EMPLOYMENT TRIBUNALS

Claimant: Mrs Carol Cooper

Respondent: Cavaghan & Gray Limited

HELD AT: Carlisle **ON:** 20 March 2018

BEFORE: Employment Judge Humble

REPRESENTATION:

Claimant: Mr Ryan, Counsel
Respondent: Mr Frew, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

The judgment of the Employment Tribunal is that the claimant has sufficient continuous service to bring a claim for unfair dismissal.

REASONS

The Hearing

1. The hearing took place at Carlisle Employment Tribunal on 20 March 2018. The claimant was represented by Mr Ryan of Counsel and evidence was given by the claimant, Mrs Jurate Fish, Mrs Sharon Archibald and Mr Jason Selkirk. The respondent was represented by Mr Ryan of Counsel and evidence was given by Mrs Ruth Carswell. There was an agreed bundle of documents extending to 95 pages.

2. There was some discussion at the outset of the Hearing regarding the late disclosure by the respondent of documents (pages 59.1 and 59.2 of the bundle). The claimant said that these letters were received only shortly before the hearing and the letter of 59.2 was of particular importance since this was a termination letter which the respondent said it sent to the claimant but the claimant denied receiving. The claimant's representative challenged the veracity of that document, although after some discussion he did not oppose its admissibility. It was accepted that its veracity could be dealt with in cross examination and submissions.

3. Evidence was by way of written witness statements which were taken as read followed by cross examination. The evidence and submissions were concluded on the afternoon of 20 March and judgment was reserved.

The Issues and the Law

4. This was a preliminary hearing to determine whether the claimant had sufficient continuous service to pursue an unfair dismissal claim. The claimant commenced work with the respondent on 28 January 1989 and she is currently employed by the respondent. The specific question for the tribunal was whether the claimant's service was broken during the period between 14 or 15 June 2015 (there was some ambiguity over that date but it is immaterial) and 26 September 2015. If so, the claimant would not have sufficient service to pursue an unfair dismissal claim arising from the termination of her employment on 31 August 2017, a Hogg -v- Dover College [1990] ICR 39 type claim.

5. The tribunal took some time at the outset of the case to identify which specific legislative provisions were relied upon by the claimant. Mr Ryan explained the claimant's case was that she was covered by a contract of employment between 14 June and 26 September 2015 pursuant to section 212(1) ERA 1996. In the alternative, if the tribunal held that she was not covered by a contract of employment during that period then the claimant relied upon sections 212(3)(a), that she was incapable of working in consequence of sickness or injury and/or upon section 212(3)(c) ERA 1996, that she was absent from work in circumstances such that by arrangement or custom she was regarded as continuing in her employment. The claimant was not relying upon a temporary cessation of work under section 212(3)(b).

6. The tribunal had reference to section 212 ERA 1996, the relevant parts of which for the purposes of this case provide that:

"(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…

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is-

(a) incapable of work in consequence of sickness or injury,

(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…

counts in computing the employee's period of employment.

(4) Not more than twenty-six weeks count under subsection 3(a)…between any periods falling under subsection (1)."

Section 210 provides that

"(3) In computing an employee's period of continuous employment for the purposes of any provision of this act, any question-

(a) whether the employees employment is of a kind counting towards a period of continuous employment, or

(b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment.

shall be determined week by week…" and

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

A week is defined at section 235(1) and "*means a week ending with Saturday*", in other words a week means Sunday to Saturday for these purposes.

7. The Tribunal were referred to the cases of Edwards v Surrey Police [1999] IRLR 456; Société Générale London Branch v Geys [2013] IRLR 122; Donnelly v Kelvin International Services [1992] IRLR 496, EAT; Kennaugh v Lloyd-Jones (t/a Cheshire Tree International Services) (No 2) UKEAT/0208/08; Scarlett v Godfrey Abbott Group Ltd [1978] IRLR 456, EAT; Rowan v Machinert Installations Ltd [1981] IRLR 122, EAT; and Curr v Marks and Spencer plc [2003] ICR 443, CA.

