



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Ms A Hadley (1)

Ms S Creech (2)

Coaster Café Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video) ON 4th August 2021

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimants: in person

For the Respondent: Mr P Clark, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that

- (1) The First Claimant was dismissed by the Respondent on 16th June 2020.
- (2) The Second Claimant was dismissed by the Respondent on 2nd July 2020.

REASONS

Background and Issues

1. The respondent is a café in a seaside resort town. The claimants were counter assistants and had continuity of service. They were laid off on 3rd January 2020 with a view to their returning to work in about April 2020 when the holiday season picked up. The Covid 19 lockdown on 23rd March 2020 prevented their return to work as originally expected by the respondent. The claimants claim unfair dismissal.

2. The issue before me is whether and if so when the claimants were dismissed; whether their claims were presented in time; whether they were presented within the primary time limit; and if not, whether time should be extended pursuant to the relevant statutory provisions.

Proceedings and evidence

3. I was provided with a file of documents of 72 pages. Witness statements were provided by both claimants, by Ms D Prosser and Mrs G Mandely, both directors of the respondent café. The witnesses were cross examined.

The findings of fact

4. It is not my function to resolve each and every disputed issue of fact. What follows are the relevant factual findings in relation to the issues. Those findings of fact are made on the basis of the evidence before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents. Ms Mandley's evidence was very short; apart from Ms Mandely I found none of the witnesses to be entirely reliable.

5. Ms Hadley and Ms Creech were both employed by the respondent in about 2012 as counter assistants in the respondent café. The commencement date of one of the claimants is in dispute but this issue is not a matter for this Tribunal. It is not disputed that the claimants have continuity of employment by reason of the TUPE regulations when the business was taken over by Ms Prosser, Ms Mandley and one other in 2019.

6. On 3rd January 2020 the claimants attended a meeting with Ms Prosser and Ms Mandley. They were paid their December 2019 wages. Ms Prosser informed the claimants that she had insufficient work for them during the winter months and that she was laying them off, with the expectation that they would hopefully be able to return to work in April 2020 when business picked up.

7. At the close of the meeting Ms Mandley suggested to the claimants that they should resign in order to obtain a P45 and be in a position to claim benefits. The claimants did not resign.

8. The claimants individually sought advice from the CAB on 20th and 23rd January 2020 about their employment rights. There appeared to be little communication between the respondent and the claimants personally from about February 2020 until they lodged tribunal proceedings, all communications with the respondent being undertaken on their behalf by CAB.

9. The country went into the first lock down on 23rd March 2020.

10. The claimants had no statement of particulars of employment or employment contract and therefore there was no express contractual right for the respondent to lay the claimants off without pay on 3rd January 2020. On 2nd April 2020 the CAB on the claimants' behalf, commenced Early Conciliation through ACAS claiming breach of contract, lay off pay and statutory holiday pay. The claims were brought within the statutory time limit which commenced on 3rd January 2020.

11. The Early Conciliation certificates were issued on 17th April 2020. The statutory time limit extension by virtue of the Early Conciliation provisions was therefore 17th May 2020.

12. During late January and early February 2020 Ms Hadley had social messaging exchanges with Ms Prosser. On 6th February 2020 Ms Prosser messaged Ms Hadley to say "*please stop telling people you are suing us because people are telling me. If this continues we will have no option than to sue you for defamation of character.*"

13. When Ms Hadley showed the message to CAB, she and Ms Creech were instructed by CAB not to speak to Ms Prosser personally or to reply to her messages. The claimants faithfully followed that instruction.

14. Despite completing the Early Conciliation process, no proceedings were brought before 17th May 2020 by the claimants. Over a period commencing late January 2020, and until late June 2020, CAB were in discussions with the respondent regarding the sums owed to the claimants by way of holiday pay and arrears of wages, and for the issue of their respective P45 and P60.

15. On 26th May 2020 the claimants saw on social media that the respondent had bought a brightly coloured catering van. This annoyed the claimants who felt that their still outstanding arrears of wages and holiday pay should have been settled before the respondent made any purchase of the van.

