



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106721/2020

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Held in Dundee (by CVP) on 25 May 2021

Employment Judge B Beyzade

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Mr. Craig Jowett

**Claimant
Represented by:
Mr. Jay Lawson,
Solicitor**

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Javelin Saw Doctor Ltd

**Respondent
Represented by:
Gillian Crew,
Counsel
Instructed by:
Croner Group Ltd**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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1.1. the claimant was continuously employed by the respondent for the period from 1 June 2005 to 24 June 2020 for the purposes of section 108(1) of the Employment Rights Act 1996. The Employment Tribunal has jurisdiction to consider the claimant's unfair dismissal claim, and it shall proceed to a final hearing along with his claims for wrongful dismissal, notice pay, holiday pay and other payments.

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1.2. A Preliminary Hearing (Case Management) date will be set down with a time estimate of 1 hour to give further directions and to determine the length of the Final Hearing.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal, wrongful dismissal, unlawful deduction from wages (holiday pay and notice pay) and other payments (failure to give statement of employment particulars) which the respondent denied.
2. A preliminary hearing was held on 25 May 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.
3. The parties prepared and filed a Joint Inventory and Bundle of Productions in advance of the hearing consisting of 61 pages.
4. After the Preliminary Hearing took place, the respondent sent an additional document to the Tribunal which was described as a letter from the respondent's accountant. As the Preliminary Hearing had concluded, I directed that any application to adduce further evidence must be lodged by 4 June 2021. No application was made by the respondent's representative.
5. At the outset of the Preliminary Hearing the parties were advised that the Tribunal would investigate and record the following issue as falling to be determined, both parties being in agreement with this:
 - (i) Whether the claimant has sufficient service (i.e., 2 years continuous service) to claim unfair dismissal?
6. The Claimant gave evidence at the hearing on his own behalf and Mrs. Shirley Jowett, Director gave evidence on behalf of the Respondent.
7. Both parties were legally represented and made closing submissions.

Findings of Fact

8. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –
- 5 9. The claimant commenced employment with the respondent on 1 June 2005. He was employed as a Saw Doctor.
10. The respondent specialises in sharpening, servicing, and maintenance of all types of cutting tools and machinery for the professional trade, and the domestic user.
- 10 11. In around May 2019 the claimant was unwell and therefore the respondent agreed that the claimant could work on a flexible basis. This included working part days and not attending work on certain days. He carried out work throughout June 2019. The claimant communicated with the respondent by way of text messages, telephone calls and face to face
15 meetings.
12. The claimant continued working for the respondent in July 2019. On 5 July 2019 at 07.47 while the claimant was travelling to the respondent's premises he asked Mrs. Jowett to provide him with a set of keys for locking up that day. The claimant had his own keys, there were times keys were shared and on that occasion he had left them with Mrs. Jowett. On the
20 same day Mrs. Jowett asked the claimant to put a message on the respondent's telephone answer machine and the claimant agreed to do this.
13. The claimant sent a text message to Mrs. Jowett on 5 July 2019 at 12.02
25 stating "*why are you lying to customers and telling them I left and didn't want to work here anymore?*" Mrs. Jowett replied denying that she told customers this. She stated she told them that he left for health reasons. On that day, the claimant had in fact spoken to four customers.
14. Mrs. Jowett sent a text message to the claimant on 8 July 2019 confirming
30 that she did all she could in relation to his wages. She referred to not knowing about benefits. Mrs. Jowett later advised that the claimant should try to get a job that is less stressful and that he could leave tomorrow if he

were not feeling up to it albeit he needed to let her know if he were going to leave. The claimant advised that work was not the problem, that he was good at his job, and he liked it.

- 5 15. On 11 July 2019 Mrs. Jowett sent a text message to the claimant asking him if he was coming into work the next day, and the claimant replied that he was attending work.
- 10 16. On 22 July 2019 Mrs. Jowett asked the claimant how much a customer was due. The claimant replied providing details of the amounts. The claimant was also asked by Mrs. Jowett the same day if he will be long, and he replied “no”.
- 15 17. The claimant requested his wages for work that he had been carrying out for the respondent. On 29 July 2019, the claimant asked Mrs. Jowett if she will be paying him two weeks wages this week so that he could pay his bills. Mrs. Jowett responded on the same day confirming the arrangements for making payments to him. The claimant was paid £400 in cash which he deposited into his bank account.
18. On 31 July 2019 and 1 August 2019 there were further text messages in relation to work that was being carried out for customers. The claimant continued to work for the respondent in August 2019.
- 20 19. Mrs. Jowett asked the claimant if he needed more money on 2 August 2019 and he asked her to put the money into his bank account.
- 25 20. As shown on the claimant’s bank statements, a number of payments were made into the claimant’s bank account by way of wages in the months of July, August, September, and October 2019 in respect of work carried out by the claimant for the respondent.
- 30 21. The claimant continued to work for the respondent in September 2019 and Mrs. Jowett exchanged further text messages on 3, 4, 16 and 20 September 2019 in relation to the claimant attending work. On 26 and 27 September 2019 there were further text messages relating to work matters.

