



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Clarke

v

Kempston Carpets Ltd

Heard at: Cambridge

On: 16 & 17 January 2018

Before: Employment Judge K J Palmer

Appearances

For the Claimant: In person

For the Respondent: Ian Robertson, Director

RESERVED JUDGMENT

It is the Judgment of this tribunal that:

1. The claimant's claim for unfair dismissal fails.
2. The claimant's claim for a redundancy payment fails.
3. The claimant's claim for wrongful dismissal or notice pay fails.

REASONS

1. This matter came before me with two days allowed for the hearing. The claimant represented himself and the respondent was represented by Mr Ian Robertson, Director. I heard evidence from the claimant and from Mr Robertson. I also heard evidence from Joanne Heath, the respondent's book keeper.
2. The respondent is a small company specializing in carpet fitting. It employs from time to time two or three full time employees and two to three sub-contractors which it engages.

3. Until 30 April 2015 the respondent was unincorporated as a sole trader owned by Ian Robertson. On 1 May 2015 the business incorporated and became Kempston Carpets Ltd the respondent in these proceedings.
4. The reason for that was that as the company was at that time expanding and seeing a greater turnover, Mr Robertson in conjunction with Ms Heath sought accountancy advice and on the basis of that advice determined to incorporate.
5. The claimant who was employed as a floor layer was dismissed. It is common ground that this happened on 4 May 2016.
6. He presented a claim to this tribunal on 26 June 2016.
7. In that claim he claims unfair dismissal and/or in the alternative a redundancy payment and wrongful dismissal or notice pay.

The Issues

8. In their ET3 the respondent highlights what is in essence the central issue in this case. That is, they say the claimant was only employed from 5 May 2015 to 4 May 2016. Thus, he does not have the requisite two years' continuity of employment to pursue an unfair dismissal claim under section 111 of the Employment Rights Act 1996 ("ERA") as a result of the requirement under section 108 of the ERA. They say he is also precluded from seeking a statutory redundancy payment under section 55 of the ERA which also requires two years' continuous employment.
9. Moreover, the claimant accepts that he was paid one week pay in lieu of notice and therefore his wrongful dismissal for breach of contract claim can only have merit on the basis of his alleged continuity of employment set out in his ET1 stretching back to 1 April 2009.
10. This in essence is the key issue for me to determine. That is whether his continuity was broken as alleged by the respondent pursuant to his resignation effective on 2 April 2015. The Respondent says he was then re-employed on 5 May 2015 after the incorporation of the respondent. Both of his claims hinge on that issue of fact.

The claimant's continuity of employment

11. In this respect, it is necessary for me to make certain findings of fact.
12. I heard evidence from Ian Robertson and from the claimant which was wildly divergent.
13. The claimant was originally employed by the unincorporated business on 1 April 2009. That is common ground. Where the divergence in evidence occurs is that the respondent says that the claimant resigned by a text dated 25 March 2015 at 15.35 sent by the claimant to Ian Robertson. I had a copy

of that text in the documentation in front of me and as its relevance to this case cannot be underestimated I will repeat it here:

“I can’t afford to work for less £600 a week. My banks told me I need to be earning more if I’ve got any chance of keeping my house on my own. If you don’t think I’m worth it then that’s fine, I’ll work till the end of next week and then I’ll have no choice but to go elsewhere and work for someone else. I am sorry to be like that but I just can’t financially do it anymore”.

14. I also had before me Ian Robertson’s reply which was in two parts and as follows:

“The job tomorrow has been put off till Monday”

“I’ve emailed Martin Grants to see if we have the next phase at Aylesbury, they have not replied, if we have not got that doubt I’ll be able to pay what you need, be sorry to lose you, but I understand.”

15. Ian Robertson then gave evidence to the effect that there was no confirmation concerning the Aylesbury job at that time and that the next contact he had with the claimant was the following Thursday on 2 April when he had a conversation with him. The gist of that conversation was that Ian Robertson asked the claimant if he was proposing to come in after the weekend. 3 April was Good Friday and 6 April was Easter Monday. Ian Robertson’s evidence is that the claimant responded to the effect that he was not and that he intended to resign as indicated in his text unless Ian Robertson could agree to pay him the increase he had sought. Ian Robertson’s evidence was that the claimant said that there is plenty of work elsewhere for him to do. Ian Robertson’s evidence is that the claimant worked Thursday 2 April and that was his last day. On the basis of that he was paid up to 2 April and a payment was made to him in early April on 7th. A P45 was produced by Joanne Heath a copy of which I have before me which specified the date of termination as 28 April not 2 April.

16. It is the respondent’s case that the claimant’s employment therefore terminated on 2 April. Mr Robertson gave evidence that the claimant was then re-employed on 5 May by the then limited company as he had approached Mr Robertson through another employee Charlie Delaney and as a result Joanne drew up a contract of employment, which I have before me specifying a start date of 5 May. Ironically the salary was then based upon a payment of £600 a week.

17. Mr Robertson admitted that since 2 April business had picked up and by 5 May he felt able to pay the higher sum. He is not able to say whether had the claimant not resigned and had remained in employment he would have increased his salary as he said the circumstances had changed and having lost the claimant he was keen to take someone on and felt he had to incentivise the claimant by offering him the money he was looking for to get him back.

