EMPLOYMENT TRIBUNALS

Claimant: Mrs J Hartopp

Respondent: Mrs E Kirby t/a Comestibles

Heard at: Nottingham

On: Thursday 18 October 2018

Before: Employment Judge Legard (sitting alone)

Representation
Claimant: Mr B Chutturdharry, Free Representation Unit
Respondent: In person

JUDGMENT having been sent to the parties on 1 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

1. Introduction

1.1 The Claimant worked as a shop assistant for the Respondent, which trades under the name of 'Comestibles' as a delicatessen. She began working for the Respondent in 2013 when it was trading under the name of 'Gourmet Delights' in Beeston before it moved to alternative premises in Heanor in December 2016 when it began trading under its present name.

1.2 Both her hours of work and weekly working pattern appear to have fluctuated over the years in accordance with the shop's fortunes. There were approximately 4 other shop assistants at any one time. There does

not appear to have been any regular shift pattern as such but it is more or less agreed that the Claimant was working a 3 day week with effect from July 2017; 9 hours of work per day at the then prevailing national minimum wage rate of £7.50 per hour.

1.3 In or around August/September 2017, the Respondent's Landlord (Mr Singh) notified the Respondent that he was intending to carry out major refurbishment works to the flat premises above which would include, amongst other things, the installation of a fireproof ceiling. A number of fire safety compliance issues had arisen at the premises in the past, on one occasion necessitating the attendance of a fire officer.

1.4 There was subsequently a dispute between the Landlord and the Respondent regarding the former's conduct and alleged loss of trade suffered by the Respondent as a consequence of those works. Ultimately the work was to commence at around the end of September 2017 and that therefore necessitated the delicatessen temporarily closing down and ceasing to trade. As a matter of common sense, food items comprised its stock in trade which could not be left for an unspecified period of time on open shelves.

1.5 The Respondent says that the Claimant effectively ceased working for her on a voluntary basis with effect from 9 September. However, that is not been borne out on the documentary evidence or the records before this Tribunal. It appears that the Claimant continued to attend the shop premises, albeit on an ad hoc basis, until at least 27 September and on that particular day, she assisted the Respondent with closing down the shop, including the removal of all stock.

1.6 It appears to be common ground that at that time, namely 27 September, both the Claimant and Respondent genuinely believed that the closure of the delicatessen was temporary and that once the refurbishment works (which included fire safety and compliance works) were complete, the delicatessen would reopen.

1.7 In Paragraph 11 of the Claimant's original witness statement she puts it as follows:

> "*… I worked for three hours at "Comestibles" on 27th September 2017, assisting the Respondent in closing down the shop and removing some of what was left of the stock from the shelves and fridge. It was on this day that the shop officially temporarily closed its doors. Since then I have been temporarily laid off by the Respondent. …*"

1.8 That said, both the Claimant and indeed Respondent could not afford not to work during the course of the refurbishment works and both sought temporary alternative employment. The Claimant took a couple of weeks off before seeking and securing employment at the East Midlands Airport on 20 October. At paragraph 15 of her original statement, the Claimant says as follows:

> "*I only applied for a temping agency job at EMA on 6 October 2017. I was interviewed for the job at EMA on 9th October 2017 and started to work there on 20th October 2017. The job was a temporary position with an agency and the employment was only taken as a result of "Comestibles" being temporarily closed. …*"

1.9 As matters turned out, the delicatessen never did reopen. The relationship between the Landlord and the Respondent appears to have turned sour. The Respondent's case is that it was not until 1 March 2018 that it was finally confirmed to her that the delicatessen would have to close on a permanent basis, the Landlord having apparently "*changed his mind*" on some key negotiating ground.

1.10 At the beginning of December, the Respondent commenced a new job at a retirement home in order, she says, to simply maintain a living for herself. The issues regarding the refurbishment to the delicatessen remained in dispute at that time. The fact of the Respondent securing the post prompted the Claimant to serve a notice (ostensibly in accordance

with s147 of the Employment Rights Act and the so-called 'LOST' (Lay Off/Short Time working) provisions. That notice is to be found at p104 in the bundle and its contents correspond very closely to the contents of the Claimant's original witness statement, specifically paragraph 11 to which I have already alluded. Paragraph 12 reads as follows:

> "*There was no period of notice given by either the Respondent regarding the closure of the shop or myself as I had no intention of leaving my job. The Respondent had been running the stock down for several months and only informed me on 27th September 2017 that she would be closing the shop until the issues with her landlord were resolved. …*"

1.11 The actual notice says, amongst other things:

> "*Having been temporarily laid off on 27 September, I now intend to claim a redundancy lump sum payment in accordance with both ACAS and Government guidance. There has now been a period of 10 weeks since Comestibles closed following a period of reduced hours working. Currently there appears to be no conclusive date regarding if and when the shop will reopen*".