16. On 1st June 2020 Ms Prosser messaged Ms Hadley to say that she had been informed by CAB that the claimants wished to return to work and asked whether that was the case? Neither claimant replied to Ms Prosser because of the instruction given by CAB not to communicate directly with their employer. It is apparent that CAB did not reply to that question on a timely basis.

17. On 3rd June 2020 Ms Prosser messaged Ms Hadley asking "*are we going to try to sort this or would you like me to leave you alone. CAB isn't responding to me and I want to get this sorted.*" The claimants did not reply personally but CAB eventually replied in the course of without prejudice correspondence which

the Tribunal has not seen and is therefore not aware of the response to Ms Prosser's question.

18. On 23rd June 2020 the Government gave notice that the lock down would be lifted on 3rd July 2020. Apart from Ms Prosser's email of 1st June 2020, there is no evidence before me that the respondent and the claimants had any discussion about the claimants recommencing their normal hours (or amended hours) when the café opened.

19. On 2nd July 2020 the six month limitation period to bring a redundancy pay claim (commencing on 3rd January 2020) expired.

20. The respondent café opened on 4th July 2020 without the claimants returning to work. There was still no resolution of the claimants' monetary claims.

21. On 23rd July 2020 the second Early Conciliation certificate was issued relating to unfair dismissal, redundancy pay and also a repetition of the outstanding monetary claims which were the subject of the first period of Early Conciliation. Neither of the claimants spoke to the ACAS conciliator personally at any stage. All communication with ACAS and with the respondent was by the CAB on the claimants' behalf. Ms Prosser's evidence was that she had had no contact with ACAS at all during any early conciliation period.

22. It is not disputed that the respondent recruited a new part time member of staff to the café and placed a welcome to him on the café's Facebook page. The date on which the recruitment was made and exactly when the welcome of the new recruit on social media took place, is not clear. There is no date on the screen shot of the social media post.

23. Ms Hadley said in cross examination that she saw the social media post on 27th July 2020. Ms Creech said in cross examination that she saw it on 23rd and 24th July 2020. The claim form claims that the claimants saw from the social media post that there was a newly recruited counter assistant at the café on 22nd July. At the case management preliminary hearing on 31st March 2021 the Employment Judge referred to the claimants settling on 22nd July 2020 as the date that they became aware of the social media post welcoming the new counter assistant. The respondent says that they recruited the new counter assistant on 24th July 2020.

24. A claim form was filed with the tribunal on 29th July 2020 bringing claims of unfair dismissal; redundancy pay; arrears of pay; notice pay; and failure to provide employment particulars.

25. The Ms Creech claims that on 23rd July 2020 it became clear to her that the respondent had recruited a replacement for the claimants and that she no longer wanted restitution of her job as trust and confidence had been broken.

26. The new recruit to the café was on a zero hours contract.

27. Ms Hadley pleaded that her employment terminated on 16th June 2020 when she reached the conclusion that because of the Covid pandemic the respondent café was unlikely to be a position to employ her and she needed to bring matters to a close so she could move on. When asked in cross examination what had prompted her decision on that date, Ms Hadley could give no explanation and seemed unaware of the date. She insisted she had seen the social media post regarding the new counter assistant on 27th July 2020 and that had been the date she accepted her employment ended.

Submissions

28. Briefly stated, the respondent's submissions were that:
- a. the respondent relies on paragraph 5 of the grounds of resistance that the respondent did not dismiss the claimants but if the tribunal found that it had dismissed them, the date of dismissal would be 3rd January 2020;
 - b. in para 10 of the grounds of resistance if the tribunal found that the claimants' employment terminated on 3rd January 2020, the time limit for filing a claim was 17th May 2020;
 - c. the claimants had plenty time to submit an ET1 before 17th May 2021 following early conciliation between 2nd April -17th April 2020;
 - d. no reasonable explanation has been given as to why the claimant's could not have submitted their claim within that time period;
 - e. the national pandemic had no bearing on the claimants' abilities to submit a claim during that correct time period;
 - f. it is inconceivable that the CAB would not have advised the claimants about time limits and the submission of their claim form to the Employment Tribunal.
29. The claimants' submissions briefly stated were that:
- a. whilst they understood the effect of the pandemic had on the availability of work in April, the respondent never sent any messages to say what was happening; no definitive date to come back to work was provided;
 - b. a message on social media was not sufficient. The claimants had been promised holiday pay last year; and were still waiting for their P60s;

