Case Number: 3310986/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs M Bassi	v	Ad Valorem Holdings Limited

Heard at: Cambridge On: 2 January 2020

Before: Employment Judge Johnson

Appearances
For the Claimant: In person, supported by her son Mr F Bassi
For the Respondent: Mr S Swanson, Legal Representative

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is dismissed because it is a complaint which the Tribunal has no jurisdiction to consider.

2. The Claimant's complaint of a failure to pay a redundancy payment is well founded. This means that this claim succeeds.

3. The Claimant's claim of breach of contract is rejected because the complaint is one which the Tribunal has no jurisdiction to consider.

4. The case will now be listed for a Remedy Hearing on a date to be confirmed with a hearing length of two hours to quantify the level of redundancy payment payable by the Respondent.

RESERVED REASONS

Introduction

1. The Claimant was employed by the Respondent as a Shop Assistant at the Ironing Services business. She claims that she was employed from 3 November 2003 until her dismissal on grounds of redundancy on 2 November 2018. The Claimant commenced proceedings in the

Employment Tribunal on 5 March 2019, following a period of Acas Early Conciliation from 4 February 2019 until 4 March 2019. She presented a claim of unfair dismissal, failure to pay a redundancy payment and breach of contract.

2. The Claimant initially presented a claim against Dr Gavin St John Heath using the address of the premises where she worked. Following the Order of Employment Judge Lewis on 22 March 2019, the proceedings were actually sent to 'Express Ironing' at the same address. The Claimant was warned that the Respondent did not appear to be a Limited company and this may affect her ability to recover damages if her claim was successful. No further details were provided by the Claimant concerning the correct name of the Respondent. A response was not recorded as having been presented by the Respondent by 7 May 2019. This was the final date for completing this action as stated in the form ET2 which was enclosed with the proceedings which were sent to them.

The Hearing

3. The parties produced bundles and witness statements to be used at the hearing. The Respondent also produced a completed ET3 Response Form which was not contained in the Tribunal file.

4. I initially discussed the case with the parties and confirmed that I would read the bundles and witness evidence. However, I expressed concern that the response did not appear to have been presented to the Tribunal at the time, or at all. I heard evidence on oath from Dr St John Heath and he explained that he had actually received the proceedings at his business' address. As he did not routinely work at this location, it took a few days for him to collect the post and to see that a claim had been presented. However, he confirmed that within a few weeks and certainly during April 2019, a response was presented electronically to the Employment Tribunal.

5. I was conscious that the papers had not been returned undelivered by the Royal Mail and noted that the response had identified the Respondent as being 'Ad Velorum Holdings Limited' and not Express Ironing Services' or 'Gavin St John Heath' as originally identified on the Form ET1. I felt that in relation to this issue, Dr St John Heath gave convincing and reliable evidence.

6. Taking into account these issues, I agreed that it would be consistent with the overriding objective for the name of the Respondent to be amended to the correct name of Ad Velorum Holdings Limited and for the response to be accepted as having been presented in time. Alternatively, if I was

incorrect and the Response had not been presented within the time allowed, I felt it was proportionate to extend time for the presentation of the response in order that it could be accepted at the hearing today. This alternative decision was made in accordance with the principles of the overriding objective and my concern that the Respondent had an arguable case and the Claimant should not be given 'a procedural windfall' due to a possible failure of the Tribunal to retain a record of receipt of Dr St John Heath's email.

7. An issue that was identified within the proceedings was that the Claimant had presented her claim more than three months following the date of her dismissal. Additionally, the Claimant had failed to notify Acas within this period. I explained that the complaints of unfair dismissal and breach of contract had been presented outside of the three month time limit and that the failure to notify Acas meant that it was not possible for time to be extended.

8. I did consider whether I could exercise my discretion to extend time on the basis that it was not reasonably practicable for the complaints of unfair dismissal and breach of contract to be brought within the three month time limit. Mr Bassi explained that his mother had decided to wait until she had an opportunity to speak with Dr St John Heath concerning her potential claim. I explained that while I understood her reasons for delaying the notification of Acas and presenting a complaint with the Tribunal, this would not be sufficient to support an argument that it was not reasonably practicable for her to do so. This was because she was physically able to present the claim and chosen to delay litigation of her own volition.

9. Accordingly, I made the decision to dismiss the claims of unfair dismissal and breach of contract.

10. The complaint of failure to pay a redundancy payment however, was within time as it was presented within the six month period allowed by the Employment Rights Act 1996.

