



EMPLOYMENT TRIBUNALS

Claimant:
Miss F Cobzaru

v

Respondent:
Mr Pasquale Bragaglia t/a La
Porchetta

PRELIMINARY HEARING

Heard at: Watford

On: 3 March 2017

Before: Employment Judge Smail

Appearances

For the Claimant: Miss C Urquhart (Counsel)

For the Respondent: Mr R Johns (Counsel)

JUDGMENT having been sent to the parties on 13 March 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 26 April 2016, the Claimant wishes to claim general unfair dismissal, automatic unfair dismissal for having asserted a statutory right, notice pay, holiday pay, and national minimum wage via a claim for unauthorised deductions from earnings. The Claimant asserts that she was dismissed on 28 November 2015. Her continuity, she says, stretches back to June 2007. The Claimant worked as a kitchen porter at the Respondent's Italian restaurant in Muswell Hill.

The Issues

2. This is a preliminary hearing necessitated by the Respondent's case, first that the Claimant was dismissed on 15 November 2015 and secondly, that her continuity was 15 September 2014 to 15 November 2015. If the dismissal was 15 November 2015, the Respondent submits that the claim is out of time. Further, if the continuity was limited as the Respondent suggests, then the Claimant would not have the right to bring a claim of general unfair dismissal.

The Law

3. The argument before me focused on the law of unfair dismissal. More as to that below. In terms of the legislation, we are dealing with section 111 which provides by section 111(2)(a) of the Employment Rights Act 1996 that a claim of unfair dismissal must be brought before the end of the period of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the three month period. See section 111(2)(b).
4. In terms of continuity of employment, we are dealing with section 212. By subsection (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. By subsection (3), any week during a whole or part of which an employee is (b) absent from work on account of a temporary cessation of work, counts in computing the employee's period of employment.

Findings of Fact on the Issues

Continuity of Employment

5. Dealing first with continuity, the Claimant herself accepts that she off for three months between 30 April 2010 and July 2010. She says this was to make way for a relative of the Respondent. She says that in return she was allowed to live in a house owned by the Respondent rent-free. On any view in my judgment, those three months are not covered by a contract of employment and continuity would be breached over that period.
6. Further, the Respondent says that the Claimant was off in fact for 18 months between 30 April 2010 and 1 September 2011. There were pay slips showing that those periods were paid. There was a P46 that was signed suggesting that work was recommenced on 1 September 2011.
7. In the absence of any other corroborating documentary evidence, I prefer the Respondent's evidence on this. It is safer for the fact that there is some documentary corroboration. Accordingly, in my judgment, the period of continuity starts for the present debate on 1 September 2011.
8. The Respondent accepts that there was a period of refurbishment between 6 July 2014 and 15 September 2014. It accepts that it did not dismiss the Claimant at the commencement of the period of refurbishment. Mr Lucio Bragaglia accepts that it was the intention that the Claimant would return to work if she were available. The Claimant did work as a kitchen porter which was the job she was contracted to do under a verbal contract on the last day the restaurant was open before refurbishment and she worked in that capacity on the re-opening on 15 September 2014.
9. She also says that for the two weeks leading up to the re-opening, she worked as a cleaner. The Respondent said she refused to work as a cleaner in the interim. To my mind, her work as a cleaner yes or no over

this period is irrelevant. Her job was as a kitchen porter; she did not work as a kitchen porter between those two dates because of a temporary cessation of work. The fact that it was a temporary cessation of work bridges the period of employment. Accordingly, her continuity was between 1 September 2011 and a date in November when she was dismissed.