18. Thereafter the claimant worked for a year until he was dismissed on 4 May 2016. The respondent says that the dismissal was a combination of factors including redundancy/conduct.
19. Thus, if the respondent's evidence is to be believed the claimant resigned leaving on 2 April thus breaking his continuity of employment and he did not start again until 5 May being dismissed a year later. In those circumstances, all three of his claims would fail.
20. It is worth making the point that in his evidence Mr Robertson did admit that he did not think he had given the claimant the contract of employment dated 5 May 2015 albeit that Joanne Heath had prepared it and given it to him to give to the claimant. He also was prepared to accept that certain correspondence sent to the claimant pursuant to the claimant's ultimate dismissal in May 2016 had been prepared for him by Joanne Heath and that he had chosen to back date the letter of dismissal pursuant to letters from the claimant appealing against his ultimate dismissal in May 2016.
21. I am bound to say that I find Mr Robertson's evidence to be entirely credible. He gave his evidence clearly and did not try and avoid difficult questions.
22. Whilst the method and procedure of the claimant's dismissal in May 2016 left a great deal to be desired, I found Mr Robertson entirely honest and straight forward in that giving of his evidence.
23. The claimant's evidence concerning events in April 2015 is entirely at variance with that of Mr Robertson. The claimant accepts he sent the text on 25 March and ultimately accepted that Mr Robertson's response did not concur with his request, but says that on Monday 30 March he spoke to Mr Robertson and Mr Robertson indicated that new work had been secured and that he could then pay him the increased amount of £600 per week. He says he continued to work until Friday 2 April. He accepts that thereafter he did not work again until 5 May 2015, but that the reason was he had been granted unpaid compassionate leave by Mr Robertson in light of the claimant's terminally ill grandfather to whom he was very close.
24. His evidence is that he continued on compassionate leave between 2 April and 5 May. His grandfather died on 17 April and that after his grandfather's death he needed time to adjust but returned on 5 May. He says therefore there was no break in continuity and he has continuous employment from 1 April 2009 to his dismissal on 4 May 2016.
25. He says he never received the contract of 5 May 2016 a fact confirmed by Mr Robertson. He says he also never received a P45 issued by Ms Heath nor the balance in cash payment which was by way of tax rebate at the end of April 2015. For the avoidance of doubt the claimant does not and did not include in his original ET1 the claim in respect of this cash payment.
26. It falls upon me to make a finding on the disputed evidence.

27. The only written evidence before me is the text exchange on 25 March where in my judgment the claimant clearly resigned with a view to leaving at the end of the week commencing 30 March 2015 and that resignation was reluctantly accepted by Mr Robertson.
28. Thereafter I have the two diametrically opposed accounts of what took place the following week.
29. What is certain is that the claimant did leave at the end of that week which is in line with his original text message. It should be borne in mind that the Friday of that week was of course Good Friday and therefore the claimant would not have worked that day in any event. He left on 2 April, which is in accordance with his original text message.
30. I am also bound to say that I found the claimant's evidence as to what happened that week to be uncertain and he was vague and difficult to pin down when questioned about discussions he had with Mr Robertson.
31. Therefore, on the balance of probability I find that it is more likely that Mr Robertson's version of events is the one which took place and where there is a dispute between the two I prefer his evidence.
32. I do not accept that the claimant's absence between 2 April 2015 and 5 May 2015 was on the grounds of compassionate leave. Naturally I accept that his grandfather was ill and it is very sad that he passed away on 17 April. Mr Robertson confirmed that he knew that the claimant's grandfather was unwell, but said that he had no further conversations with him about his grandfather other than to occasionally ask him how his grandfather was.
33. I accept Mr Robertson's evidence.
34. It may well be that the claimant was distracted and not himself, but that cannot in my judgment affect the fact that he resigned by text and it was accepted. He carried out his resignation without withdrawing it by leaving on 2 April 2015.
35. I am bound to say that I have a great deal of sympathy for the claimant. Had he simply have continued to work throughout April or indeed genuinely sought compassionate leave which Mr Robertson indicated he would have given him on full pay, then he would certainly have retained continuity of employment through the process of the incorporation on 1 May and may well in early May had been able to secure the pay rise he was seeking.
36. He would then have been able to pursue before this tribunal his claims for unfair dismissal and/or a redundancy payment and may well have succeeded. The same applies to his claim for notice pay as his continuity of employment would have been sufficient to enable him to pursue a claim for statutory notice well in excess of one week's notice paid to him on the basis of his one year's continuity of employment.
37. In respect of the evidence I heard from Joanne Heath I entirely accept her explanation as to why the P45 specified the date of leaving as 28 April as

opposed to 2 April. She said that it was part of her training that she would always issue a P45 up to the end of the month irrespective of when someone's employment terminated. She has now revised that strategy and in future will indicate the actual date of termination on the P45. The date in the P45 is not determinative of the effective date of termination of employment. I have made a finding of fact that the claimant's employment terminated on 2 April 2015.

Conclusions

- 38. I conclude therefore that this tribunal does not have jurisdiction to consider the claimant's claims for unfair dismissal and/or a redundancy payment as he does not have the requisite two years' continuity of employment to the date of dismissal as required in section 108 and section 155 of the ERA.
- 39. Both of those claims therefore must fail and are dismissed.
- 40. The claimant's claim in notice pay also fails because he was given the requisite amount of statutory notice to which he was entitled.
- 41. For the above reasons the claimant's claims must fail and are dismissed.

Employment Judge K J Palmer

Date: 27 February 2018

Sent to the parties on:

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For the Tribunal Office