. Lord Westbury said:

> "If the landlord has once done that which the law throws upon him the obligation to do, his rights consequent upon having performed that legal duty ought not to be affected in any manner whatever by that which is done by his antagonist, upon whom the notice has been served. It would be an idle thing to say that a landlord serving a notice in due manner according to law, is to be deprived of the benefit of what he has done by the wilful act of the servant of the tenant, or by the incapacity of that servant, *or by any accident that may befall the notice after it has been received in the dwelling house of the tenant on whom it was served*." (my emphasis)

92. Later, commenting on the *Jones v Marsh* case, he continued:

> "Lord Kenyon lays it down as beyond the possibility of dispute that in every case the service of a notice by leaving it at the dwelling-house of the tenant has always been deemed sufficient. But he qualifies that by explaining that he speaks of notices affecting property, as notices to quit, and not those notices which are intended to bring an individual within personal contempt. Those may require personal service. The

> other, the ordinary civil notice (if I may so call it) is abundantly satisfied if it be left at the dwelling-house of the party."

Again, the generality of this dictum, as applicable to "the ordinary civil notice" is significant. It is apparent that neither Kenyon CJ nor Lord Westbury were confining their analysis to landlord and tenant cases. In their view, every kind of notice not requiring personal service such as contempt proceedings, falls within the principle that due delivery to the recipient's home is sufficient. I have no doubt that they would have regarded a notice to terminate an employment as an ordinary civil notice.

93. Lord Westbury concluded:

> "I shall be glad, therefore, if we can relieve the law from a degree of uncertainty and doubt brought into it, contrary to all principle, and if we can, in justice to the landlord, relieve him from having an act done by him, which act satisfies the obligation of the law, nullified and rendered of no effect by circumstances which have happened altogether after the delivery of his notice, and in the house of the tenant or under the control of the tenant, with which the landlord has no concern whatever."

In my judgment these dicta reinforce what appears from the earlier cases, namely that from the moment when an ordinary civil notice is duly delivered to the home (or office) of the intended recipient, the law allocates the risk of mishap thereafter to the recipient. Those risks include destruction of the notice before it comes to the attention of the recipient, but also the risk (exemplified by the *Neville v Dunbar* and *Papillon v Brunton* cases) that it will not come to the attention of the intended recipient until after the due date for service because he or she is away from home. This is because the obligation on a person to give such a notice must be one which can be effectively discharged by taking steps available to that person, without the effectiveness of those steps being undermined by matters within the control of the intended recipient.

94. A recurrent theme in the speeches of both the Lord Chancellor and Lord Westbury is that, to the extent that the dicta originating with Buller J in *Jones v Marsh* and Lord Ellenborough in *Buross v Lucas* might suggest that delivery to the recipient's home or agent might only raise a rebuttable presumption of due delivery, they were wrong. In respectful disagreement with Lady Black, I do not read their concentration upon agency, or any part of what Lord Westbury said about what he called "the lower ground" to represent a stepping back from their firm adherence to

what Kenyon CJ said in *Jones v Marsh,* or what Abbott CJ said in *Neville v Dunbar* as representing the high ground of principle which they sought trenchantly to affirm. They focussed upon agency, and upon the "lower ground" only because that was the way in which the case had mainly been argued. I agree that with Lady Black that Lord Colonsay appears to have confined himself to the lower ground.

95. Lady Black refers to *Hogg v Brooks* (1885) 15 QBD 256. The case may have turned upon an unusually drafted break clause in a lease. In any event none of the authorities cited to us are referred to in the brief judgment of Brett MR. His conclusion appears to have been that, for as long as the tenant remained untraceable, the break clause in the lease simply could not be activated at all. I venture to doubt whether that very uncommercial result, derived from a literalist reading of the clause, so as to exclude service either upon the demised premises, or upon the last known residence of the tenant, would be followed today.

96. I agree with Lady Hale that *Stidolph v American School in London Educational Trust Ltd* [1969] 2 P & CR 802 is not of decisive force, because it was not suggested that the intended recipient was not at home when the relevant statutory notice arrived by post. But I do not regard the fact that, in that and other cases, the requisite formalities for giving notice are statutory, means that the cases can be ignored. In every case the question is: what duty or obligation by way of service or delivery is imposed upon the person required to give notice? Once that duty has been performed, matters which then affect the question whether or when the notice actually comes to the attention of the intended recipient are for the risk of the recipient. In the present case Mrs Haywood does not suggest that postal delivery to her home was not a permitted method of giving notice of termination.

