

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102002/17

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Held in Glasgow on 23 February 2018

Employment Judge: G Woolfson

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Miss Halide Mustafa

**Claimant
In Person**

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ScotNursing Ltd

**Respondent
Represented by:
Ms K Irvine -
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

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1. The claimant does not have the necessary qualifying service to claim unfair dismissal, and therefore the claim for unfair dismissal is dismissed.

2. The claimant's application to add a wages claim is accepted and will proceed as a claim under Section 13 of the Employment Rights Act 1996.

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REASONS

Introduction

E.T. Z4 (WR)

1. The claimant was unrepresented. The respondent was represented by Katherine Irvine. The claimant and Ms Irvine each produced a folder of documents. The claimant and Ms Irvine put forward representations and submissions to the Tribunal. No evidence was led.

The issues

2. The issues to be determined by the Tribunal are:

- (i) whether the claimant had sufficient service to claim unfair dismissal, and
- (ii) whether an application to include a wages claim (as well as breach of contract) should be accepted.

The claimant's length of service

3. The claimant and Ms Irvine agreed the following:-

- (i) The claimant commenced employment with the respondent on 20 June 2016.
- (ii) The claimant's employment with the respondent terminated on 6 June 2017 (with the claimant being paid to 13 June 2017).
- (iii) The claimant had previously been employed by the respondent from October 2014 to March 2015. Having moved to Australia temporarily and then worked at a different company before rejoining the respondent on 6 June 2017, the claimant's continuous employment with the respondent was broken.

(iv) Therefore, the claimant's most recent period of continuous employment with the respondent was from 20 June 2016 until 6 June 2017.

5 4. Under Section 108 of the Employment Rights Act 1996, to claim unfair dismissal under Section 94 of the 1996 Act an employee must have been continuously employed for a period of not less than two years ending with the effective date of termination. Although there are exceptions to this rule, no information was presented to the Tribunal to suggest that any of the exceptions are applicable in this case.

10 5. The claimant confirmed that her employment commenced on 20 June 2016 and terminated on 6 June 2017. The claimant was not continuously employed for a period of two years. As such, the claimant does not meet the requirements of Section 108 referred to above. This means that the Tribunal does not have jurisdiction to hear the claim of unfair dismissal.

15 6. The Tribunal acknowledges the sentiment put forward by the claimant that she feels she has been treated unfairly. However, the Tribunal is bound to apply the requirements of Section 108. Therefore, as the claimant was employed by the respondent for less than two years, the claim for unfair dismissal cannot proceed and is dismissed.

The wages claim

25 7. For the respondent, Ms Irvine put forward a submission of which the following is a summary:-

30 (i) In the claim form, the claimant ticked "other payments", and not "arrear of pay".

- (ii) The claimant has made a reference to some form of breach of contract in relation to on-call payments, but without specifying the basis for any alleged breach.
- 5 (iii) The first mention of a claim relating to wages was in an email to the Tribunal on 26 October 2017. However, it is not clear which wages are being referred to.
- 10 (iv) If the wages relate to on-call payments, the last date on which any such payments may have been due was the end of February 2017. Therefore, any such wages claim has been submitted out of time as it should have been submitted by the end of May 2017 after a period of early conciliation. The claimant has not given any reasons as to why it was not reasonably practicable to bring such a claim earlier.
- 15 (v) The nature of the amendment is a new factual allegation which changes the basis of the claim. Reference was made to the case of **Selkent Bus Co Ltd v Moore**. Even though the claimant had knowledge of the facts, no reason has been provided as to why the claim was introduced late.
- 20 (vi) The claimant would not be prejudiced if the wages claim is not accepted, as she already has a claim for breach of contract.
- 25 (vii) The application to accept a wages claim should therefore be refused.
8. The following is a summary of the points put forward by the claimant:-
- 30 (i) The claimant did not fully understand the claim form and she made as much sense as she could of Section 8.2. She ticked the box "other payments" as she wished to claim for on-call payments, and then proceeded to refer to on-call on a number of occasions in the claim

form. The claimant thought she made it clear her claim was for on-call payments.

5 (ii) It was through discussions with ACAS that the claimant was informed the Tribunal had only noted her claim as unfair dismissal and breach of contract. The claimant then contacted the Tribunal to clarify that her claim was also for wages.

10 (iii) The claimant disputed that the last date for payment of on-call was February 2017. On-call payments were due through to 12 May 2017.

15 (iv) The claimant worked more hours in the office than the hours for which she was contracted. However, she is not claiming any pay for such hours. Her claim is only in respect of on-call payments (and unfair dismissal). When she referred to "wages" in her email to the Tribunal of 26 October 2017, she was referring to on-call payments.

20 (v) The claim is in respect of hours worked outwith the office, usually 11 hours at a time.

9. The Tribunal places significance on the fact that the claimant confirmed her claim is solely in relation to on-call payments. References to on-call are clearly made in the ET1, Section 8.2. It appears that prior to the Preliminary Hearing it was not clear to the respondent that the claim was solely in relation to on-call payments and that the claimant's reference to wages in her email of 26 October 2017 was a reference to on-call payments.

10. That being the case, the Tribunal is satisfied that this is not a situation in which new factual allegations are being made which change the basis of the existing claim. Rather, this is the addition of another label to facts already
30 pled. With reference to the ***Selkent*** case, the Tribunal treats this as a minor amendment. Therefore, the amendment is allowed and the claim will proceed

as a claim under Section 13 of the Employment Rights Act 1996. The breach of contract claim will also proceed.

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Employment Judge: G Woolfson
Date of Judgment: 07 March 2018
10 **Entered in register: 10 March 2018**
and copied to parties