22. The claimant had asked when he could work again on a full-time basis. The claimant sent a text message to Mrs. Jowett on 24 October 2019 querying why she could not pay two full time staff wages and he confirmed that he would be agreeable with working part time. Mrs. Jowett advised that she would start to pay him £280 a month in a couple of weeks and an additional payment will be paid to him in cash. On 28 October 2019, the claimant queried whether his wages will be paid to him the next day, and Mrs. Jowett confirmed this.
23. The claimant continued to carry out work for the respondent throughout October 2019 and November 2019.
24. The respondent issued a P45 in respect of the claimant's employment (certified and completed on 12 November 2020) which suggested that the claimant's last date of employment was on 30 June 2020. However, the claimant continued to carry out his tasks for the respondent after 30 June 2019. The claimant's employment continued until 24 June 2020, on which date his employment was terminated.

Observations

25. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –
26. I was entirely satisfied that the claimant was a credible and reliable witness. He gave his evidence clearly and candidly. He was convincing in describing what happened, particularly in relation to work he carried out and payments he received from July 2019, and it was understandable that he could not provide evidence on challenging the P45 as the same was not apparently issued until several months later. I found Mrs. Jowett's evidence to be somewhat unsatisfactory as she was not clear on what basis she asserted she paid the claimant personally from July 2019 onwards and the documentation provided by her was very limited at best, and woefully inadequate much of the time. Mrs. Jowett accepted that the claimant worked for a few hours from July 2019 onwards.

27. The respondent asserted that the claimant did not challenge the fact that his P45 had been issued stating that his employment terminated on 1 July 2019. According to the P45 the date it was certified and issued by the respondent was on 12 November 2020. There was no letter provided to the Tribunal evidencing the respondent's assertion that the claimant's employment terminated on 30 June 2020 and there was no final pay slip in the Bundle.

28. The respondent had told customers in July 2019 that the claimant no longer wanted to work there, and the claimant expressed his displeasure about this to Mrs. Jowett.

29. Mrs. Jowett accepted that payments continued to be made to the claimant after 30 June 2020. This was supported by various bank statements. There was no supporting evidence provided by the respondent by way of pay slips or any documentation otherwise referring to the payments.

15 **Relevant law**

30. To those facts, the Tribunal applied the law –

31. Section 108(1) of the Employment Rights Act 1996 ("the Act") provides:

"Section 94 [the right not to be unfairly dismissed] 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."

32. Section 210 of the Act states:

"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.

(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.

(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*

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

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.

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(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.”*

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33. Section 212 of the Act states:

“212 Weeks counting in computing period

(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.*

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(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,*

(b) *absent from work on account of a temporary cessation of work,*

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(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.”

30 **Submissions**

34. Ms. Crew for the respondent submitted that the respondent relied upon a break in continuity of employment between 1 July and November 2019 and she referred to section 212 of the Act. It was the respondent's case that it

was agreed that the claimant's employment would terminate on 1 July 2019 due to his ill health. She referred to his P45 being issued, and the claimant's sick note following which he stated that he carried on working. Ms. Crew referenced Mrs Jowett's evidence that from July 2019 the claimant worked on a casual basis only working a few hours as and when required and that this was not to the same level as previously. She submitted that the text messages at pages 52 and 53 supported this. Ms. Crew explained that the payments paid to the claimant were notice and holiday pay, and that Mrs. Jowett paid him directly for any casual work, and I was invited to prefer Mrs. Jowett's evidence.

35. Mr. Lawson stated that Mrs. Jowett's evidence was less reliable, including numerous references to part time work were made in September 2019, the way she asserted she made payments to the claimant personally, and she had someone in the room on more than one occasion while she were giving evidence. He suggested that the text messages supported the claimant's evidence that he continued to work after his P45 was issued on 1 July 2019, that he was asking for keys on 5 July 2019, and he was required to put a message on the respondent's telephone, and he continued to serve customers. He was undertaking work in July and August 2019 similar to that in June 2019, and that he stated that he did challenge the P45 being issued and that from his recollection Mrs. Jowett did not deny this. He referred to a text message in which the claimant challenged why Mrs. Jowett lied to customers about him leaving his employment due to ill health. He stated that there were wages payments in July, August and September 2019 and text messages from the claimant referring to wages, and the claimant was asked to work by the respondent, and that the claimant's employment continued and there was no break in continuity of service as alleged by the respondent.

Discussion and decision

36. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

37. The respondent accepted that the claimant was employed by the respondent between 2005 and 1 July 2019 and that he carried out some

work thereafter. The respondent also conceded that the claimant was in employment with the respondent between 18 November 2019 and June 2020. The respondent contended that there was a break in the claimant's continuity of employment between 1 July 2019 and 17 November 2019, during which the respondent stated that the claimant was not employed by the respondent.

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38. In this case, as both parties observed, the relevant provisions of the law, nor the application of those provisions, are not a matter of dispute here. The issue is very sharply focused: whether there was a break in the claimant's employment between 1 July 2019 and 17 November 2019?

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39. I am confronted with two divergent factual positions. The claimant insists that he continued to work for the respondent from 1 July 2019 and he carried out similar duties. The respondent insists that not only was the claimant's P45 issued with a termination date of 30 June 2019, thereafter the claimant worked on a casual and ad hoc basis only until November 2019 when he was re-employed. The respondent's position is that the claimant did not challenge the termination date on his P45, and he was re-employed on 18 November 2019.

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40. Both representatives submitted that their respective clients were entirely credible and reliable in their evidence. In this case, I am not persuaded that either the claimant or Mrs. Jowett was in any way deliberately seeking to mislead the Tribunal as to what had happened here.

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41. The claimant's evidence was consistent with the text messages to which I was referred and the fact that wages payments continued to be made to him from July 2019 onwards as shown on his bank statements. The claimant who I found to be credible and reliable, denied that his employment with the respondent terminated on 1 July 2019.

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42. I considered that the claimant did have continuity having regard to sections 210-212 of the Act. In considering section 212 of the Act, I found that throughout the period of 1 July 2019 and 17 November 2019 the claimant continued to work under an implied contract of employment with the respondent (there was no written contract of employment produced by the parties). There was sufficient mutuality of obligation to create a contract of

employment throughout this period. The claimant was obliged to carry out work during this time and he did indeed perform work for the respondent. There was a need for the claimant to attend work. Ms. Crew asked in cross examination whether the claimant would be disciplined if he did not attend work, and the claimant answered that there was never anything like that in place throughout his employment. I accepted the claimant's evidence in relation to this matter and the fact he was regularly paid wages from July 2019 onwards. Any reduced hours worked, were due to the flexibility that was agreed between the claimant and Mrs. Jowett due to the claimant's health and the claimant's employment continued from 1 July 2019 and there was no break in continuity as alleged by the respondent or otherwise.

43. As I did not accept that there was any break in the claimant's continuity of employment or that there was any week in which the claimant was not engaged by the respondent under a contract of employment, I do not need to consider the provisions of section 212(3) of the Act. Furthermore there was no evidence to support there being incapacity, or any absence due to temporary cessation of work. In any event, if I am wrong and there were no contract of employment between 1 July 2019 and 17 November 2019, I consider that under section 212(3)(c), any period during which the claimant was not employed under a contract of employment from 1 July 2019 could properly be described as by arrangement pursuant to which the claimant would be regarded as continuing in his employment. Given that he had liaised with Mrs. Jowett throughout this period (and prior to this), there could be no doubt that any absences from work had been by arrangement, and I would have been satisfied that the parties regarded the employment relationship as continuing from 1 July 2019 for some purpose.

Conclusion

44. The Employment Tribunal has jurisdiction to consider the claimant's unfair dismissal claim, and the said claim shall proceed to a final hearing along with his claims for wrongful dismissal, notice pay, holiday pay and other payments. A Preliminary Hearing (case management) will be listed to give further directions.

Case Management Orders

45. Parties are directed to file and to exchange in electronic form a completed Agenda for Case Management **seven days before the Preliminary Hearing.**

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I confirm that this is my judgment in the case of Mr Craig Jowett -v- Javelin Saw Doctor Ltd 4106721/2020 and that I have signed the order by electronic signature.

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	Employment Judge:	Beyzade Beyzade
15	Date of Judgment:	22 June 2021
	Date sent to parties:	23 June 2021