97. *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] 1 QB 929, CA was a case about the summary termination, by telex, of a charterparty by the owner upon breach by the charterer. It was not about termination on notice. The dicta cited by Lady Hale recognise the impracticability in that context of an implied term that the communication of termination be timed to take effect only upon the telex actually being read, or coming to the attention of a responsible employee. Beyond that the case offers little assistance.

98. In my judgment the Trust was right to place emphasis in its submissions upon the wide range of statutory provisions which appear to be formulated upon an assumption that service of what may loosely be described as ordinary civil notices is completed upon delivery to the intended recipient's address, regardless when, or even whether, the contents thereafter come to the attention of the recipient. They include section 7 of the Interpretation Act 1978, section 196 of the Law of Property Act 1925, section 1147 of the Companies Act 2006, section 29 of the Misuse of Drugs Act 1971, section 267 of the Public Health Act 1875 and Part 6 of the Civil

Procedure Rules. All of them provide for the service or giving of notices by post to the intended recipient's address. None of them require the notices to be brought to the attention of the recipient, or postpone the effective date of service or delivery until an absent intended recipient has returned home. Some of them provide for a rebuttable presumption that the notice is deemed to be delivered on a specified date after posting, but the presumption is as to the date of due delivery (sometimes described as receipt), not the date when the notice comes to the attention of the intended recipient. That is why, in the *Stidolph* case, Edmund Davies LJ said that the relevant statutory presumption of due receipt would be undermined if the recipient could, while admitting receipt, still challenge the notice on the basis that its contents had not actually come to his attention. To much the same effect is the dictum of Carnwath LJ in *Wilderbrook Ltd v Olowu* [2005] EWCA Civ 1361; [2006] 2 P & CR 4, cited by Lady Hale. While I agree that cases about statutory provisions for service of notices by post do not directly impinge upon the construction of an employment contract to which no such provision applies, they are of such wide application to ordinary civil notices that they can fairly be said to reflect settled common law, from the earlier cases which I have described, to the effect that if postal or other delivery to the recipient's home is an authorised method of giving notice, it is achieved once the notice is actually delivered, regardless of whether the intended recipient is actually at home, and regardless of what may thereafter happen to it when it gets there, such as being burned by an agent or eaten by the dog.

99. Like Lewison LJ, and in respectful disagreement with Arden LJ, I do not read *Freetown Ltd v Assethold Ltd* [2012] EWCA Civ 1657; [2013] 1 WLR 701 as an authority to the contrary. At para 37, Rix LJ speaks of the common law as requiring proof of receipt, whereas the Interpretation Act deemed receipt from proof of posting. But he did not thereby mean that the common law required it to be shown that the document had actually come to the attention of the recipient, merely that it had been duly delivered at the recipient's address. This is apparent from his description of the facts, at para 3. It was a case where the answer to the question whether a statutory appeal had been issued in time turned upon the time-lag between when it was posted and when it arrived, not between when it arrived and when its contents first came to a person's attention.

100. The essential difference between my analysis of the common law cases and that of Lady Hale and Lady Black is that they treat them all as at least consistent with the theory that delivery to an agent is as good as delivery to the principal, in the eyes of the law. I agree that this theory is capable of being identified as one of the strands by which those cases where delivery was made on time to an agent of the intended recipient at the principal's home can be analysed. But it does not address the cases, such as *Papillon v Brunton*, where there was no-one at the specified (business) address at the relevant time. Furthermore, if the underlying principle is that delivery is complete only when there is actual communication to the intended recipient or a reasonable opportunity to read the contents of the notice, the

agency theory fails to explain those cases, such as *Neville v Dunbar*, where the agent could not possibly have communicated the contents of the notice to the intended recipient in sufficient time, or those where, on the facts found, there was no such communication, such as *Tanham v Nicholson*. The agency theory is simply not supportive of the supposed principle. Rather, it supports the concept of the allocation of risk, where delivery either to the address supplied by the intended recipient, or to the recipient's agent, transfers to the recipient the risk as to the consequences which then ensue, including the consequences of any delay before it reaches the hands of the recipient. Nor does the theory that the agency analysis was what mattered address the trenchant wording of the senior judges, which constantly asserts that delivery to the relevant home or business address is sufficient.