Effective date of termination

10. That of course leads to the most important dispute before me, namely what was the effective date of termination. Was it, as the Claimant says, 28 November? or was it, as the Respondent says, 15 November 2015? This matters because of the limitation period. ACAS was notified for the first time on 26 February 2016, which therefore became Day A for the purposes of the ACAS conciliation. The early conciliation certificate was issued on 26 March 2016. The time limit for bringing the claim expiring at the end of one month after 26 March 2016, maintains the Claimant, the deadline for her claim was therefore 26 April 2016 and that was the date it was received by the tribunal. But that is only if 26 February 2016 fell within the primary period of limitation.
11. It is the Respondent's case that the dismissal was on 15 November so that ACAS would need to have been informed by 14 February 2016. 26 February 2016 would fall outside the primary period of limitation, and so, argues the Respondent, the Claimant needs an extension of time, but is not entitled to one because, it submits, it was reasonably practicable to present a claim in time.
12. The Claimant says she was dismissed by telephone by the Respondent owner of the restaurant, Mr Pasquale Bragaglia, on 28 November 2015 for refusing to come back into work that evening to do another shift. She said she had already done one shift on 28 November; he wanted her to do a further one. Because she refused, she says, she was dismissed. Of course, that could amount to a dismissal for asserting a statutory right to a rest break which was the way the Claimant wanted to bring her claim of automatic unfair dismissal. She says she knows it was 28 November 2015 because 28 November was her brother's birthday and she mentioned to her brother who was holding a small gathering for his 41st birthday that she had just been dismissed by Mr Bragaglia. She says she received a phone call on her mobile phone.
13. The Respondent's case centres around the evidence of the new manager of the restaurant, Mr Lucio Bragaglia. As I understand it, he is the son of Pasquale Bragaglia. He had only recently assumed the role of manager, having only just finished sixth form. He says that the background to the problem was that the Claimant had indicated a preference to working the midday shifts as a kitchen porter at the restaurant. The other kitchen porters had complained that they were having to work more evening shifts. Evening shifts tend to be more demanding than the lunchtime shift. A disagreement had brewed on Saturday 14 November 2015. Mr Lucio Bragaglia tells me the following;

"I met with Florina on the following day, Sunday 15 November 2015. We met

just before the start of her shift at midday and just outside the kitchen back door in the back alley behind the restaurant to discuss these matters including the complaints. At the time, everyone was in the restaurant except for Carmine Di Leone, the pizza chef, who was outside smoking a cigarette. The alleyway is narrow, one way, and just wide enough for one vehicle and deliveries to us or neighbouring business. The kitchen door was closed and the alleyway was quiet as it was a Sunday. This meant that Carmine at only a few years away could hear us which neither Florina or I minded. Florina accepted the complaints but wouldn't comment further. She looked down, I thought a little embarrassed and said that she couldn't be bothered to argue anymore and that she didn't like cleaning pots and pans. She also explained that her back was giving her problems and that due to her lack of respect for the job, she no longer enjoyed working with us in the restaurant and said that she felt it would be better if she moved on to something else and we find someone else to do her job. I didn't prompt her on this but I did think it was for the best and said so. Florina and I then agreed that after her work shift on that Sunday finishing at 6pm, she would leave. I didn't require any notice from her and was happy in the circumstances for her to leave with immediate effect. That is what she wanted to do and I thought that was best for the kitchen team. Florina apologised for leaving suddenly but clearly she wasn't interested in the job anymore, perhaps having grown tired of it, so I thought it best all round if she just left without doing any more shifts."

14. I have to do my best in deciding which of those versions is most likely. I have not been assisted by the Claimant in that if it were the case that she had received a phone call on her mobile phone on 28 November 2015, she could have proved that by adducing her own telephone records or pushing for disclosure of telephone records from the Respondent. Her brother did put in a statement to the effect that he was told at his birthday party about the dismissal but her brother has not attended today to be subject to cross-examination, so there is only limited weight that I can put on his evidence.
15. In contrast, I was impressed by Lucio Bragaglia as a witness. He was cautious with his evidence; he reflected upon it but when pushed was firm on the date and the circumstances of these matters, being the 15 November 2015. His position is corroborated by documentary evidence. He told me that at the end of the month, he informed the accountant that the Claimant's leaving date was 15 November 2015, such that a P45 was generated on 1 December 2015 showing the dismissal date as 15 November 2015. I accept Mr Johns' point that this P45 was generated at a time when it was unknown that there would be an important disagreement about the dismissal date lending credibility to the dismissal date being 15 November 2015.
16. I have to do the best that I can: and I rely upon, first of all, Mr Lucio Bragaglia's evidence which I thought was trustworthy; and secondly, the corroboration provided by the date on the P45. I did not rely at all upon Mr Di Leone's evidence. Mr Di Leone was hampered it seemed to me by the lack of an interpreter. It happens that Veronica Pittalis' evidence ties in with Mr Bragaglia's but it is Mr Bragaglia's evidence coupled with the P45 that has influenced me. So, I find as a fact, doing the best I can on the balance of probability, that the Claimant was dismissed on 15 November 2015.

