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EMPLOYMENT TRIBUNALS

Claimant: Mr K Emerton

Respondent: Marco's Bar Ltd

Heard at: East London Hearing Centre **On:** 18 October 2017

Before: Employment Judge C Ferguson

Members: Mr S Dugmore
Mr M L Wood

Representation

Claimant: In person

Respondent: Miss Ferber (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the Claimant's claims are dismissed.

REASONS

1 By an ET1 presented on 28 March 2017, the Claimant brought complaints of unfair dismissal and disability discrimination. He also ticked boxes relating to unpaid wages but confirmed today that there were no separate complaints relating to wages, notice or holiday pay.

2 Although this was meant to be the start of a three day final hearing on all issues, in agreement with the parties we converted today's hearing into a preliminary hearing to determine two preliminary issues:-

2.1 Whether the Claimant has the requisite qualifying service to claim unfair dismissal; and

2.2 Whether the Claimant was a disabled person at the relevant time.

3 We note that it is agreed that the correct name of the Respondent is Marco's Bar Ltd.

4 We heard from the Claimant and from Mark Worship, the Managing Director of the Respondent.

Qualifying service for unfair dismissal

5 The Respondent is a family run restaurant with approximately 19 employees, some of whom are salaried and some are casual part-time workers.

6 The Claimant's employment terminated on 5 December 2016. He claims that by that date he had more than two years' continuous employment with the Respondent.

7 It is not in dispute that the Claimant began working for the Respondent part-time on 6 September 2014, nor is it in dispute that he resigned in the spring of 2016 and that his last day of work was 26 March 2016; that was a Saturday. The Claimant's pay was calculated weekly by reference to a week ending with a Saturday. He received a payslip dated 26 March 2016 that covered the hours worked in the period 20 to 26 March inclusive. He also received a few weeks later a P45 confirming his last day of work as 26 March.

8 The Claimant's evidence, which is not disputed, is that he worked at a hotel in the following week from 28 March. It is also not in dispute that the Claimant returned to work for the Respondent soon after leaving and then worked for the Respondent until early December 2016 when his employment terminated.

9 The critical issue is whether there was a gap in the Claimant's employment which broke his continuity of employment.

10 The law on this is contained in section 108 of the Employment Rights Act 1996 ("ERA") which sets out the two-year qualifying service required to bring an unfair dismissal complaint, as well as sections 210, 211 and 212 of the ERA and then also there is the definition of week in section 235 of the ERA.

11 The Claimant says that he worked the following weekend after he left i.e. 2 and 3 April 2016 and there was therefore no break in continuity of service. The Respondent disputes that and says that the first time the Claimant came back to work for them was in the middle of the week commencing the 4 April. Although it appears that at the preliminary hearing on 5 June 2017, the Claimant's argument was that he maintained a zero hours employment relationship with the Respondent while he was working at the hotel, he now accepts and it is clear from the evidence that he formally left the Respondent on 26 March 2016. He had written a letter of resignation saying he was leaving because he wanted to further his career. There cannot have been any ongoing contract of employment with the Respondent therefore until, at the earliest, when he worked another shift for the Respondent. The principal issue therefore is the factual dispute about when that shift occurred.

12 We prefer the Respondent's evidence on this issue. We do not accept the Claimant's account that he worked on 2 April. According to the Respondent's normal systems if the Claimant had worked on that day he would have received a payslip dated 2 April 2016. The Claimant accepts that he did not receive such a payslip and seeks to explain that by saying that he was paid "cash in hand" and that the Respondent did not make a record of the shift. That is contrary to the evidence of the Respondent's normal practice which was to pay staff in cash at the end of each shift and later issue payslips and make tax declarations based on the number of hours worked each week. The Claimant has not put forward any reason why the Respondent would have acted differently on this occasion. The Respondent's other records also show that the Claimant did not work in tax week 52 of that year which was the week from 27 March to 2 April inclusive.

13 We also take into account that the Claimant said in his witness statement: "Two weeks after I had left I was covering a shift for them. I was then asked to come back to them on a full time position". He said in his oral evidence that that was wrong and it should have read: "In the two weeks after I left" but he could not explain why the mistake had been made and in any event if he had worked on 2 April it would be odd to describe that as "in the two weeks" after leaving as opposed to "a week after leaving" or "the weekend after leaving".