101. In days when homes were (at least among the moneyed classes who could afford to litigate) usually staffed even where their resident owners were away, there may not have appeared to be much practical difference between the transfer of risk when the notice was delivered to the intended recipient's home (or business) address, and when it was put into the hands of an agent. But the leading judgments are careful to state that either will do, and the typical modern case where a home address is empty when the owner is away makes the delivery to the address alternative more important than it may once have been.

The Employment Cases

102. Turning to cases about employment there is, as Lady Hale observes, very little about the common law as to termination on notice. There is however a significant amount of authority about the requirements for summary termination. In my judgment, they say almost nothing about the requirements for termination on notice. Summary termination means that the employment relationship comes to an abrupt end, with immediate consequences including but not limited to the running of a short limitation period for the bringing of unfair dismissal proceedings. It is an exceptional process, whereas termination on notice is the normal agreed way in which (subject to statutory consequences about unfairness or discrimination) the contract may be terminated, usually by either side. Summary termination may be a right conferred upon the employer by express contractual term, in specified circumstances usually involving serious breach of contract by the employee. It may just consist of the acceptance by one party of a repudiatory breach by the other as putting an immediate end to the contract.

103. It is therefore no surprise to find dicta in some (although not all) of the authorities on summary termination (usually called dismissal) to the effect that actual communication to the employee is necessary. By contrast termination on notice always involves a period thereafter while the employment relationship continues. That period may be short or long, but will usually include sufficient time

for a delay between the date of delivery of the notice and the date when it comes to the attention of the employee to be accommodated, so that the employee still knows about the termination well before it happens, even if that period may be shorter than the full contractual or statutory notice period.

104. The rules which the common law has developed over centuries about the giving of ordinary civil notices represent a compromise between the reasonable need for the givers of the notice to be able to exercise the right triggered by the notice, at a time of their choosing, without being hindered by uncertainties about what happens to the document containing the notice after they have parted with it, and the need of the recipients to receive the contents of the notice at a place where it is likely to come to their attention within a reasonable time. Thus the common law has not (as it did in relation to acceptance of a contractual offer) treated mere posting as sufficient. Although posting raises a presumption of due delivery, it remains open to the intended recipient to prove that the notice document never arrived. Due delivery to the recipient's home (or office) marks the point where the risk of mishap passes from the sender to the recipient. There is no reason why the law should automatically apply this time-honoured compromise to the more draconian and immediate process of summary termination. Nor by the same token is there any basis to read the cases about summary termination as saying anything about the requirements for valid termination on notice.

105. *Brown v Southall & Knight* [1980] ICR 617 was a case about summary dismissal. The question was whether the date of delivery of the letter summarily dismissing the employee was the effective date of termination for statutory purposes connected with the period of his continuous employment, or the slightly later date when the employee returned home and read it. None of the cases about the requirements of a notice were cited to the EAT. This is hardly surprising, because it was simply not a case about termination on notice. Had it been, the time lag between delivery and reading the notice would not have mattered, because neither event would have terminated the employment there and then. The passage in the judgment of Slynn J cited by Lady Hale confines his analysis to summary termination in express terms. He says:

> "In our judgment, the employer who sends a letter terminating a man's employment summarily must show that the employee has actually read the letter …"

106. The next in time is *London Transport Executive v Clarke* [1981] ICR 355, which was about the requirements for the effective communication by the employer of its election to treat a repudiatory breach by the employee as having terminated the contract; ie summary termination. This was held to have been achieved on the date when a letter to that effect was delivered by post to the employee's home

address, even though he was not at home. The employee, who had been abroad without leave, returned home and read the letter about three weeks later. It is fair comment that the date issue was not critical to the outcome, but the Court of Appeal appear to have regarded it as axiomatic that the communication of the acceptance of the repudiation was effectively achieved by, and at the time of, the delivery of the letter to the employee's home when he was not there. The *Brown* case was cited, but not referred to in the judgments.

107. The EAT applied a slightly more nuanced approach to the requirements for communication of summary termination in *Hindle Gears v McGinty* [1985] ICR 111, which was a case about the attempted summary dismissal of an entire group of striking workers, by letters to all their homes. Two workers decided to return to work before the letters arrived, so they had no opportunity to read them before they arrived for work. The question was whether they had been dismissed and then re-engaged on arrival at work, or not dismissed before they resumed work. Following and developing the decision in the *Brown* case, Waite J said that the requirement in a summary termination case for the communication of the dismissal to the employee meant that the letter had either to have been read by the employee, or that the employee had had a reasonable opportunity to read it. Again, it was not a case about termination by notice, and none of the cases about the requisites of an ordinary civil notice were, or needed to be, cited.

108. *McMaster v Manchester Airport plc* [1998] IRLR 112 was also a case about summary dismissal. That much was common ground. It is true that the requirement for communication to the employee, for the purpose of determining the effective date of communication, was treated as applying both to summary dismissal and dismissal on notice, but this was again common ground. The only case referred to in the judgment was *Brown v Southall & Knight*. The report does not show whether any other cases were cited, but it looks most unlikely (bearing in mind the common ground) that the cases on the requirements of an ordinary civil notice were cited. The dictum of Morison J (at para 9) that constructive or presumed knowledge has no place in private rights under employment contracts may be right or wrong, but it has nothing to do with the requirements of a valid notice. Validity upon due delivery does not depend on any kind of knowledge on the part of the intended recipient. It is simply a good notice upon due delivery, just as is a posted acceptance of an offer, even if never delivered or received.

109. *Edwards v Surrey Police* [1999] IRLR 456 was not (save in a statutory sense about constructive unfair dismissal) about a dismissal at all. Rather, it was about summary resignation. The issue was whether the employee's employment had an effective date of termination when she decided to resign and wrote a letter to her employer saying so, (as had been held at first instance), or when the letter of resignation reached the employer (as the EAT held). There neither was, nor needed to be, consideration of the requirements of a valid notice, as between the due

delivery and the reading of the letter. On either basis, the effective date was within the period for the bringing of her claim for constructive unfair dismissal.

110. The next case, *George v Luton Borough Council* (2003) EAT/0311/03 is also about summary termination by resignation. The employee gave notice by letter dated 30 July 2002 that she was resigning with effect from 31 July, complaining of constructive dismissal. It reached the offices of the employer on 1 August, but was not read by anyone in authority there until 2 August. She commenced proceedings for constructive unfair dismissal only on 1 November. The EAT held that the letter was to be construed as an acceptance of repudiation by the employer, not as a 28 day contractual notice of termination. The case offers no assistance therefore on the question as to the requirements or effective date of a notice of termination. The *Brown, McMaster* and *Edwards* cases were all cited, and it was accepted that summary termination by the employer required communication to the employee. But the EAT held that a summary resignation letter from the employee took effect upon delivery to a corporate employer, rather than upon its being read by someone in authority. None of the cases about ordinary civil notices were cited, or relevant.

111. *Potter v RJ Temple plc* (2003) UKEAT/0478/03 was yet another case about an employee's acceptance of repudiation by the employer as putting an immediate end to the contract. The acceptance was faxed to the employer, and arrived at 8.21 pm on 13 September 2002, but was read only on the following day at the earliest. The employee's application for constructive unfair dismissal was out of time if the faxed letter took effect upon due delivery. Although it was not a case about termination by notice, both the facts and the outcome bear a real similarity with *Papillon v Brunton*, although neither that case or any of the others on ordinary civil notices were cited. HHJ Richardson took it as read that termination by the acceptance of a repudiation needed to be communicated, but concluded that the need for certainty as to the effective date of termination for statutory purposes meant that communication should be taken to be achieved upon due delivery of the letter, rather than upon its being read, even though the letter arrived after office hours.

112. The developing jurisprudence in the EAT about the effective date of termination by an employer was approved in the Court of Appeal by majority and by this court unanimously in *Gisda Cyf v Barratt* [2009] ICR 1408 and [2010] 4 All ER 851. It was again a case about summary dismissal rather than dismissal on notice. Once effective, it brought about the immediate termination of the contract. The dismissal followed disciplinary proceedings against the employee. The letter was posted on 29 November 2006, delivered to the employee's home, while she was away visiting a relative, on 30 November, and read by her on the day after her return, on 4 December. The timeliness of her subsequent proceedings for unfair dismissal depended upon the effective date of termination being on or after 2 December. It was held that the effective date of termination was 4 December, when the employee read the letter. Both the majority in the Court of Appeal and this court were at pains

to limit their reasoning to the statutory meaning of the effective date of termination, rather than, if different, to the ordinary common law of contract as applied to employment contracts which, it had been argued, pointed to the date of due delivery, even in cases of summary termination. The essential reasoning was that it would be wrong, in construing a statutory term in legislation for employee protection, to conclude that a short limitation period for bringing a claim should start running before the employee had learned, or had a reasonable opportunity to find out, that her employment had been terminated: see per Lord Kerr, giving the judgment of the Supreme Court, at paras 34-37.

113. The phrase "effective date of termination" defined in section 97(1) of the Employment Rights Act 1996 contains separate formulae, in separate sub-sections, for termination on notice, and termination without notice. For termination on notice it is the day upon which the notice expires. For termination without notice it is the date upon which the termination takes effect. The *Gisda Cyf, Brown* and *McMaster* cases were all about the second of those formulae.

114. The only considered judicial view in *Gisda Cyf* about what was the relevant law of contract for the purpose of determining when summary dismissal by letter to the employee's home took effect is to be found in the dissenting judgment of Lloyd LJ in the Court of Appeal. He considered that it was the date of due delivery rather than the date (if later) when the letter was or reasonably could have been read. The majority in the Court of Appeal did not express a view on the point, and nor did this court, not least because, by then, the employee was unrepresented. In both courts, the contractual analysis was, in the end, held to be irrelevant. But the case does make clear that the *Brown* and *McMaster* line of cases in the EAT about the effective date of termination are about statutory construction, not the common law about the termination of contracts. They are not even about the statutory meaning of effective date of termination when the contract is terminated on notice, rather than summarily. Bearing in mind that the effective date in a notice case is not until the notice expires, which may be weeks after it is delivered or read, it is by no means obvious that the same answer to the question about delivery or reading of the notice would follow from the analysis of the courts' reasoning in relation to summary termination. I am content to leave that question to be answered on an occasion when it needs to be (if it ever arises).

115. I agree with Lady Hale's reasons for not finding this court's decision in *Geys v Société Générale, London Branch* [2012] UKSC 63; [2013] 1 AC 523 of significant assistance. It was about the ordinary common law of contract, but it was specifically about two types of alleged summary termination, one by repudiatory breach and the other by the making of a payment in lieu of notice. Any issue about a time-lag between the due delivery and reading of a notice of dismissal was dealt with by express term.

116. Likewise I have not found significant assistance from the latest dismissal case in the EAT, namely *Sandle v Adecco UK Ltd* [2016] IRLR 941. The question was whether the employee had been summarily dismissed by inaction on the part of the employer. The EAT held that there had been no dismissal at all, because nothing relevant had been communicated to the employee. The requirement in the passage cited by Lady Hale that there be something of which the employee was made aware does not (and was not intended to) resolve the question whether communication by written notice is effective upon due delivery.

117. Standing back and reviewing the employment cases as a whole, the following points stand out. First, none of them was about termination on notice, by the employer or the employee. They were all about summary termination. Secondly, and unsurprisingly, none of the long standing common law authorities about the requisites of an ordinary civil notice, reviewed at the beginning of this judgment, were even cited, although there was some, inconclusive, consideration of the common law principles in the *Gisda Cyf* case in the Court of Appeal, broadly supportive of due delivery as the relevant date. Thirdly, the only authoritative guidance that a summary termination document is not effective upon due delivery, but only when read, or after a reasonable opportunity for reading, relates to the statutory context about the effective date of termination, in which the potential for a different answer under the common law is treated as irrelevant. In the non-statutory summary termination context, the cases go either way. Fourthly, the policy reasons for rejecting due delivery in the statutory context are firmly linked to the fact that summary termination has immediate effect, in particular by starting the running of a short limitation period, which is simply not a consequence of the due delivery of a notice of termination taking effect at a future date. Finally, the only statement in all the employment cases (in *McMaster)* that a termination on notice is given only when it is read, rather than when delivered, merely recorded the parties' agreement about the matter, rather than even an obiter dictum by the court.

Policy

118. I have already expressed my view that policy plays a subordinate role where there is already an established common law principle which supplies the standard implied term. I have described the common law principle that an ordinary notice takes effect when it is duly delivered to the recipient's address as a compromise which strikes a fair balance in relation to the risks to both parties of the notice not immediately reaching the recipient, and which preserves as far as possible the reasonable requirements of both the giver and the recipient. The time honoured implied term therefore has a sensible and even-handed policy objective behind it.

119. Some of its advantages benefit both parties equally. The foremost is certainty. Both the employer and the employee need to know when the employment will

actually terminate, even where (as often happens) the notice expresses an expiry date by reference to a stated period from receipt. The employee needs to know from what future date to seek to put in place alternative employment, or state assistance in lieu of wages. An employee giving the notice to their employer may well wish to fix precisely the date from which he or she is free to begin employment, for example, with a competitor, free from restrictions under the current contract. The employer giving or receiving notice will wish to know precisely from which date to recruit, train and put in place a replacement employee. Neither will wish to be subject to uncertainties about matters known only to the other party, such as when after due delivery the notice came to the attention of the intended recipient. Neither will wish to have to become embroiled in a dispute about whether the other party deliberately absented themselves from home or office in order to make the giving of timely notice more difficult or even impossible.

120. Counsel for Mrs Haywood submitted that it was a policy advantage to treat both the statutory test for effective date of termination and the common law rule about the taking effect of a notice of termination in the same way. I disagree. First, it ignores the fact that all the cases on effective date relate to summary termination rather than termination on notice, and that the policy considerations applicable to each are not the same. Secondly, to treat the statute as amending what I consider to be settled common law about termination on notice is to give it an effect well beyond that which it has been held to have, and beyond that which is needed to preserve to the employee the full benefit of the short limitation period. It was submitted further that the employment world has been proceeding since the decision in the *Brown* on the assumption that it reflects the common law, so that parties to employment contracts currently in force must be taken as making that assumption. Again, I disagree. In my judgment the absence from the *Gisda Cyf* case of any judicial challenge to Lloyd LJ's analysis of the position at common law makes this submission untenable.

121. Where, as here, the development of a standard implied term at common law may be perceived to be based upon a compromise about the fair allocation of risk, as I have described, it is inherently unlikely that all policy considerations will point in the same direction. There will always be reasons for, and against, drawing the compromise line there, or elsewhere. In the present circumstances I am satisfied that there is a sufficient basis in policy for drawing the line where it has for so long been drawn, unless matters have so changed over time to require it now to be moved. True it is that, in the modern world, few private homes are staffed in the way in which a few were in the 18th and 19th centuries. It may be that people now travel away from home, and certainly abroad, more than they used to. It may be that the post is a little less reliable than it may once have been. But it has not been submitted that these changes make a critical difference. Even if they are significant in relation to post, this will be a passing phase. Before long it is likely that most notices of this type

will be sent electronically, accessible by the intended recipient anywhere in the world with a wi-fi signal, via mobile phone or tablet.

The Judgments in the Court of Appeal

122. It will already be apparent that I find myself in broad agreement with the reasoning of Lewison LJ in his dissenting judgment. As for the majority, Proudman J held that nothing less than actual communication to the employee would suffice: see para 70(a). Arden LJ held that the essential requirement was receipt by the employee (regardless whether she opened it and read its contents) but that due delivery to the employee's home was not sufficient for receipt, until at least she actually saw the envelope containing the letter: see para 149. These are but crude summaries of two carefully reasoned judgments, but those conclusions are in my judgment each inconsistent with the common law principles applicable to the delivery of ordinary civil notices, including employment notices, as I have sought to explain.

123. Lady Hale's formulation is slightly different again. She prefers the formula that notice is given at the earlier of the times when it is read, or when the employee has had sufficient time to do so. It is to be noted that, if departure is to be made from the long established principle that notice is given when it is duly delivered, no precise consensus has emerged as to the alternative, for the foundation of what we all recognise should be a standard implied term.