Findings of Fact

The employment tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings on all of the evidence before it but only upon those matters which were relevant to the issues to be determined):

8. The claimant commenced work for the respondent on 20 January 1989. She was employed as a line assistant at the respondent's factory in Carlisle.

9. In August 2014 the claimant husband, who also worked at the respondent factory, was diagnosed with cancer. The prognosis was not good and he was absent from work due to his illness. In September 2014 the claimant commenced a period of absence to care for her husband. The claimant's own mental health deteriorated and by the summer of 2015 she was suffering from a stress-related illness such that she was not capable work.

10. The claimant believed the respondent was very supportive during her period of absence. The respondent's human resources department kept in touch with the claimant and make some home visits. Mr Agnew, the respondent's Operation Director at that time, relayed to the claimant through human resources that she should not be concerned about her work. She was neither pressured to return to work nor given any impression that her job was under threat.

11. On 27 May 2015 the claimant was visited by Mrs Emma Martin, a human resources representative of the respondent and Ruth Carswell who was an occupational health adviser for the respondent. A letter was sent to the claimant by Mrs Carswell in advance of that meeting (page 59.1) which stated that she would like to visit the claimant at her home. There was no indication that one outcome of that meeting might be the termination of the claimant's employment. The claimant and Mrs Carswell regarded it as a further welfare meeting and nothing more.

12. During the course of the meeting Mrs Martin said the she had spoken to Mr Agnew and that the respondent wanted to support Mr Cooper and the claimant to pay a "*lump sum as a gesture*" because of the situation they were in. By this stage it was recognised that Mr Cooper was terminally ill and that he would not be able to return to work. The payment was described to Mr Cooper as a gesture of goodwill because of his loyal service to the company. The claimant recognised from the conversation that her husband's employment was coming to an end and she believed that the payment made by the respondent was a "*nice gesture*". It was understood by both parties that Mr Cooper's employment was to terminate.

13. There was then some discussion of the claimant's situation, who was still absent from work at this point due to stress related illness. The claimant was having difficulty coming to terms with the fact that her husband was terminally ill and that his death might be imminent, but at the same time she knew that she would be required to return to work at some point because of her financial position. She did not have an accurate grasp of the time scale but knew that she was not likely to return to work within a few weeks because of the state of her own health, which was connected to her husband's condition and the care she was providing to him. There was some discussion with Mrs Martin about a payment being made to the claimant. The tribunal accepted the claimant's evidence that the conversation was initiated by Mrs Martin who used words along the lines of "*would it help you if we gave you a payment to help you out? Willie Agnew has authorised it.*" The claimant said that she was reassured that her job would remain open for her whenever she wanted and she would suffer no loss by accepting the payment. The claimant had no recollection of Mrs Martin using the word dismissal or termination of employment but believed Mrs Martin may have used the word "*leave*". She said "*although I was told I would be leaving my job, it was going to be kept open to me*. *What I do know is that I always considered myself an employee of the respondent even after the meeting. I was simply told that I did not have to work and was not expected to attend work until I was ready.*"

14. The claimant's recollection was less than precise, which was not surprising given the passage of time and that it was a particularly stressful and difficult time for her. Mrs Archibald, who was present at the meeting, said the claimant was "*told that she could be permitted to have leave from her employment, but that she could return to work whenever she wanted…*" Her evidence was that Mrs Martin, "*said that the contract would just continue…*" and the meeting ended with Mrs Martin saying, "*when you are ready to come back let us know.*"

15. The tribunal did not have the benefit of evidence from Mr Agnew or Mrs Martin. The respondent's only witness was Mrs Carswell and her memory of the meeting was also less than precise. Her recollection was that the claimant "*asked where she stood if she were to leave her employment*" and that Mrs Martin said "*she would look into the financials were [the claimant] to leave*". She said that it was discussed with the claimant that "*if you wish to return to work in the future she should contact HR and that she would not need to come back through the agency.*" In other words, she could approach the respondent directly with regard to re-employment rather than having to apply through an agency.