14 In the absence of any other evidence to support the Claimant's contention that he worked on 2 April and given that the documentary evidence suggest otherwise we find that he did not work for the Respondent at all during the week from 27 March to 2 April inclusive and that at no time during that week did he have a relationship with the Respondent that was governed by a contract of employment. His continuity of service was therefore broken and he does not have sufficient service thereafter to claim unfair dismissal.

Disability

15 The Claimant claims that the Respondent's treatment of him from mid-November 2016 until the end of his employment including his alleged dismissal on 5 December 2016 amounted to direct discrimination because of disability, indirect discrimination under section 19 of the Equality Act 2010 ("EqA"), discrimination because of something arising from disability under section 15 EqA, harassment and failure to make reasonable adjustments. In respect of each complaint he says that the relevant disability was depression.

16 At the preliminary hearing on 5 June 2017 it was recorded that he was also relying on anxiety but his evidence today was that he only began suffering from anxiety after the end of his employment so it cannot be relevant to the Claimant's complaints of disability discrimination.

17 The law on this is set out in section 6 and schedule 1 of the Equality Act 2010. Section 6 states:

"(1) A person (P) has a disability if –

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”

18 Paragraph 2 of Schedule 1 to the Equality Act defines long-term effects. It states:

- “(1) The effect of an impairment is long-term if –
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”

19 We note that the relevant time for considering the Claimant's alleged disability is when the alleged discrimination occurred, namely from early November 2016 until up to and including 5 December 2016. (*McDougal v Richmond Adult Community College* [2008] ICR 431, CA).

20 The agreed background is that the Claimant was signed off work from 14 November 2016 for two weeks due to “depression”. On 1 December 2016, he was signed off for a further two weeks due to “depressive disorder”. The Claimant says he was dismissed over the telephone on 5 December 2016. The Respondent disputes this and says that the Claimant resigned on that date. We note that the Claimant had problems with his stomach around this time for which he was receiving treatment but he confirmed today that he does not rely on that in respect of his disability discrimination complaints.

21 We note at the outset that there was very little evidence about the Claimant's alleged disability. He did not comply with the direction from the Employment Tribunal to supply a statement of disability and provided very little information about his mental health issues in his witness statement for today's hearing. There was no medical report or letter from the Claimant's GP or any other person who has treated him for mental health problems dealing with the Claimant's mental health during the relevant period. All we have is the GP records which suggest that the Claimant was diagnosed with a depressive disorder on 14 November 2016 and was prescribed medication on the same date. He was signed off for two weeks and then for a further two weeks taking him beyond the date his employment was terminated.

22 That entry in the GP record is the first mention of depression. Although there are some vague references in earlier records to lack of self-esteem and confidence issues and it appears that the Claimant reported on 14 November that he had “long going depression” and that he used to self-harm as a child, there is no evidence of any earlier diagnosis. The Claimant's evidence was that he had never had to take time off work or take any medication for mental health problems prior to November 2016.

23 The only other relevant medical evidence is a letter from the Claimant's gastroenterology specialist which refers to the Claimant's depression in passing. It states:

"His [stomach] symptoms have been very debilitating to the extent that he has had to go on sick leave from his job working in a kitchen. This has led to some consequent depression, for which he has been started on Sertraline. At the time of symptom onset, he was not depressed."

24 There is also a record of a psychiatric assessment on 17 March 2017 which says that since January 2017 the Claimant's depression and anxiety "got bad and worse". The Claimant says he has not worked since leaving the Respondent.

25 Whilst there is evidence that the Claimant has had mental health problems that have turned out to be serious and long-term we must consider what the position was from early November until 5 December 2016. At that time, even assuming that the condition had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities, there is nothing to suggest that it was likely at the time to last at least 12 months or to recur. The fact that the Claimant may have had mental health issues in the past is nowhere near enough, without medical evidence in support, to demonstrate that the diagnosis in November 2016 was a recurrence of a previous condition or that further recurrence was likely. Such evidence as there is – the fitness to work notes and the GP records showing this was the first diagnosis and the first time medication had been prescribed – do not support a finding that it was long-term. It is for the Claimant to show that he was a disabled person in order to pursue any of his disability discrimination complaints and we do not accept that he was at the relevant time.

Employment Judge Ferguson

6 November 2017