Evidence used in the Hearing

11. For the Claimant the Tribunal heard witness evidence from the Claimant. For the Respondent the Tribunal heard evidence from Dr Gavin St John Heath who is a Director of Ad Valorem Holdings Limited. Despite the hearing being listed for one day, Dr Heath had arranged to attend a meeting that afternoon. As I felt it would not prejudice the Claimant in changing the usual order of evidence being heard, he was allowed to give his evidence before lunch and was then released. Mr Swanson continued to represent him for the remainder of the hearing.

12. This was a case where each party provided their own hearing bundles and documents were contained in small bundles totalling no more than 100 pages in length.

13. The documentation produced by the Respondent was primarily with reference to the sale agreement from 5 Starz Limited to Ad Valorem Holdings Limited, a contract of employment between Ad Valorem and the Claimant dated 23 April 2018, pay slips and email correspondence. The Claimant had produced documents including her original contract of employment and various pay slips, bank account statements and emails with Dr St John Heath and the Claimant's previous employer.

14. The parties were allowed breaks as appropriate.

15. I noted that Mr Bassi had attended to support his mother because she did not feel that her English was good enough for her to represent herself at the hearing. Accordingly, I asked Mrs Bassi whether it was necessary for her to have a Tribunal appointed interpreter to support her in the giving of evidence. She confirmed that her English was reasonably good, but that she felt nervous about the formal language that might be used in the hearing. I felt it was proportionate to allow Mr Bassi to support his mother, but explained that I would reserve the right to postpone the hearing and instruct an interpreter if it became necessary to do so. This was ultimately not required during the hearing.

The Issues

16. Following the dismissal of the complaints of unfair dismissal and breach of contract, I was left to consider the remaining complaint of an unpaid redundancy payment.

17. There was no dispute as to the Claimant's commenced employment with the dry cleaning business on 3 November 2003. Similarly there was no dispute that she was dismissed on 2 November 2018.

18. The issue for me to consider was whether in anticipation of the transfer of the business 5 Starz Limited to Ad Valorem Holdings Limited, the Claimant's former employer terminated her employment and broke the continuity of employment. If this was correct, this meant that the Claimant's employment with the Respondent only commenced in April 2019 and she therefore would not have accrued sufficient service to present a complaint seeking a redundancy payment.

Findings of Fact

19. The Respondent is a company which is owned by Dr Gavin St John Heath and he is a Director of this business. It appeared that he had been looking to develop a dry cleaning business and had sought to buy the laundry business known as Express Ironing Services in 2018. This business which operated primarily in Northampton had been owned by a series of individuals and at the time it was bought by the Respondent, it was owned by a company called 5 Starz Limited.

20. It is understood that Dr St John Heath had been looking to support his sister and brother-in-law following his brother-in-law's redundancy from his job as a school teacher. While this gave rise to the business being bought, Dr St John Heath explained that shortly after the company purchase had taken place, his brother-in-law found alternative employment as a teacher. Dr St John Heath was left to manage the business himself.

21. The Claimant had worked at the Express Ironing Services premises at 96 Kingsley Park Terrace, Northampton, for many years and despite a number of changes of ownership had remained in employment throughout.

22. Dr St John Heath explained that what attracted him to the Express Ironing Services business was that it was for sale at a surprisingly low price and the business included a substantial amount of capital equipment relating to laundry services. In his opinion, the value of this equipment far exceeded the value of the company. It was his understanding was that the company would be sold without any employees. He did not anticipate that any employees would be transferred over to Ad Valorem Holdings Limited employment as a consequence of the purchase.

23. There was no dispute that the business was purchased by the Respondent on or around 9 April 2018. A contract for this purchase was included within the bundle. The agreement was silent as to employees being committed to the business. A schedule was included which identifies a number of items of equipment which would allow the purchaser to continue to operate laundry services at the shop's location.

24. While Dr St John Heath no doubt believed that he was purchasing a company without any employees, no evidence was produced to suggest that the business was not being sold as a going concern. By way of necessity, employees would have been working in the business up until and including the date of transfer to the Respondent.

25. The Respondent placed a great deal of reliance upon a P45 form that was sent by 5 Starz Limited to the Claimant which was dated 29 March 2018. This was sent by the proprietor of this company, Riz Rehmatulla, by an email of 13 April 2018. In this email Mr Rehmatulla explained to the

Claimant that the P45 was dated 29 March 2018 because it was the last day that they owned the business. He went on to say,

"The new owners will set up your payroll and pension scheme… etc… as of that date onwards"

I believe that this email was sent under the misapprehension by the proprietors of 5 Starz Ltd. who thought they needed to send a P45 on behalf of all employees whom they were ceasing to employ and who were transferring over to the Respondent.

