Case No: 2601020/17

EMPLOYMENT TRIBUNALS

Between:

Mr M Joaquim Sebastiao **Claimant**	**and**	Casual Dining Group Ltd t/a Bella Italia Nottingham **Respondent**

RECORD OF AN OPEN ATTENDED PRELIMINARY HEARING

Heard at: Nottingham **On** Wednesday 13 December 2017

Before: Employment Judge Britton (sitting alone)

Representation

For the Claimant: In person assisted by Ms M Ludewig

For the Respondent: Mr A Powis, Paralegal

JUDGMENT

1. The Claimant has sufficient qualifying service to bring the claim of unfair dismissal.

2. The respondent's application for strike out or a deposit ordered is refused.

3. Directions are hereinafter set out.

REASONS

Introduction

1. The first issue that I have to determine as per the direction for today's hearing issued by my colleague Employment Judge Milgate is as to whether or not the Claimant has sufficient service to bring the unfair dismissal claim.

2. Engaged is Section 108 of the Employment Rights Act 1996 - by reference to the right to bring a claim for unfair dismissal essentially pursuant to Section 94 - thus:

> "***108 Qualifying period of employment.***
>
> *(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination[1]..*"

3. The EDT in this case, and I will take it from the ET1 (Claim), is 6 March 2017. So, the central issue on this point becomes was the Claimant employed, as he pleads, continuously from 14 February 2007, in which case he has got significantly more than 2 years' qualifying service; or is it that he was only employed, says the Respondent in its ET3, from 14 February 2015 in terms of a second period of employment, there having been a break in continuity from the first period of employment from 3 August 2015? If the Respondent's contention prevails, then of course he does not have the qualifying service.

4. There are exceptions to the 2 year qualifying service rule; an example being where the dismissal was by reason of whistleblowing. None of those apply in this case.

5. In terms of the factual scenario in this case, it really centres on two things. Did the Claimant resign the first period of employment on 3 August 2015? The Respondent is not saying that in the alternative, it dismissed him. Is the evidence available to me consistent with him having done that? What do I make of the hiatus, so to speak, between the latter part of November 2015 and the Claimant starting to work, in terms of undertaking a shift, in the week circa 14 December 2015? How does that assist me?

6. In terms of evidence, I have before me a bundle of documents prepared by the Respondent. I have also deployed in considering matters, a letter that the tribunal received on behalf of the Claimant on 2 November 2017 and which is dated 31 October 2017. I also read,which was not in the bundle, correspondence about events in this matter: namely a letter written on behalf of the Claimant to the Respondent on 31 March 2017; the reply of Adrian Butcher, Operations Manager, on 11 April 2017; and a further reply from the Respondent of 28 April 2017.

Findings of Fact

1. The Claimant is Angolan, albeit he has lived in this country from about 2007 I am quite satisfied that he speaks very limited English[2]. Since the issues in this case came to light, he has been assisted by Ms Ludewig, who is also a Government approved interpreter. I have no doubt at all that the Claimant has been greatly assisted by Ms Ludewig who has been able to put

[1] The EDT.

[2] The tribunal had not appointed an approved interpreter. Mr Powis did not object to Ms Ludewig acting as an interpreter.

together for him his claim to the tribunal; handle the correspondence to which I have referred; and deal with ACAS on his behalf. I am quite satisfied that she has interpreted in this case faithfully and in accordance with the oath that she took; that was obvious from the dialogue before me.

2. The Claimant always worked at the Bella Italia restaurant in Nottingham as a kitchen porter. The first contract of employment in the bundle before me (Bp29) records him as having commenced the employment on 14 February 2017. He gave good service and indeed in the documentation before me I can see that the Respondent has scored him as excellent in all respects (Bp[3] 34). I do bear in mind that I would have thought that a company the size of Bella Italia (because it is part of the Casual Dining Group which is a prominent chain of Italian restaurants) would want to retain the services of somebody like the Claimant if it could possibly do so because based on my judicial experience over many years I am aware of the high turnover, particularly in the more menial jobs, of labour in the restaurant trade.

3. That becomes a relevant factor in my deliberations for reasons I shall come to.

4. In mid 2014, the Claimant's partner and their then child and who had been living with him at 80a Portland Road, Nottingham, decided to move back to Angola because her parents were in a position to provide them with a better standard of living than they were enjoying on the low wage of the Claimant in Nottingham. So, off they went.

5. In fact, the Claimant's partner was by now pregnant. By May 2015, the Claimant was thus the father of a second child and understandably wanted to go and visit as soon as he reasonably could. It seems to me that sometime about the end of July/beginning of August, he had made the arrangements subject to getting the approval of the management at Bella Italia.

6. For my purposes at that stage, the management team was headed by Shivan who had previously been the chef in the kitchen and who had worked for a long time with the Claimant. Another member of staff was Ricco, who was a waiter and who had also been working at the restaurant for many years. He was able to help the Claimant with the language barrier as the latter, as was obvious today, had never mastered other than the most rudimentary English. In this context as I have said there was a discussion between Shivan and the Claimant, with Ricco assisting, about his visiting Angola.

