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EMPLOYMENT TRIBUNALS

Claimant: **Miss P Woolerton**

Respondent: **POP Services Ltd**

Heard at: **East London Hearing Centre**

On: **16 March 2018 and (In-Chambers) 2 May 2018**

Before: **Employment Judge M Hallen (sitting alone)**

Representation

Claimant: In person

Respondent: Mr M Hopkins (Solicitor)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The Claimant was both unfairly and wrongfully dismissed by reason of redundancy.

(2) The matter is listed for a remedies hearing on Thursday 13 September 2018 at the East London Hearing Centre and directions are given in the body of this judgment in respect of preparation for that hearing.

REASONS

Background and Issues

1 In her Claim Form received by the Tribunal on 18 August 2017, the Claimant asserted that she was unfairly dismissed and was entitled to notice pay and redundancy pay.

2 The Respondent in its Response Form sent to the Tribunal on 31 December 2017, asserted that the Claimant did not have enough service to claim unfair dismissal and a right to redundancy pay stating that her employment started on 1 March 2016 and terminated on 31 March 2017. Accordingly, the Respondent asserted that as she did not have two years' service she was not entitled to unfair dismissal protection or redundancy pay. The Respondent also asserted that as the Claimant's employment terminated on 31 March 2017 and she submitted her Claim Form to the Tribunal on 18 August 2017, her Claim Form was submitted outside the three month limitation period and the Tribunal had no jurisdiction to hear her claim.

3 The Tribunal had to determine a number of issues in this case. Firstly, the Tribunal had to find the correct commencement date for service and it also had to find the effective date of termination. Secondly, the Tribunal had to determine the reason for the termination of the Claimant's employment. The Respondent asserted that the Claimant resigned from her employment on 31 March 2017. Thirdly, The Tribunal had to ascertain whether in fact the Claimant resigned on this date or was dismissed subsequently by the Respondent on a later date. Fourthly, if the Claimant was dismissed by the Respondent on a later date, the Tribunal had to determine the reason for the termination and whether, assuming the Claimant had the requisite length of service, the dismissal was a fair dismissal pursuant to section 98 of the Employment Rights Act 1996 (ERA) and/or whether the Claimant was entitled to payment for redundancy pay and two months contractual notice. Fifthly, the Tribunal had to determine whether the two four week breaks in the Claimant's employment with the Respondent between 7 August to September 2015 and 31 July 2016 to September 2016 broke her continuity of employment when she went on holiday or whether her continuity of employment was preserved by reason of section 212(3)(c) ERA 1996 which provides that:

> "… during the whole or part of which an employee is
>
> (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purposes …
>
> counts in computing the employee's period of employment."

4 The Tribunal had in front of it an agreed bundle of documents plus a witness statement for the Claimant plus her witness Lauren Taylor-Baker as well as a witness statement from the Respondent's witness Ms Deborah Curran who was a Director of the company. These witnesses were subject to cross-examination and questions from the Tribunal. The Respondent also provided written closing submissions.

Facts

5 The Claimant commenced employment as a Customer Service Adviser on 17 November 2014 with the Respondent. The Respondent accepted that the Claimant was a good worker and that there were no issues with her performance or conduct. It also accepted that it provided her with training and that she gained relevant experience from the commencement of her employment which the Respondent found useful.

6 The Claimant worked in the sales department of the Respondent which is a telecommunications company providing home telephone lines and broadband services to customers. At the time of the Claimant's termination of employment the Respondent employed between 35 to 40 employees. At the date of the Tribunal hearing the Respondent employed 22 employees.

7 The Respondent produced the Claimant's employment contract which was marked R4. It confirmed the commencement of the Claimant's employment on 17 November 2014 and specified her job title. It also confirmed that the Claimant was entitled to one month notice of termination of employment after completing her probation period. With regard to the booking of holidays it stated:

> "In normal circumstances, no more than two weeks' holiday may be taken at any one time."

8 The Respondent has had this policy in place for a number of years as it helped to minimise disruption to the business and to ensure that arrangements in respect of cover for staff taking annual leave could be made. A few months after the Claimant started with the Respondent, she requested that she wished to take four weeks' holiday entitlement in one go so that she could visit Thailand where she had relatives.

9 Ms Curran, the Respondent's Director, explained to the Claimant that the Respondent's policy was that no more than 10 working days holiday could be taken in one go and she would have to leave the Respondent's service and to apply for a position, if one was available, on her return from holiday.

10 The Claimant agreed to this "arrangement" and asked if the Respondent would consider offering her a part-time role on her return as she wished to start a college course which would not allow her to work full-time hours.

11 Ray Abbott, the Sales Director for the Respondent at the time, wrote a letter to the Claimant dated 4 August 2015 (pages 32 and 33 of the bundle of documents) confirming the following:

> "After our recent conversations I write to confirm points agreed.
>
> Your last full time working day will be Friday 7th August 2015 before you leave.
>
> When you return you wish to start college and work part time at POP Telecom. If you agree to this and if a sales position is available then it will be as follows: …"

12 The Claimant worked for the Respondent up until the 7 August 2015 and then left for Thailand. The Claimant's P45 was issued by the Respondent on 26 August 2015 recording her last day of service as 7 August 2015 (pages. 45 to 47).

13 The Claimant returned to work and as agreed with Mr Abbott prior to her holiday and set out in writing on pages 32 to 33 she resumed duties as a part-time worker in order to undertake her college course.

14 The Respondent gave evidence that it took the Claimant back as she was experienced and trained and that it did not need to find a new recruit without any experience at this time.

15 The following year in September 2016, the Claimant again requested to take her four weeks holiday entitlement together as she had done in the previous year. Again the Respondent agreed with the same terms as the previous year as set out by Mr Abbott in writing. The arrangement was that the Claimant's last date of employment with the Respondent would be 31 July 2016 and that if there was a position available when she returned from her holiday then she was welcome to apply for this position on her return. Her P45 was issued confirming her leaving date as 31 July 2016 (p. 49). Again the Claimant returned to work for the Respondent and pursuant to the arrangement she was taken back due to her skills and experience following her holiday.

16 Shortly after returning from her second holiday, the Claimant put in a third request for a holiday.

17 On 26 September 2016, Ms Curran was passed a copy of the Claimant's holiday request form by Katy Millen who was a manager of the Respondent. The holiday request was for the period commencing 3 April 2017 to 1 May 2017 (p.35). Ms Curran wrote to the Claimant on 26 September 2016 (p.34) stating:

> "As you have been previously aware the company do not allow holiday for more than 10 working days at any one given time. For this reason, if you still require the month away from your position then, like you have done, for the previous two years you will have to resign and then when you return from your journey reapply for a position within Pop Services.
>
> I understand that this will not be a problem for you as you have done it on two previous occasions. Alternatively, you can take 10 working days holiday and everything will remain the same."

18 Ms Curran followed up the Claimants request for her four week holiday on 3 April 2017 with a further letter to her on 23 January 2017 which was at page 36 of the bundle of documents. The letter said as follow:

> "Please accept this letter as formal agreement that you will be leaving work on the 31st March 2017 as you have decided to leave to visit Thailand…
>
> Please call us when you return to see if there is a position available for you within Pop Services."

19 Katy Millen completed the Claimant's leave form on 1 April 2017 (p.37) and the Claimant's P45 was prepared and issued on 18 April 2017 showing her leaving date as 1 April 2017 (p.50). When the Claimant returned from Thailand and as she had done in previous years, she contacted the Claimant to resume her part-time position. Unfortunately, on this third occasion, the Respondent had been going through some changes which meant that a number of redundancies were made in the Claimants

absence on holiday. There were no part-time positions available for the Claimant when she called after her holiday to resume her position. As a consequence of these changes, Ms Currant wrote to the Claimant on 26 May 2017 (p.38) telling her that:

> "… we do not have any part time positions within Pop Services and are now only employing full time staff. If you should change your mind on working full time then please do not hesitate to call us."

20 The Respondent sent this letter by recorded delivery to ensure that the Claimant received the letter and was aware of the circumstances and the certificate of posting was at page 39 of the bundle of documents. The Claimant thereafter commenced ACAS pre-claims conciliation and filed her Claim Form at the Tribunal on 18 August 2017 which was within a period of three months from the letter sent to the Claimant on 26 May 2017 which was at page 38 of the bundle of documents. The Tribunal found as a matter of fact that this letter was a letter of termination of the Claimant's employment by reason of redundancy and that the effective date of the Claimant's termination was 27 May 2017 when the Claimant received the letter. As per her contract of employment, the Claimant was not given one month's contractual notice as required nor was she paid one month's pay in lieu of notice. In addition, as the Claimant had more than two years continuous service she was not paid her statutory redundancy pay either.

Law

21 In order for the Claimant to bring a claim for unfair dismissal and redundancy pay, the Claimant would need to show that she was continuously employed with the Respondent for a period of two years. Section 108(1) ERA 1996 states:

> "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."

22 Section 94(1) of the ERA 1996 provides that:

> "An employee has the right not to be unfairly dismissed by his employer."

23 Section 210(4) ERA 1996 states:

> "… a week which does not count in computing the length of a period of continuous employment breaks continuity of employment."

And section 212(1) ERA 1996 states that:

> "Any week during the whole or part of which an employee's employs relations with his employer are governed by a contract of employment counts in computing the employee's period of employment."

Furthermore section 212(3)(c) states:

> "Subject to subsection (4), any week (not within subsection (1)) during the whole

or part of which an employee is –

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose…"

24 Section 111 ERA deals with the presentation of complaints to an Employment Tribunal and confirms that a complaint maybe presented to an Employment Tribunal by a person if he was unfairly dismissed. Subsection (2) confirms that an Employment Tribunal will have no jurisdiction to hear a complaint presented to it unless it is presented before the end of a period of three months beginning with the effective date of termination or –

"(b) 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 before the end of that period of three months."

25 The Respondent also referred the Tribunal to the cases of *Curr v Marks & Spencer plc* [2002] EWCA 1852, *Booth and others v USA* [1999] IRLR 16 EAT and *Letherby and Christopher v Bond* [1998] ICR 486

The Tribunal's conclusions and further directions

26 The Tribunal had to ascertain in the first instance the commencement date for the Claimant with respect to her employment. Both parties agreed that the Claimant commenced employment on 17 November 2014 as a Customer Service Agent and the Respondent produced the Claimant's contract of employment specifying the same. In addition, from page 3 of the contract of employment marked R4, it was clear that the Claimant was entitled to one month's notice or pay in lieu of notice in respect of the termination of her employment. The main issue in this case was whether the Claimant's three extended holidays taken during the course of the Claimant's service with the Respondent terminated the Claimant's employment for the purposes of employment protection. Although the Respondent had in its contract of employment a requirement that no more than 10 working days holiday could be taken at any one time by anyone of its employees, with regard to the Claimant, it had on each of the occasions the Claimant took her holiday entitlement during 2015, 2016 and 2017 a written "arrangement" in place pursuant to section 212(3)(c) of the ERA 1996 that did not terminate the Claimant's employment.

27 The facts set out in the facts section of this judgment make it clear that on each of these occasions, the Respondent permitted the Claimant to take extended leave to visit relatives in Thailand on the understanding that when she returned she would return to and resume her duties. Indeed, on the two occasions in 2015 and 2016 the Respondent confirmed that it took the Claimant back because she was skilled and experienced and that it did not need to retrain a completely new employee to undertake those duties. The Claimant was recognised to be a good and hard worker that brought added value to the Respondent's business. As a valued employee who was trained and skilled in her job the Respondent quite naturally took her back on those two occasions.

28 The Tribunal found that this "arrangement" agreed between the Respondent and the Claimant in writing was sufficient to continue the Claimant's employment for the purposes of employment protection and that her service and continuity was not broken during these two earlier periods of extended holiday. It was clear to the Tribunal and as stated by Ms Curran in her evidence that when the Claimant sought to return to work after her third holiday to resume her duties due to a restructuring of the Respondent's business there was no part-time positions available to the Claimant. Accordingly and by letter dated 26 May 2017, the Claimant's employment was terminated in writing by Ms Curran. This letter was at page 38 of the bundle of documents and specified as follows:

> "I am sorry to inform you that at this moment in time we do not have any part time positions within Pop Services and are now only employing full time staff."

29 The Tribunal found as a matter of fact that this letter was a letter of dismissal with the effective date of termination being 27 May 2017 when the Claimant received the letter. The reason for dismissal was redundancy and it was clear to the Tribunal that as the employee had more than two years' service at this time the dismissal was unfair. The Respondent did not follow a fair and recognised procedure in respect of a redundancy dismissal, namely it did not give the Claimant prior warning of her dismissal by reason of redundancy, did not consult with her, did not set out the selection criteria with respect to redundancy and failed to pay her her contractual notice and/or redundancy pay. In the absence of the Respondent following a fair procedure the dismissal had to be unfair. It was also dubious and doubtful to the Tribunal that the selecting of part-time employees over full-time employees by reason of redundancy would amount to a fair selection criteria in any event.

30 The Respondent asserted that the Claimant's termination date was 31 March 2017 being the date that she departed for her third holiday. The Tribunal was not persuaded by this argument. As specified earlier, there was an 'arrangement' in place for the Claimant to take holiday and on her return to work she would be re-employed by the Respondent. This was set out in writing with the Claimant on three occasions and on the third occasion the Claimant had a legitimate expectation to recommence her employment. The fact that the Respondent did not need her services meant that it should have followed a fair process and procedure in respect of making her redundant from her position. The Respondent failed to do this and terminated her employment in writing by reason of redundancy as specified earlier.

31 As the Claimant's effective date of termination was 26 May 2017 by reason of redundancy, and her Claim Form was presented to the Tribunal on 18 August 2017, her claim was within time and the Tribunal had jurisdiction to hear it.

32 In conclusion, the Tribunal finds that the Claimant was unfairly dismissed by reason of redundancy and also wrongfully dismissed because the Respondent failed to give her one month's notice as required by her contract or pay her in lieu of notice. Furthermore, the Claimant did not receive her statutory redundancy pay calculated on her total length of service and she is entitled to this.

33 The Tribunal lists the matter for a remedies hearing on **Thursday 13 September 2018**. The Claimant is to prepare an up-to-date schedule of loss along

with a witness statement setting out the compensation which she is seeking as well as setting out evidence that is pertinent to her losses and her mitigation of those losses. She is also required to prepare a short supplementary bundle of documents related to her losses and mitigation of those losses and to provide both the written statement and the bundle of documents to the Respondent no later than 16 August 2018. If the Respondent wishes to prepare a witness statement to present to the remedies hearing on 13 September it must do so no later than 30 August 2018 and provide a copy of these statements to the Claimant on this date.

34 The parties are reminded that the services of ACAS are available should they seek to avail themselves of those services and resolve the matter between themselves without need to attend the remedies hearing on 13 September 2018.

Employment Judge Hallen

14 May 2018