Reasonable Practicability

17. The next question, then, is was it reasonably practicable to present the claim in time because on that finding, the claim was presented out of time. Disappointingly, the Claimant did nothing to research her employment rights in November and December 2015 and January 2016. It seems to me that if she had suffered an unfairness, she would have and could have and should have in those circumstances researched her employment rights.
18. She tells me in her statement that she did not know that she could do anything about the situation; she did not know about the existence of employment tribunals or the like. She had an ongoing personal injury claim relating back to an injury she sustained on 2 April 2015. She tells me in her witness statement that it was only by chance when she was discussing the position with her personal injury lawyer on or about 1 February 2016 that she was advised to speak to Levine's employment department. She had a discussion over the phone I think on 1 February 2016, again on 9 February 2016, leading to an interview on 17 February 2016. It is all a little unclear when she learned of the time limits. In evidence, she said it was some time between the conversation on 9 February and the meeting on 17 February 2016. It seems to me likely however that she will have been told of the time limits no later than 9 February 2016 by the solicitors and it would have been for the Claimant to inform those solicitors of her date of dismissal. Any employment lawyer has alarm bells ringing when matters are approaching three months. If the lawyers served her ill in this regard, then maybe she needs to look to them for redress, but I have no evidence before me that that was the position.
19. It seems to me that it was practicable for the Claimant to investigate her rights in November and December 2015, in January 2016 and even when she claims to have investigated those rights in February, there was still time to get a claim in in time. The fact that one was not brought in time is down to lack of urgency on the Claimant's part as far as I can tell. It seems to me on the balance of probability that it was reasonably practicable for her to present a claim in time, which has the unfortunate consequence that this claim has been brought out of time and these claims for that reason will all be dismissed.

Other Claims

20. The judgment above concentrates on the effective date of termination for the purposes of unfair dismissal claim. It has been pointed out that also we were to consider the limitation position in connection with the unauthorised deductions from earnings claim. That focuses upon the last deduction rather than the effective date of termination. It would be fair to say, and both Counsel do not disagree with me, that we have all focused upon the unfair dismissal side of things and it is only after the judgment that it has been raised by Counsel that there is a slightly different test for the unlawful deductions claim. There was no cross-examination from either side of the other party's position on deductions and payments. In truth, everyone was focusing upon the dismissal. Likewise, my judgment. I am uncomfortable with deciding this issue now. If there is any real prospect of a different

decision being made in respect of the other claims, the Claimant will have to make an application for a further Preliminary Hearing citing the basis for it.

CONCLUSIONS

- 21. Continuity of employment was between 1 September 2011 and the effective date of termination. The effective date of termination was 15 November 2015. I prefer the Respondent's evidence on the effective date of termination. I rely upon, first of all, Mr Lucio Bragaglia's evidence which I thought was trustworthy; and secondly, the corroboration provided by the date on the P45, which was given when there was no controversy about limitation periods. This means the claim was presented out-of-time. It was reasonably practicable for the Claimant to present her claim within the primary period of limitation. That she did not do so was because she had not looked in to making a claim for the bulk of the 3 months. It would still have been possible to bring a claim towards the end of the 3 month period, when the Claimant says she started to look. The Claimant did not act with any degree of urgency.

Employment Judge Smail

Date: 1 June 2017.....

Reasons sent to the parties on

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For the Tribunal office