7. The Claimant has been clear, and it was in his ET1 and more importantly it is a counter to the ET3, that what happened is that he explained that he would like to go back to Angola for 3 months. I am quite satisfied that the Claimant wanted the reassurance that if he did, his job would be safe for him to return to. Shivan told him not to worry and that the job would still be there when he got back.

8. The Respondent pleads in the ET3, and this is reiterated in the written submissions of Mr Powis as per paragraph 2:

[3] Bp = a reference to a bundle page.

> "*In or around August 2015 the Claimant requested eight weeks' holiday. The Respondent was unable to grant this request and the Claimant therefore resigned. His employment was therefore confirmed as terminated on 3 August 2015*"

9. Reference is then made to computer generated documentation to that effect, ie Bp33.

10. But I have no information from the Respondent in the following respects. I do not have any evidence from Shivan (he now works for Pizza Express in Nottingham). But I gather from the letters I have before me from the Respondent, that there was some sort of investigation in circa March/April 2017. But I do not have any statements that might have been taken at that time by Mr Butcher. I do not in that respect also have any evidence from Ricco.

11. Furthermore, there is no P45. The document at Bp 37 headed "Statement of earnings for the year ending 2015/2016", which gives the leaving date as 3 August 2015, has actually been generated as a replacement for a P45 for the purposes of these proceedings via ACAS requesting the same on behalf of the Claimant.

12. Furthermore, there was no letter issued by the Respondent if the Claimant did resign. I would usually expect to see from a organisation with a significant HR team, and also if for instance they wanted him to come back[4] even if he was resigning on good terms, a letter thanking him for his services, confirming that he had resigned but making it plain that he was very welcome to apply for work on his return from Angola, subject to vacancies; finally enclosing his P45.

13. Thus so far, I am not persuaded by the Respondent[5] that he had resigned.

14. Is there any other evidence that assists me? The computer generated documentation by payroll certainly shows on the payslip that the employment ended on 3 August. But I do not know what the internal trail was in terms of the chain of communication from the Nottingham restaurant to payroll and HR at the Respondent's headquarters. Albeit Bp34 could be seen to be in some ways as a leaving confirmation, is it sufficiently clear? This is a template with typed entries. Recorded is a termination date of 3 August 2015. The reason for the termination is "*extended holiday. 8 weeks*". Under the heading re-employ notes: "*was advised that if position available we will re-hire"*.

15. But it does not record who made the entries. Often with large employers, when somebody leaves they will endeavour to do a leaving process with the relevant employee, amongst other things to find out why they are leaving and record that in terms of the reason and employee satisfaction and matters of that nature. I am not saying Bella Italia had any such approach to policy, I do not know. I have no internal communication

[4] This goes to my point about wanting to retain his services apropos labour turnover.

[5] The respondent obviously in terms of the burden of proof needs to satisfy me on the balance of probabilities that he did resign.

whatsoever from the restaurant in Nottingham up the management chain. Therefore this evidence in itself does not disprove the clear and consistent evidence of the Claimant, and who I found honest and credible, that he did not resign and indeed received the reassurances that I have already referred to. And why would he want to resign? He had been there for many years. He liked the work; he had built up good working relationship with such as Shivan and Ricco; he was supported and particularly in terms of such as the language barrier which might have been a considerable obstacle elsewhere. .

16. It follows that so far I am not persuaded that he did resign on 3 August 2015.

17. The Claimant returned from Angola at the beginning of November 2015. He went to Bella Italia to see Shivan. He was told that there was not any work for him, presumably because it was being done by others, but that he was "*to hang in there*" on the basis that there would be work available soon.

18. After about 2 weeks, the Claimant had not been offered work and therefore on advice he went to the Job Centre where he was asked for his P45. He explained that he had not got one. As it is, the Job Centre told him that he could use a form and with it go to the employer who could then confirm the fact that the employment had ended, if that were the case, and provide a document that would substitute for a P45. That in effect is the same as Bp37 in the bundle.

19. As it is, he did not need to do that because at that stage the chef at the restaurant (Keeva) who again the Claimant had known for many years, rang him up and said that they had work for him. So the Claimant started back; the first week was 2 shifts but then it was back to normal and that seems to have been around about 9 December 2016.

20. The Respondent prays in its aid that the Claimant had to bring in the necessary immigration status documentation in order to be cleared for work, albeit I understand the Claimant has dual Angolan and European nationality via the historical colonial Portuguese link. Having said that, on 9 December the Claimant therefore brought in inter alia his national insurance card and passport (see Bp31 and 32).

21. So, the Respondent submits that surely this is evidence that there had been a break in employment and that this was the start of a new period of employment. Stopping there, of course if Claimant did not resign and if the Respondent did not dismiss him, then the Respondent would have to fall back on the doctrine of frustration.