1.12 No counter notice was received but, as Employment Judge Heap observed on 13 July when this matter was originally listed, the Claimant did not subsequently resign in accordance with s150. Employment Judge Heap put it this way:

> "*3. Previously, the Claimant's position was that she had been placed on either short time or temporary lay off as a consequence of which she had served on the Respondent a Notice of Intention to claim a redundancy payment. It is common ground that the Respondent had not served a counter notice and the Claimant had therefore contended that she was entitled to a redundancy payment. However, as set out in Mr. Chutturdharry's Skeleton Argument, it*

appeared that the Claimant would find a somewhat insurmountable hurdle to succeeding in that complaint on the basis that it is accepted that she did not resign from employment or, if any form of implied resignation by conduct could possibly be construed, she certainly did not do so within three weeks of the failure to serve a counter notice nor did she do so by giving the notice that she was required to give to the Respondent. The statutory requirements … were therefore not satisfied and I observed to the parties that it appears that the complaint would therefore be likely to be doomed to failure as a result – a point which Mr. Chutturdharry had for his part already observed in his Skeleton Argument and against which he therefore does not appear to argue to the contrary."

1.13 By a Claim Form dated 16 January 2018, the Claimant brought claims in respect of a redundancy payment; unlawful deductions from wages and unpaid holiday pay. The Claimant sought £1,215 by way of a redundancy payment; £168.75 by way of unpaid holiday payment and the sum of £96.25 unlawful deduction from wages.

1.14. The matter came before Employment Judge Heap on 13 July and aside from what I have set out above, Employment Judge Heap also noted that the Claimant, who was by then represented (and if I may so say very ably) by Mr Chutturdharry, was putting her claim on a wholly different footing. Employment Judge Heap put it this way:

"*4. It is against that background that there appears to have been shift in the Claimant's case. As I understand it … she now says that there was no temporary period of lay off at all and that the Respondent had closed her shop … for good on 27th September 2017. It is now said that what the Respondent says about the intention at that time being to temporarily close pending works being completed at the shop is*

inaccurate. As it was, the shop never did re-open given that, as a result of what I understand to be various difficulties with the landlord, the Respondent eventually forfeited her lease. However, the Respondent says the position is that the Claimant was never dismissed on 27th September as she now claims. It is said that at that point, she was laid off and it was anticipated (but for the difficulties to which I have just referred) that she would take her old position back in the shop once it was re-opened. There was, says the Respondent, no final decision to close for good until March 2018."

1.15 It was also noted and accepted on the Claimant's behalf before me today, that if 27 September was intended to be relied upon as the last day upon which payments ought properly to have been made, then the claims in respect of the same had been presented outside the relevant statutory time limit. Once again, Employment Judge Heap observed at paragraph 7 of her order as follows:

> "*7. … given that the Claimant now says that her employment terminated on 27 September 2017, it is clear that the claim for unpaid wages and unpaid holiday pay have been presented outside the applicable statutory time limits …*"

1.16 Employment Judge Heap adjourned the matter to allow both parties to better prepare themselves and marshall their respective evidence.

2. Evidence

2.1 I have heard evidence from the Claimant and Respondent in person. Both were thoroughly cross-examined. I have also been referred to an agreed bundle of documents comprising 121 pages. I reminded both parties that it was their responsibility and their responsibility alone to draw my attention to any document that they considered to be relevant to their

respective cases and it was not to be assumed or inferred that I have read each and every page.

2.2 During the course of the hearing, the Respondent sought to rely upon a calendar which was produced part way through the Claimant's evidence. That was objected to by Mr Chutturdharry and I disallowed the production of that document on the basis that it was far too late in the day and it would have been to the significant prejudice of the Claimant were it to be admitted so late in the day.