26. The Claimant explained that although the business was transferred to the Respondent at the end of March / beginning of April, she continued to work and would open and lock up the shop as normal. It was not until on or around 9 April 2018 that Dr St John Heath attended the premises with his wife and introduced himself to the Claimant and her colleague.

27. I did not hear any evidence to suggest that Dr St John Heath was in any way surprised by the Claimant's presence at the shop and I find that he accepted and acknowledged that she remained an employee at this location.

28. I did hear evidence concerning the initial agreement of a contract of employment on 23 April 2018 between the Respondent and the Claimant. It was signed with the Claimant's signature. This signature appeared to be similar to that which was used by the Claimant in her original contract of employment contained within her bundle and which was signed by her previous employer. What Dr St John Heath argued was that the Claimant had actually been asked by him to start work for his company as a consultant on a slightly higher wage and that this employment only commenced following the signing of this contract with an informal contract verbally being agreed from 9 April 2018 until 23 April 2018.

29. The Claimant was very keen to assert that at no stage had she seen this contract, or indeed signed it, until it was made available within the bundle at the hearing today. Dr St John Heath, however, asserted that the Claimant had agreed to her appointment as a consultant and that she had indeed signed the contract.

30. I did consider the signature on the contract dated 23 April 2018. It did bear some resemblance to the Claimant's signature that she had given in a previous contract. However, I did notice that there was some shadowing behind it and it did appear that it had been cut and pasted and applied to the contract. It is also important to note that this contract did not seek to refer to the Claimant as a consultant.

31. Additionally, I was also aware that the Claimant continued to be paid a consistent figure towards the end of each month by the Respondent until

her dismissal on 2 November 2018. While there was a change from fortnightly pay to monthly pay when the company transferred, the net figures paid were broadly consistent and did not suggest that there was any uplift to the Claimant's pay due to her becoming a consultant as asserted by Dr St John Heath.

32. Finally, it seems surprising that the Claimant, if she had signed a contract on 23 April 2018, would have received a full payment of salary for that month a few days later on 27 April 2018 of £1,357.20. While Dr St John Heath sought to argue that the Claimant had been working informally from 7 April until 23 April 2018, I noted that this issue had not been identified in his witness statement and it appeared to be his original case that he had not sought to engage the Claimant until 23 April 2018.

33. While I am not clear as to who had inserted the signature and why it was done, I prefer the Claimant's evidence that she did not sign this new agreement and that she had continued working for the laundry business following its transfer to the Respondent.

34. For these reasons I find that the Claimant was a more credible and reliable witness and that her employment continued by virtue of the application of TUPE following the transfer of the company from 5 Starz Ltd. to the Respondent between the days of 28 March 2018 to 1 April 2018.

35. This means that the Claimant's continuity of employment was not broken and at the date of termination she had completed 14 years of service.

The Law

36. Section 139 of the Employment Rights Act 1996 provides, amongst other things, that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished.

37. Under section 155 of the Employment Rights Act 1996, an employee does not have any right to a redundancy payment unless she has been continuously employed for a period of not less than two years ending with the relevant date. Section 145 provides that the relevant date:

37.1 In relation to an employee whose contract of employment is terminated by notice, whether given by her employer or by the employee, means the date on which notice expires;

37.2 In relation to an employee whose contract is terminated without notice means the date on which termination takes effect; and

37.3 In relation to an employee who is employed under a limited-term contract which terminates by virtue of a limiting event without being renewed under the same contract means the date on which termination takes effect.

38. Where the contract is terminated by the employer and the notice required by section 86 to be given by the employer would, if duly given, on the material date, expire on a date later than the relevant date (as defined above) then for the purposes of determining the employee's entitlement to a redundancy payment under section 155 and the calculation of the amount of the redundancy payment to which the employee is entitled, the later date is the relevant date. The material date is the date when notice of termination was given by the employer or where no notice was given, the date on which the contract was terminated by the employer.

39. Under section 163 of the Employment Rights Act 1996, for the purposes of a reference to an Employment Tribunal for a determination as to an employee's right to a redundancy payment or the amount of a redundancy payment, an employee dismissed by his employer shall, unless the contrary is proved, be presumed to have been dismissed by reason of redundancy.

40. Section 162 of the Employment Rights Act 1996 provides that the amount of a redundancy payment shall be calculated by:

40.1 Determining the period, ending with the relevant date, during which the employee has been continuously employed;

40.2 Reckoning backwards from the end of that period the number of years employment falling within that period; and

40.3 Allowing the appropriate amount for each of those years of employment.

41. The appropriate amount means:

41.1 One and a half weeks' pay for a year of employment in which the employee was not below the age of forty one;

41.2 One week's pay for a year of employment in which he was not below the age of twenty one; and

41.3 Half a week's pay for each year of employment not falling within the above sub-paragraphs.

42. Where twenty years of employment have been reckoned, no account shall be taken of any year of employment earlier than those twenty years. For

the purpose of calculating a redundancy payment the amount of a week's pay shall not exceed £505.00

43. Section 141 of the Employment Rights Act 1996 provides that an employee is not entitled to a redundancy payment if she unreasonably refuses an offer to renew her contract of employment or to re-engage her under a new contract of employment, with the renewal or re-engagement to take place either immediately on, or after an interval of not more than four weeks after, the end of his employment where:

43.1 The provisions of the contract as renewed, or of the contract as to:

43.1.1 The capacity and place in which the employee would be employed;

43.1.2 The other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract; or

43.2 Those provisions of the contract as renewed, or of the new contract, would differ from the provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

44. The reasonableness or otherwise of the refusal depends on factors personal to the employee and is assessed subjectively from the employee's point of view. The test is whether this particular employee in this particular situation acted reasonably in refusing the offer of employment; see Readman v Devon Primary Care Trust [2013] EWCA Civ 1110.

Discussion and Analysis

45. Once the complaints of unfair dismissal and breach of contract had been dismissed, I was left to consider the complaint of the non-payment of a redundancy payment to the Claimant following her dismissal on 2 November 2018.

46. There was no dispute that the Claimant was dismissed on 2 November 2018 and that the effective reason was redundancy.

47. What was in dispute was whether the Claimant had accrued sufficient continuous service to bring a complaint for a redundancy payment. The Respondent had maintained its position that the Claimant had only started working for them as of 23 April 2018 and accordingly at the date of dismissal had been working for less than seven months.

48. It is clear from my findings of fact that the Claimant was in fact employed by 5 Starz Limited at the date of the transfer and continued to be employed by the Respondent until 2 November 2018. Her continuous employment had run from the date of commencement of employment with the business on 3 November 2003. Although the Claimant had been employed by a number of companies during this period, her employment was transferred from one employer to another and there is no evidence to suggest that her 'chain' of employment was broken before the Respondent purchased the business in April 2018.

49. While the P45 which was identified by the Respondents suggested that the Claimant's employment was terminated by her former employer 5 Starz
Ltd, it required further investigation.

50. Although the P45 is dated 28 March 2018, it was not actually sent to the Claimant until 13 April 2018. Moreover, in his email enclosing the P45, Mr Rehmatulla of 5 Starz Limited was suggesting that the Respondent as new owners of the business, would be setting up payroll and pension schemes as of the date of transfer, which he believed was 29 March 2018. As I have determined in the Findings of Fact (above), it is not in itself indicative of a termination of employment and a break in the continuity of service. I am not satisfied that this document demonstrates that the Claimant was no longer employed by this business when it was purchased by the Respondent.

51. What is clear from the Claimant's evidence is that she continued to work at the premises and simply assumed that the Respondent would continue to employ her in the usual way. It was not the first time this business had been taken over while she was employed at the premises and under these circumstances it was understandable that she did not feel that her job was likely to be terminated. This is reinforced by the fact when the Respondent did finally meet the Claimant, on or around 9 April 2018, he did not express surprise that she was still working at the business, or seek to advise her that she needed to agree a new contract of employment.

52. As the complaints of unfair dismissal and breach of contract have been dismissed, there is no need to consider the basis upon which the Claimant's employment was terminated. However, it is clear that she was summarily dismissed by the Respondent and subsequently, Dr St John Heath sought to discuss the possibility of an ex gratia payment being agreed which would represent the notice pay that the Claimant should have received of around £1,000 plus an additional sum of £1,000. This was presumably in recognition of the problematic way in which her employment was terminated.

53. For the purposes of these proceedings, it is simply important to note that the date of termination of 2 November 2018 was not in dispute and that I find that the Claimant had accrued 14 completed years of service at the date of termination with there being no break in employment prior to the transfer of the company to the Respondent.

Conclusion

54. Accordingly, the Claimant's complaint that there was an unpaid redundancy payment in respect of her termination of employment, is successful and the claim will now be listed for a Remedy Hearing when the correct level of redundancy payment will be calculated.

55. If the parties are able to reach an agreement concerning the correct level of redundancy payment to be paid to the Claimant once they have considered this Judgment, they should inform the Tribunal as soon as possible in order that the Remedy Hearing can be postponed.

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Employment Judge Johnson

Date: 15 January 2020

Sent to the parties on: .....

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For the Tribunal Office