22. The Respondent also prays in its aid that at this stage following having brought in the satisfactory proof of his immigration status and there being now work for him, that also on 9 December 2015 he signed the contract of employment (Bp30), which records his employment as starting from 14 December 2015. I gather from the Respondent that the counter signature underneath that of the Claimant is purportedly that of the then Deputy Manager, Daniel.

23. But the Claimant is adamant that this is not his signature. In this respect, he prays in his aid that when he did sign a contract of employment

for the first spell of his employment (Bp29), he initialled it. So why put his full signature on the contract at Bp30? More importantly, he relies upon that the spread of his signature, and that is to say the spacing of the same, as per the letter dated 31 October 2017 (received by the tribunal on 2 November 2017) and which he accepts to be his signature, is markedly different from that at Bp30 because it is bunched up. I am not an expert, but I do note that there are marked differences in the two signatures.

24. So, what do I make of it? I do not have Daniel to assist. I have a Claimant who I find credible. It follows that I am not persuaded that the Claimant did sign that second contract of employment.

25. So, that leaves me with the period when there was no work for him when he got back from Angola and before he started back in the job on 14 December. Where does that take me? I have found that the Claimant did not terminate this contract of employment when he went to Angola. Does frustration apply to the period up to his return ? I have really answered that question because this is not a supervening unforeseeable event. In my judicial experience it is not unusual for contracts of employment explicitly or impliedly to permit by agreement between the employee and the employer, for an extended period of leave particularly in such as the restaurant trade with the high proportion of workers from abroad or with an ancestral heritage abroad in such as the former European colonies: thus for example to allow for a return to see family. Whilst the individual is away on that extended leave, somebody else may have to be deployed to work in the role. Thus, on the return from leave, it might not necessarily follow that work could be immediately available. There might have to be a period before a slot could be provided. That seems to me to have happened here. But as the employer was not obliged to pay wages during the extended period of leave and because inter alia the Claimant's leave entitlement was already exhausted, it is not put to any expense. I do not conclude that it is fatal to the argument that the employment contract had continued.

Conclusion

26. Therefore I conclude that this employment was not ended on 3 August 2015 and that it continued until the employment ended, circa 6 March 2017. Therefore the Claimant has got more than the required 2 years of continuous employment in order to bring his claim of unfair dismissal.

Second item on the agenda

27. There was on the agenda today a second application of the Respondent that in terms of the ending of employment on 6 March 2017, if there was qualifying service, that I should in any event dismiss the claim as having no reasonable prospect of success or order a deposit payable by the Claimant as a condition precedent of continuing with it, his claim it having only little reasonable prospect of success.

28. But what stares out of the documentation before me is that there is a clear cut conflict in this case on the facts: the first fundamental being did the Claimant resign or was he dismissed? This will require findings of fact and having heard sworn evidence from the competing witnesses. It cannot be dealt with just on the documentation. It is a question of who the tribunal

believes. As the jurisprudence makes plain this is a matter for the Judge or the tribunal panel, depending on the jurisdiction, at the main hearing. The Respondent via Mr Powis does not resist my observation. Therefore I am not at this stage striking out the claim or ordering payable a deposit.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The case is hereby listed for one day to determine whether or not the Claimant was unfairly dismissed and also as to whether in the circumstances it was wrongful dismissal (breach of contract) for the purpose of notice entitlement. This will be heard by a Judge sitting alone at the **Nottingham Employment Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG** on **Friday 23 March 2018** at **10:00**. For the purposes of that hearing, the following directions now apply.

2. If not done already, the Claimant will provide a schedule of loss to the Respondent by **21 December 2017**.

3. <u>The trial bundle process</u>

   (a) By way of first stage discovery, the Respondent will send to the Claimant a chronological, double spaced draft trial bundle index. This will be by **Friday 12 January 2018**.

   (b) The Claimant will reply thereto by **Friday 26 January 2018** adding at the appropriate space by way of brief description any additional document he requires in the trial bundle. If he has the same, he will send a copy to the Respondent. If on the other hand he believes it to be in the Respondent's custody or control, he will make that plain.

   (c) There is liberty to apply if necessary.

4. By not later than **9 February 2018**, a single bundle of documents is to be agreed. The Respondent will have conduct for the preparation of the bundle. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle

- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the tribunal and the parties, notices of hearing, location maps for the tribunal and other documents which do not form part of either party's case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should not be sent to the tribunal in advance of the hearing.

5. Witness statements

By not later than **Friday 23 February 2018**, there is to be mutual exchange of witness statements. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the tribunal to draw from the document as a whole.

6. **It is hereby ordered that the Tribunal Service will provide an interpreter in Portuguese to assist the Claimant at the hearing**.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of*

"cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so." **If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.**

_____

Employment Judge Britton

Date: 12 January 2018

Sent to the parties on:

13/01/18

For the Tribunal: