EMPLOYMENT TRIBUNALS

Claimant: Mr A Sokunbi

Respondent: Asda Stores Limited

Heard at: **London South Employment Tribunal**

On: **18 September 2019**

Before:

Representation
Claimant: In person
Respondent: Mr P Sangha (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Respondent has permission to rely on the Amended Grounds of Resistance filed on 1 May 2019.

2. The Claimant has sufficient qualifying service to claim unfair dismissal, pursuant to s.108 of the Employment Rights Act 1996.

3. The Respondent's application to strike out the claim or for a deposit order to me made is refused.

4. A final hearing will be listed and directions given in a separate case management order.

REASONS

INTRODUCTION

1. A preliminary hearing was listed to consider the Respondent's application to strike out the claim, or for a deposit order to be made, on the basis that the Claimant does not have sufficient qualifying service to claim unfair dismissal and/or the claim has no (or little) reasonable prospect of success.

2. By a claim form presented on 12 June 2018, following a period of early conciliation from 16 May 2018 to 12 June 2018, the Claimant brought a complaint of unfair dismissal.

3. The Claimant claimed that he was employed by the Respondent as a Warehouse Operative from 7 July 2014 until his dismissal on 1 May 2019. He said he had been dismissed for "hot having the right documents to continue in employment". He said that "during the time in between my dismissal" he provided the correct documents, but the Respondent said the deadline for appealing had passed. He had never received an outcome letter so was not given the chance to appeal.

4. The Respondent originally defended the claim on the basis that the dismissal was for a fair reason, namely a statutory duty or restriction prohibited the employment being continued, under s.98(2)(d) of the Employment Rights Act 1996 ("ERA"), and the Respondent acted reasonably. The Respondent asserted that the Claimant had been reminded of his right of appeal on 1 May 2018 and the decision was followed up in writing on the following day. The Claimant sought to appeal on 17 May 2018.

5. The Respondent submitted Amended Grounds of Resistance on 1 May 2019, one day after the deadline for filing a response. It did not expressly request permission to amend, but Mr Sangha did so at the preliminary hearing. The Claimant did not object to the amendment and I granted permission to amend on the basis that the amendment had been made so soon after the original response that no prejudice had been caused to the Claimant. In the Amended Grounds the Respondent asserted that the Claimant does not have the requisite qualifying period of service to bring the claim. He had previously been employed by the Respondent, but his employment terminated on 28 February 2017 and he was re-employed on 12 June 2017.

6. I heard evidence from the Claimant and considered various documents submitted by both parties.

FACTUAL BACKGROUND

7. The factual background is as follows. The Claimant commenced employment with the Respondent on 7 July 2014. On 28 February 2017 he attended a disciplinary hearing for failing to provide sufficient documentation to evidence his ongoing right to work in the UK. The Respondent said they had been told by the Home Office on 27 February 2017 that the Claimant did not have the

right to work in the UK. At the hearing the Claimant was informed that, as he had not provided evidence of his right to work in the UK, he was summarily dismissed. The notes of the hearing indicate that he was told he had the right to appeal within 7 days of receipt of the letter, and "in the event you gain the relevant RTW documentation we would be happy to consider your application in line with our recruitment procedures".

8. The decision was confirmed in a letter dated 7 March 2017 which said the Claimant's last day of employment was 28 February 2017 and he had the right to appeal within 7 days of receipt of the letter.

9. The Claimant appealed on the basis that he had made an application before his right to work had expired, and in any event an "ESC check" (Employer Checking Service) done on 4 October 2016 was valid until 20 April 2017.

10. An appeal hearing took place on 19 April 2017. The Respondent rejected the appeal on the basis that although the Claimant had submitted evidence of a fresh application, he did not have the right to appeal the refusal decision so he lost the right to work. Further, although he believed the ECS check allowed him to work until 20 April 2017, correspondence had been received from the Home Office on 22 February 2017 suggesting that the Claimant no longer had the right to work and the Claimant gave consent for the Respondent to contact the Premium Service to confirm his immigration status.

