



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107823/2019

Preliminary Hearing Held at Inverness on 11 December 2019

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Employment Judge A Kemp

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Miss K Laing

**Claimant
In person**

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Kingsmills Hotel (Inverness) Limited

**Respondent
Represented by:
Mr K Tudhope
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The claim of unfair dismissal made by the claimant is not within the jurisdiction of the Tribunal as the claimant does not have the continuous service required by section 108 of the Employment Rights Act 1996 and that claim is dismissed.

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2. The claim for breach of contract shall proceed to a Final Hearing.

REASONS

Introduction

- 5 1. This case called for a Preliminary Hearing to address an issue of jurisdiction, in particular whether or not the claimant had the necessary continuity of service to claim unfair dismissal. She also pursues a claim of breach of contract for which no continuity of service is required.
- 10 2. The respondent argued that there was a break in continuity, which the claimant denied. The respondent's position was that the claimant had resigned on 8 April 2017, to take up alternative employment, and commenced a new period under their employment on 1 July 2017.
- 15 3. Prior to the hearing of evidence I addressed with the parties that the burden of proof rested on the respondent, which was accepted, and they gave their evidence first. I explained to the claimant the process for giving evidence, asking questions in cross examination, and the issue to be determined as noted below.

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Evidence

- 25 4. The parties had prepared a bundle of documents for the purposes of the hearing to which two documents were added by the respondent without objection, being a P60 that the claimant had produced which had been omitted from the bundle in error, and a full record of rotas in the disputed period, extending beyond those which the claimant had produced from her own records. Most but not all of the documents were referred to in evidence.
- 30 5. Evidence was given orally by Mr Craig Ewen the respondent's Operations Director, Mrs Rosemary Vacca the respondent's HR Manager, and by the claimant herself.

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Issue

6. The issue before the Tribunal was whether or not the claimant's continuous service was broken by a period during which she was, the respondent claimed, not employed by them between 8 April 2017 and 1 July 2017.

Facts

7. The Tribunal found the following facts to have been established:
8. The claimant is Miss Katrina Laing.
9. She was employed by the respondent which operates the Kingsmills Hotel in Inverness.
10. Her work for the respondent commenced on 7 September 2015. It was as a casual worker working as a bar attendant.
11. The terms were set out in a letter dated 2 September 2015, and stated that the claimant was under no obligation to accept hours of work offered and the respondent was under no obligation to offer her work. The claimant was then attending a College course and worked around her commitments for doing so.
12. In about May 2016 the claimant ceased to attend College. She commenced a period of more regular working, and was promoted to a position as bar supervisor.
13. The claimant was not offered a formal contract of employment at that point. She was paid on an hourly basis for the hours that she worked. The level of her earnings varied dependent on the hours worked. Her earnings in December 2016 were £1,322.82 net, for January 2017 £1,170.09 and for February 2017 £834.43.

14. Where a person worked for the respondent, they signed in on a time sheet which had the rota for that week on, and then signed out, stating the time, when they left. That record was then transposed into a time book, which was processed by HR and passed to payroll for generation of a wage slip and payment of the wages due.
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15. Wages were paid by payroll under necessary statutory deductions into the bank account of the person concerned.
- 10 16. On 17 March 2017 the claimant wrote to the respondent to inform them that she was “handing in her notice”. She had a new full time job she was to be commencing working in a pharmacy. She requested that she be kept “enrolled” with the respondent, and said she might be willing to work every second Saturday night and potentially week days, but could not guarantee that.
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17. When the respondent received that letter, they processed it as a termination of employment. They completed a leaver’s form for her to record her departure. The claimant worked on 18 March 2017, then had a period of holidays, before working again on 5, 7 and 8 April 2017.
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18. The claimant was issued with a P45 by the respondent which had her leaving date as 8 April 2017.
- 25 19. The claimant was paid her accrued wages for the period to 8 April 2017, and her accrued but untaken holiday pay. Payment of the sum of £650.14 was made to her by transfer directly into her bank account on 24 April 2017.
- 30 20. The claimant had a conversation with the bar manager at the respondent with regard to her availability for future shifts, as a result of which she was sent each week by email the rota for the hotel bar staff for the following week. That rota was prepared in advance by a period of about four days, and indicated what shifts each of a named set of staff were scheduled to work in the forthcoming week.
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21. That rota shows the claimant scheduled to work on 7 and 8 April 2017, then as “off” thereafter save for one week where her name does not appear, and for 28 May 2017 and 11 June 2017 on which dates she was
5 scheduled for a shift.
22. The claimant was not in receipt of any payment from the respondent for the period from 8 April 2017 to 1 July 2017.
- 10 23. The claimant did not carry out any work for the respondent in the period 8 April 2017 to 27 May 2017, then worked for one day on 28 May 2017, then did not work again until she carried out work for one day on 11 June 2017, and again not then until 1 July 2017.
- 15 24. No wage slip was produced by the respondent for the claimant for the days she was scheduled to work under the rota in that period, being on 28 May and 11 June 2017.
- 20 25. Where a shift is worked, the person doing so signs in at the start time given on the sheet, and then signs out, stating the time the shift ended, at the end of the shift, all on a rota sheet kept on the premises. The respondent did not produce the rota sheets for the two weeks including 28 May and 11 June 2017.
- 25 26. The claimant was employed by the respondent on a full time basis, with standard hours of 39 per week and on 5 days per week, on 1 July 2017. That was confirmed by a written contract of employment that was sent to her, that confirmed a commencement date of 1 July 2017.
- 30 27. The claimant completed a “new start information” form for the respondent, with details to allow her to be paid including her national insurance number and bank details. She signed that form on 5 July 2017. She was paid for the work she carried out for the period from 1 July 2017 onwards, with payments made directly to her bank account. The payment for the full
35 month paid on 25 August 2017 was £1,300.50.

28. Her employment was terminated by the respondent summarily on 25 May 2019.

5 **Submission for respondent**

29. Mr Tudhope argued that there was a lack of the essentials of employment, particularly of mutuality of obligation, and particularly in the disputed period between 8 April 2017 and 1 July 2017. He argued that the probability was that the claimant had not worked on the two dates from the rota, as she was not paid for that, had not made any complaint about that at the time, and there was nothing in the respondent's records to support that she had in fact done so.

15 30. He accepted that it was possible that timesheets of some kind existed for those dates, but argued that they would not be relevant for the issue before the tribunal at this hearing.

Submission by claimant

20 31. For understandable reasons the claimant did not make a submission. I had however heard the evidence and was aware of her position which was that she had asked to be kept "on the books" when she found a new full time job, and in the disputed period had worked for two days albeit that she did not appreciate until recently that she had not been paid for doing so.

Law

30 32. The provisions relating to continuous employment are in Part XIV, Chapter 1, of the Employment Rights Act 1996, in particular section 210 which provides as follows:

“210 Introductory

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

5 (2) In any provision of this Act which refers to a period of continuous employment expressed in months or years—

(a) a month means a calendar month, and

(b) a year means a year of twelve calendar months.

10 (3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—

(a) whether the employee's 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,

15 shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

20 (4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.”

25 33. The predecessor statutory provisions have been described as 'a complete definition of what is meant by “continuously employed”’: **Wood v York City Council [1978] IRLR 228**. In **Koenig v The Mind Gym UKEAT/0201/12** the issue to be determined was described as being, in that case, when the employee had started work under the contract of employment. That was a
30 question of fact.

Observations on the evidence

34. I was entirely satisfied that the evidence of Mr Ewen and Mrs Vacca was
35 credible and reliable. Mr Ewen understood that the claimant had not

worked on the two days shown in the rota in the disputed period as she had not been paid for doing so, and the respondent's systems would have led to payment had she done so. He very fairly accepted that it was possible that she had done so and for some reason that was not picked up, but he thought that unlikely. Mrs Vacca was of the opinion that such a possibility was not a serious one.

35. The claimant gave evidence in a straightforward manner. As matters developed there was in fact little real dispute on the facts. The dispute centred around the two days during the disputed period when the claimant alleged that she was working, as supported by the rota. The claimant accepted that she had not been paid for the work on the two days in the disputed period, but said that she had not noted that until recently.

36. Whilst the circumstances are certainly unusual, and there might be a written record from the timesheets, if they remain available, to establish the issue definitively, I considered that the evidence of the claimant that she had worked on the two disputed days in the material period was to be accepted. It was supported by the rota itself. The claimant said that she had worked on those days, and despite the absence of written records by way of payslip or similar, and the lack of challenge at the time, I considered that she was credible and reliable in that regard. I also noted that the timesheets had not been produced, but either might have been or that evidence of an unsuccessful search for them could have been presented. As I shall come to, however, I did not regard that as determinative of the issue before me, and matters may be different if the evidence is more full.

Discussion

37. It is for the respondent to prove any break in continuity (section 210(5)). Continuity is considered on a week by week basis. In the present case, it was accepted that the parties' contractual relationship started in about September 2015, and in fact I accepted the respondent's evidence on the actual date, which was supported by a leaver's form that was prepared from records.

38. Initially the claimant worked as a casual worker, around her College commitments. In about May 2016 they ceased, and she moved to more regular employment. Whilst the evidence of the nature of the relationship at that stage was limited, it appeared to me that it was likely that at that point (May 2016) the claimant was an employee, even though no written record of that was provided. She was working as a bar supervisor, as was accepted. She worked on a more regular basis. She was being paid sums that varied, but were around the level very roughly of £1,000 net per month, with a higher sum paid when work was busy such as in December 2016. That indicated a reasonable level of working. It was not much less than she was paid when she was a full time employee after 1 July 2017.
39. It was clear, and accepted, that the claimant had resigned from the respondent, giving them notice, on 17 March 2017. She did so because she had a new full time job to start. By that stage although she was working more full and regular hours for the respondent that arrangement ended. It required to because of her new full time role.
40. The respondent issued a P45, and did so as the claimant was leaving. Whilst her notice of resignation gave a possibility of her working in the future on some shifts, she could not guarantee that.
41. As it turned out, she did not work for the period from 9 April 2017 to 27 May 2017. That is a total of over six weeks where there was no relationship between the parties, no work carried out, and no obligation either on the claimant to accept work offered by the respondent or for the respondent to provide work to her. Taking the case for the claimant at its highest she was working in a new form of relationship as a casual worker following her resignation, and in fact did so at best on a very limited basis for two days during that period
42. In light of that it appears to me that Mr Tudhope must be right in his submission that that cannot be a continuing employment relationship. The essential ingredient of mutuality of obligation is missing. It was missing as

the claimant had decided to terminate the former relationship, for the perfectly good reason that she had a new full time job. That was supported by the payment of accrued holiday pay, only paid in lieu on termination, and issuing the P45. It was also supported by the lack of any work done for a material period thereafter, with one day.

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43. There was therefore no employment relationship between the parties for that period of over six weeks, and that does break continuity for the purposes of section 210.

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44. There was a further gap between 29 May and 10 June 2017, a period in excess of a week where no work was performed, and again from 12 June 2017 to 1 July 2017, a period of over two weeks where no work was performed. Those periods also broke continuity.

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45. I concluded that the respondent had discharged the onus upon it and proved that there had been a break in continuity of employment during those periods, but particularly that between 9 April 2017 and 27 May 2019, which is a period in excess of six weeks. That I consider does break continuity, such that the claimant had continuous service with the respondent which commenced on 1 July 2017.

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46. In light of the date of termination of her employment, she does not have the service for a claim of unfair dismissal which requires to be no less than two years, under the terms of section 108 of the Employment Rights Act 1996. That is also the case even if the minimum statutory period of notice is added to the date of termination.

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47. It follows that the Tribunal does not have jurisdiction to consider the claim for unfair dismissal and I require to dismiss it.

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Conclusion

48. The unfair dismissal claim is dismissed for want of jurisdiction.

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49. The claimant's claim of breach of contract shall proceed to a Full Hearing.

50. A listing letter shall be issued to the parties to seek to identify dates for that hearing, after which a formal Notice of Hearing shall be issued separately. At that stage the Tribunal will also make case management orders in relation to that Final Hearing. In the event that the respondent can find the two timesheets for 28 May 2017 and 11 June 2017, that can be disclosed to the claimant. If the claimant wishes to seek those sums within her claim for breach of contract, she should email the tribunal with a copy to the respondent seeking to amend her claim to include the pay due for those two days, together with a claim for the failure to give her notice. The contract before me indicated that if the notice due thereunder was 4 weeks, unless the claimant was guilty of repudiatory conduct that justified summary termination.

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51. For the avoidance of doubt nothing in this Judgment and Reasons binds the Tribunal hearing the breach of contract claim. The evidence before that Tribunal may be different to that before me.

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35	Employment Judge:	Alexander Kemp
	Date of Judgment:	19 December 2019
	Date sent to parties:	20 December 2019