3. The relevant law

3.1 I do not propose to set out in detail the so-called LOST provisions with the context of this judgment. In any event, that particular claim together with the basis upon which it was originally put, is no longer pursued or relied upon by the Claimant.

Redundancy

3.2 The definition of redundancy is to be found at s139 of the Employment Rights Act. Section 139(1) says:

> "***139 Redundancy***.
>
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*

…"

3.3 s163 of the same Act says:

"***163 References to employment tribunals****.*

(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or

(b) the amount of a redundancy payment,

shall be referred to and determined by an employment tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

…"

3.4 I have also been referred to several authorities by Mr Chutturdharry, including the case of ***Whitbread plc v Flatter & others [1994] UKEAT/287/94*** and ***Safeway Stores v Burrell [1997] IRLR 200***. The case of ***Whitbread*** appears to support the proposition that temporary cessation of a business may, depending upon the particular facts of the case, amount to a redundancy situation within the meaning of section 139(1) although in that case, the tribunal was not satisfied that a redundancy situation had in fact arisen. More importantly, as I find it, in that particular case, the individual Claimants had all received unequivocal notices of termination. I have also been referred to ***Safeway Stores v Burrell*** which, amongst other things, confirms that there is in essence a three stage process to determining a claim for a redundancy payment.

3.5 The first of those three stages, it has to be established that the employee has been dismissed. For dismissal itself (see s95(1) of the Employment Rights Act), an employee is treated as having been dismissed if, but only if,

> *"(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *…"*

3.6 The contract of employment is only terminated by an employer if there is a specified or ascertainable date on which the contract is to cease (see ***Haseltine Lake v Dowler [1981] IRLR 25***) and for dismissal to be effective it must be communicated to the employee. Dismissal can be inferred from an employer's conduct but it still has to be communicated to the employee in a sufficiently unequivocal way to be effective (see ***Sandle v Adecco UK Ltd [2016] IRLR 941***).

3.7 So far as time is concerned, it is agreed and common ground that the wages and holiday pay complaints have been presented outside the statutory time limit. It is therefore a question for the tribunal as to whether or not it was reasonably practicable for such complaints to have been presented in time and, if not, whether or not the complaints were presented within such further period as the tribunal considers reasonable (see section 111(2)).

3.8 It is a question of fact in each case whether it was reasonably practicable to present a claim in time and the burden rests squarely upon the Claimant's shoulders to persuade the tribunal that it was not so reasonably practicable. It is not generally reasonably practicable for an employee to bring a complaint until he or she has acquired knowledge of the facts giving him or her grounds to apply (see ***Northamptonshire County Council v Entwhistle [2010] IRLR 740*** and ***Machine Tool Industry Research Association v Simpson***).

3.9 A claimant is unlikely to be able to show that it was not reasonably practicable to present a complaint because of ignorance of the right to claim (see ***Porter v Bainbridge Ltd [1978] IRLR 278***). However, it is always necessary for the tribunal to consider what a claimant knew and whether his or her lack of relevant knowledge was reasonable. Where an employee has knowledge, there is an obligation upon him or her to seek information or advice about the enforcement of those rights and accordingly ignorance of time limits may well be held not to be reasonable if the claimant was aware of the right but made no further enquiries about how or when to do so.

3.10 If it is not reasonably practicable, the tribunal may allow an extension of time of such further period as it considers reasonable. There is no fixed limit, each case must be considered on its facts in light of the claimant's explanation for the delay (see ***Marley v Anderson [1996]***).

4. Submissions

4.1 I have heard submissions from both Mr Chutturdharry on behalf of the Claimant and from Mrs Kirby on her own behalf. Those submissions have both been extremely helpful. I am indebted to both for having presented their respective cases with clarity and with force.

5. Conclusions

Redundancy payment

5.1 Putting aside the clear inconsistencies in how the Claimant has up until July of this year elected to put her case (by which time she had of course sought expert advice) I am not satisfied that the Claimant was in fact dismissed. There is certainly no, or no reliable, evidence to support a finding that the Claimant's contract of employment was terminated on an ascertainable date. Mr Chutturdharry has given me a couple of options, either 27 September, which he accepts was at a time when the shop was

only temporarily closed, or 5 December. There is no evidence that supports a finding that notice of termination was effectively, let alone unequivocally, communicated to the Claimant whether expressly or by implication. The fact is that both Claimant and Respondent were equally confident as at 27 September that the delicatessen would reopen following a period of refurbishment.