16. It was common ground that the meeting ended amicably, the general consensus was that the respondent was seeking to do the 'right thing' by making a lump sum payment to the claimant and offering her an opportunity to return to work

when she was ready. There was no mention of a termination but there was mention of the claimant "*leaving*". The claimant's understanding of this was that it was a "*leave of absence*" with a right to return when she was ready to do so, although the reality is that she did not give much, if any, thought as to whether she would remain under a contract of employment or whether her continuous service would be protected. She simply understood that she would receive a lump sum payment and would be able to return when she was ready.

17. The tribunal held that it was the respondent intention that the claimant would leave her employment by way of a termination and that in fact her employment did terminate. There was support for that from the following: an internal email from Mrs Martin dated 11 June 2015 which stated "*I have just spoken to [the claimant] please proceed with the termination I will complete the forms and get them to you tomorrow*" (page 59.3); an ill-health termination calculation (page 60); a P45 dated 12 June (61-62) which the claimant accepted she received; an internal document completed on 15 June 2015 which was headed "*Notification of Leaver*" for the claimant (63); a payslip which was issued to the claimant dated 18 June 2015 which showed gross pay of £6090 and which included a PILON and accrued holiday pay (64); a "New *Starter Details*" form which was completed by the claimant when she returned to work on 26 September 2015 (67); and the contract of employment which the claimant signed on her return to work stated that the claimant's employment was continuous from 27 September 2015 (page 43). There was sufficient evidence in those documents, together with the use of the word "*leave*" at the meeting of 27 May, to persuade the tribunal that the claimant's employment terminated on 15 June 2015. We were not therefore required to make a finding upon whether the letter produced at page 59.2 of the bundle was received by the claimant or indeed whether it was a contemporaneous document at all; that remains a live issue at any substantive hearing.

18. The tribunal found that the respondent made an open offer to the claimant that she could return to the business when she was fit to do so. This was a more emphatic offer than that which was recalled by Mrs Carswell: the suggestion that the claimant would not have to re-apply for her position through an agency which did not amount to much of an offer at all. If there were no promise of re-employment then the actions of the respondent in terminating the claimant's employment would have been reprehensible: they would have terminated the contract of an employee of 18 years standing in circumstances in which her husband was dying of cancer, paid only the minimum statutory and contractual entitlement and given her only an opportunity to re-apply for her job. That was not the understanding of either of the parties at the time; it was regarded as a goodwill gesture to assist the claimant through a difficult time. The tribunal held that there was a definite promise to the effect that the claimant would be re-engaged when she was fit to return to work.

19. The tribunal did not find however that there was any express agreement that the claimant would retain her continuous service. None of the witnesses before the tribunal, including the claimant, were able to say whether or not continuous service was mentioned at the meeting of 27 May or at any other time prior to re-engagement. Mrs Archibald came closest to it when she said that Mrs Martin said, *"the contract would just continue"* but that did not fit with any of the documentary evidence. The tribunal found that the issue was not mentioned at the time. The issue only arose when a dispute emerged in 2017 about the terms of the claimant's contract of employment. The tribunal make no findings upon what or whether any

other terms of re-engagement were agreed at the meeting of 27 May 2015 or on any other date; that is an issue which may concern a future tribunal.

20. The claimant's husband died on 14 August 2015. On 1 September 2015, the claimant wrote to Mrs Martin and stated, "*Due to my change in circumstances I would like to return to work as a line assistant on weekends. I am available to do so as from Saturday, September 19 if that is convenient for yourselves. Thank you.*"

21. The claimant was assessed by occupational health on 24 September 2015 and deemed to be fit to return to work. She recommenced work with the respondent on 26 September 2015 (page 67) on the same terms and conditions which she had enjoyed when she left the business in June 2015. However, she was later informed in July 2017 that she had returned on "*incorrect terms and conditions of employment*". This led to a dispute which resulted in the termination of her employment on 31 August 2017 and re-engagement on inferior terms on 1 September 2017. The circumstances of that dispute do not concern us at this preliminary stage.

Conclusions

22. The tribunal held that the claimant's employment was not governed by a contract of employment between 15 June and 25 September 2015. While the claimant may have understood she was on a leave of absence, she did not in reality give much, if any, thought to her legal status. The claimant's employment was terminated on 15 June following her agreement to "*leave*" at the meeting of 27 May, which was confirmed in a subsequent telephone conversation (evidence by an internal email) and when the claimant was issued with her P45 and final payslip. The respondent's words and actions were sufficient to terminate the claimant's contract.

23. There was an offer made to the claimant that she could return to work when the time was right and she was fit to do so. As to whether this was an arrangement for the purposes of 212(3)(c) the tribunal had particular regard to Curr v Marks and Spencer plc [2003] ICR 443, CA. In that case LJ Gibson stated at Paragraph 30:

"*the ex-employee (who is included in the definition of 'employee') must, by arrangement (which can, but need not, be a contract) or custom, be regarded by both the employer and the ex-employee as continuing in the employment of the employer for any purpose in that week. The parties might, for example, agree that for pension purposes the ex-employee is to be treated during the child break as continuing in the employment of the employer. But there must be a mutual recognition by the arrangement that the ex-employee, though absent from work, nevertheless continues in the employment of the employer. Without there being a meeting of minds by the arrangement that both parties regard the ex-employee as continuing in that employment for some purpose, s.212(3)(c) will not be satisfied*."

24. The tribunal held that there was no meeting of minds between the claimant and respondent that the employment would be regarded as continuing. The claimant gave little, if any, thought to that particular point and the respondent did not intend that the claimant should be regarded as continuously employed; the contemporaneous documentary evidence before the tribunal pointed to the contrary.

25. We turn now to section 212(1)(c). The tribunal accepted the claimant's evidence that she was incapable of work from the summer of 2015 until September 2015. This was not challenged on the evidence. Upon sight of the claimant's written submissions, following the conclusion of the evidence, there was a suggestion by the respondent's representative of an "*ambush*" on this point. However, the claimant's representative had identified at the outset of the hearing that he was relying upon section 212(1)(c) and the claimant's illness was covered in her witness evidence so there was ample opportunity for the respondent to address it. It was submitted on behalf of the respondent that the claimant was fit to work from 1 September 2015 when she sent the letter requesting a return to work, or alternatively that she was fit from 19 September 2015 since she indicated that she could return to work on that date.

26. There was a lack of evidence as to when precisely the claimant was fit to return to work, no medical evidence was submitted to the tribunal. Mrs Carswell confirmed that the claimant was unfit for work at the time of the termination of her employment in June 2015. The claimant's evidence, which was credible, was simply that she was unfit to work due to ill health for the period of her absence. The claimant's husband died on 14 August 2015 and she wrote to the respondent on 1 September seeking a return to work on 19 September. On the balance of probabilities, and having regard to the presumption of continuity under section 210(5), the tribunal held that the claimant was unfit to work between the termination of her employment on 15 June and 18 September 2015 but was fit to work from Saturday 19 September 2015, the date indicated in her letter. The claimant returned to work on Saturday 26 September 2015 following a medical assessment with the respondent on 24 September 2015 (pages 66 and 67).

27. The tribunal therefore held that the gap in the claimant's employment during the period from 15 June to 18 September 2015 was bridged by section 213(3)(a) ERA 1996 when she was incapable of work in consequence of sickness; there was then a second gap between Saturday 19 September and Friday 25 September before the claimant recommenced work on 26 September 2015. That second gap did not break the claimant's continuous service since it was not a complete week from Sunday to Saturday capable of breaking continuity pursuant to sections 210(4) and 235(1) ERA 1996.

28. Accordingly, the claimant has the qualifying period of service to bring an unfair dismissal claim. The case shall proceed to be listed for a substantive hearing.

Employment Judge Humble

Date 10 April 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 April 2018

FOR THE TRIBUNAL OFFICE