11. The decision was confirmed in writing on the same day and the Claimant was informed that he had a further right of appeal under the disciplinary procedure.

12. The Claimant submitted a further appeal and a second appeal hearing took place on 19 June 2017. The Claimant provided a copy of his Certificate of Application from the Home Office dated 1 May 2017. He claimed he handed it in at the warehouse (Erith XDC) on 15 May 2017. By the time of the hearing the Respondent had received a Positive Verification Notice ("PVN") from the Home Office, dated 12 June 2017, confirming the Claimant's right to work in the UK. It was stated to be valid for six months. The notes of the appeal hearing record the following outcome:

> "It is my decision to re engage you, offer you employment with Erith XDC on a lates rota pattern suitable to the business needs you will receive back payment to the 12 June 2017, the point from which we received the positive VPN on your ECS."

13. The decision was confirmed in a letter dated 19 June 2017. The letter stated that the Respondent had received the Certificate of Application on 16 May 2017 and in accordance with company policy on 1 June 2017 it requested the Claimant's permission to conduct an ECS check. He gave permission on 5 June 2017. The letter also noted that the Claimant's right to work had been due to expire on 3 April 2017. An ECS check carried out on 27 February 2017 said he had no right to work in the UK and, at this point, the Claimant had provided no evidence to suggest he had started "the aforementioned process". He only began the process of regaining his right to work after this decision. The Respondent was in no position to offer re-engagement until it received the PVN on 12 June 2017. The letter concludes:

"Based on these findings, I advised you that your dismissal has been overturned and you are offered re-engagement on the following terms;

- 1 weeks back pay from 12 June 2017, the point at which Asda was in the possession of your PVN
- Re-engagement of your employment, to return to late shift pattern of Asda's choosing, on a 40hr contract, 5/7 with immediate effect."

THE LAW

14. Pursuant to s.108 ERA, an employee does not have the right to claim unfair dismissal unless he or she has been continuously employed for a period of not less than two years ending with the effective date of termination.

15. Section 210 ERA provides, so far as relevant:

> (3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—
>
> (a) whether the employee's employment is of a kind counting towards a period of continuous employment, or
>
> (b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,
>
> shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.
>
> (4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.
>
> (5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

16. Section 212 ERA provides, so far as relevant:

> (1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
>
> (2) . . .
>
> (3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—
>
> …
>
> (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, . . .
>
> (d) . . .

counts in computing the employee's period of employment.

…

17. The Employment Protection (Continuity of Employment) Regulations 1996, made under s.219 ERA, provide for continuity of employment to be preserved in certain cases where an employee is reinstated or re-engaged, but the Claimant accepted in his evidence that the decision to re-engage him in June 2017 was not made pursuant to any Tribunal claim, early conciliation or settlement agreement, so the Regulations do not apply.

18. Separately to those provisions, it has been established that where an employee is reinstated following dismissal in accordance with an appeal process, continuing will be preserved under s.212(1) because the contract is deemed to continue throughout the relevant period. (Roberts v West Coast Trains [2005] ICR 254).

DISCUSSION AND CONCLUSIONS

19. The Respondent contends that the Claimant was not employed between 28 February 2017 and 12 June 2017, and therefore does not have sufficient qualifying service, pursuant to s.108 ERA, to claim unfair dismissal. That is the only issue in dispute, i.e. the Respondent accepts that if the Claimant's continuity of service was not broken during that period he can claim unfair dismissal.

20. The Respondent also argues, however, that the very limited basis on which the Claimant asserts that his dismissal was unfair has no reasonable prospect of success and therefore the claim should in any event be struck out or a deposit order made.

21. Mr Sangha accepted that in order to establish that the Claimant does not have sufficient qualifying service he has to displace the presumption in s.210(5) ERA.

22. Neither party produced a copy of the disciplinary procedure, but it is clear from the notes of the second appeal hearing and the outcome letter of 19 June 2017 that the decision was to allow the appeal and "overturn" the Claimant's dismissal. The Respondent did not argue that that was not done in accordance with the disciplinary procedure. The references in the notes of the appeal hearing to "offering" employment, and in the notes of the original disciplinary hearing to making an "application", do not reflect the reality of the situation, otherwise there would have been no question of paying the Claimant for any period prior to him accepting the new position. He was reinstated and his dismissal was overturned. The Respondent has not produced any evidence, such as a new contract of employment, to suggest that the Claimant was not treated as having been continuously employed from 2014. The point appears to have been raised for the first time in the Amended Grounds of Resistance.

23. Pursuant to the principle in Roberts, the overturning of the Claimant's dismissal and his re-engagement had the effect of reviving the contract of employment.

This is so notwithstanding the fact that the Claimant was not paid and did not work in the period between 28 February and 12 June 2017. I note that pay during the period between dismissal and appeal outcome was not considered relevant in Roberts, where the decision on appeal was to substitute demotion and the period between dismissal and appeal was treated as suspension without pay (see paragraph 6).

24. Mr Sangha argued that the Roberts principle does not apply in this case because the Respondent can only employ the Claimant if he has the right to work in the UK. If it does not have a PVN, employing the Claimant would be illegal. He argues that employment cannot count towards the qualifying period where the contract is illegal. He referred in oral submissions to an authority on the point but did not provide a copy to the Claimant or the Tribunal. In any event, there are a number difficulties with the argument, even if it is correct that illegal employment cannot count towards continuous employment.

25. First, it is not correct to say that in the absence of a PVN it would be illegal to employ the Claimant. The purpose of the PVN is to provide a statutory defence to an employer where they would otherwise be liable to a criminal or civil penalty for employing a person who does not have the right to work in the UK. Section 15 of the Immigration, Asylum and Nationality Act 2006 prohibits the employment of a person subject to immigration control who is not entitled to work in the UK. That is a question of fact and the Respondent has not provided any evidence of the Claimant's immigration status during the period between 28 February and 12 June 2017. The outcome of the ECS check on 27 February 2017 has not been produced. It would appear that the application that led to the certificate dated 1 May 2017 had the effect of permitting the Claimant to work in the UK, but there is no evidence of when that application was made.

26. Further, even if there was a period when the Claimant was not permitted to work in the UK, the Respondent has not displaced the presumption in s.210(5) that the Claimant's employment was continuous. If the period does not count under s.212(1), then it would, on the facts before me, count under s.212(3)(c). He was absent from work in circumstances such that, by arrangement or custom, he was *regarded as continuing in the employment of the Respondent* for any purpose. Even if there could be no contract of employment in force during the period because of illegality, the effect of overturning his dismissal on appeal is that he was *regarded* as continuing in the Respondent's employment. I note that during the appeal process the Respondent continued to apply its right to work policies, including conducting an ECS check when the Claimant provided the certificate in May 2017. The Claimant's evidence was that he was not sent a P45 and he was not challenged on the point.

27. In the circumstances I am satisfied that the Claimant's continuity of service was preserved, either by s.212(1) or s.212(3)(c), in the period between 28 February 2017 and 12 June 2017 and therefore he has sufficient continuous service to claim unfair dismissal.

28. As to the merits of the claim, the Claimant essentially argues that the dismissal was unfair because (a) the Respondent should have overturned it on appeal, having received confirmation of his right to work, and/or (b) it was procedurally unfair because he was not informed of the right to appeal. The Respondent

may argue that any procedural unfairness made no difference to the outcome, but that does not affect the merits of the claim on liability. The case is arguable and depends on findings of fact after hearing the evidence. There was no evidence before me on either issue. I therefore refuse the application to strike out the claim or for a deposit order to be made.

Employment Judge Ferguson

Date: 9 October 2019