5.2 The Claimant, perfectly understandably, elected to take some time off before interviewing for and securing a post at the East Midlands Airport in October. At no point did the Respondent tell her that she was redundant or dismissed, a fact acknowledged by the Claimant in evidence. She received no correspondence to that effect; there were no words that could be interpreted as constituting words of dismissal and the Respondent did not act or behave in such a way from which dismissal could be inferred.

5.3 Accordingly, the first and arguably the most crucial element of the three stage test (see ***Safeway***) has not been established to my satisfaction. Accordingly, the Claimant, despite the s163 presumption, was not in my view dismissed, whether by reason of redundancy or at all.

5.4 The claim for a redundancy payment must therefore fail.

Holiday pay and unlawful deduction from wages

5.5 I will first deal with the time point given that it goes to jurisdiction. Was it in all the circumstances of the case reasonably practicable for the Claimant to have presented her complaint in respects of both heads of damage before the expiry of the relevant period? The Claimant relies on 27 September for the purposes of establishing when time should begin to run.

5.6 The Claimant, through her representative, both before Employment Judge Heap in July and myself today, accepts that these claims have been presented outside their respective statutory time limits, the same having expired subject to EC provisions on 26 December 2017.

5.7 The Claimant in fact presented her complaint on 16 January 2018. The 'stop the clock' period (for EC purposes) amounts to 8 days from 4 to 12 January. Accordingly, the claim was approximately 12 days out of time.

5.8 In her supplementary witness statement, the Claimant says this:

> "*Unfortunately, it was not reasonably practicable for me to present my complaints for unpaid wages and holiday pay in time because I did not know that there were shorter time limits to bring a claim for unpaid wages and holiday pay from that which applied to a redundancy payment. At the beginning of October, my husband carried out some online research on redundancy. I telephone ACAS to gather some information on the topic. On 4 January, my husband officially contacted ACAS to find out about the procedures in relation to my dispute with the Respondent and a Mr Pye was assigned to my case. Around the same time, my husband contacted the Nottingham Law Centre. The Nottingham Law Centre took some details from him and they said they would get back to us but unfortunately the never did. My husband did not contact the Nottingham Law School Legal Advice Centre until 18 April as he was still waiting for the Nottingham Law Centre to get back to us. As it is a student run service, I only heard back from the Nottingham Law School Legal Advice on 19 June 2018. My first meeting with Mr Chutturdharry was on 27 June 2018 and the first time I had received legal advice was when he sent me an advice letter on 6 July 2018. Therefore, it was not reasonably practicable for me to present this complaint in time.*

5.9 In my judgement, there is no good reason why the Claimant or her husband, who I understand is a chartered engineer, could not have contacted the Nottingham Law Centre or indeed Law School Legal Advice Centre well in advance of 26 December. The fact that the Claimant's husband, a clearly educated professional, had conducted detailed online research on lost redundancy provisions and notices and the like, demonstrates that the information on time limits, if reasonably sought, was

there to be acquired.

5.10 The Claimant did not receive any legal advice until 6 July 2018. In my judgement, there was ample opportunity, either through herself or indeed her husband, to have sought and obtained such advice (which would have been relatively straightforward) well before the expiry of the statutory time limit. There are no further extenuating circumstances such as illness, disability, internal appeal processes, postal strikes or misleading information that might have pointed me in an alternative direction and her ignorance of her rights, or certainly the time limits pertaining thereto, cannot by itself assist her on the facts of his particular case.

5.11 Unfortunately therefore, I find that it was reasonably practicable for these claims to have been presented in time and they are therefore out of time and the tribunal lacks the jurisdiction to hear them. There is no requirement for me to go on to consider whether the period within which they were presented was in fact reasonable.

5.12 As an aside, had I accepted jurisdiction for the complaints of holiday pay and unlawful deduction from wages, I would have found in the Claimant's favour. I know that is scant comfort to her and I do not wish to rub salt in her wounds but on both issues of substantive fact, I found the Respondent's evidence inherently unreliable on both heads of damage and I would have had no hesitation in preferring the evidence of the Claimant on both matters.

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Employment Judge Legard

Date 15th January 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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