- c. they had never said they weren't going to go back to work for the respondent and they were waiting for a return date officially in writing;
- d. trust had gone when the respondent recruited a member of staff in July 2020 and they had heard nothing about a return date. They had trusted the respondents and therefore had not commenced proceedings after the first period of early conciliation.

The Law

30. Section 18A of the Employment Tribunals Act 1996 provides, so far as material:

“(1) Before a person (“the prospective claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

31. S95(1)(c) provides:

(1) For the purposes of this Part an employee is dismissed by his employer if ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

32. S111 (1) and (2) provide that a claim for unfair dismissal must be presented to the Employment Tribunal before the end of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Conclusions

33. I remind myself of the first issue to be determined – were the claimants dismissed? If they were dismissed, when were they dismissed? The respondent says that they did not terminate the claimants' employment as counter assistants; the claimants therefore remain employed throughout and were still employed. That contention became untenable at the very latest when the claimant's filed an ET1 claim form for unfair dismissal.

34. Ms Creech says that she did not resign but was dismissed by the respondent's conduct which was inconsistent with her continuing employment on about 24th July 2020. Ms Hadley claims that she was dismissed on 27th July 2020 on the same ground as Ms Creech which is in contradiction to the her pleaded dismissal date of 16th June 2020.

35. At the meeting in 3rd January 2020 the claimants were told that they were being laid off and hopefully the work would pick up when the Spring season started. The covid pandemic and lock down prevented the respondent café from trading until early July 2020. The claimants were confused by the suggestion from Ms Mandley that they should resign so a P45 could be issued and the claimants could sign on for state benefits. The claimants did not know if they had been dismissed or not. They requested their respective P45 but none was ever issued by the respondent. The claimant's did not resign. The claimants were not dismissed on 3rd January 2020. It did not become evident until 23rd March 2020 that their work could not recommence in April 2020 as the respondent had hoped, because of lock down. Thereafter there is a failure by the respondent to deal with its employees in a responsible way.

36. There is considerable confusion around the date that Ms Creech became aware of the recruitment of another counter assistant which she relies on for a termination date of 24th July 2020 on the basis of an irrevocable breach of trust and confidence by the respondent. Ms Creech's oral testimony contradicted her pleading. I find that the date of knowledge of the new recruit is not really relevant however, as the new recruit did not replace either or both of the claimants. He was on a zero hours contract and they were not.

37. I find that the point of termination of Ms Creech's employment was 2nd July 2020 when CAB commenced on her behalf Early Conciliation for a second time just within the statutory time limit for bringing a redundancy pay claim under S164 ERA 1996, six months after the meeting on 3rd January 2020. The commencement of Early Conciliation for a redundancy payment is inconsistent with a continuing employment relationship beyond 2nd July 2020. It is not an issue for this Tribunal to consider the applicability of S164 to the facts of this case.

38. Ms Hadley's termination of employment was on 16th June 2020 because at that point it became clear to her that the respondent could not continue to employ her. That is what she has pleaded in the ET1 grounds of complaint and in the absence of any plausible explanation why she drew back from that date and aligned the date of termination of her employment and the reasons for its termination with Ms Creech's, the termination date for Ms Hadley remains as pleaded, 16th June 2020.

39. Although the claimants were in negotiation with the respondent over the period April - July 2020 with CAB acting on behalf of the claimants, those negotiations were fruitless.

40. At the point that the claim form was lodged in the Tribunal on 29th July 2020, the monetary claims for lay off pay and holiday pay were more than two months out of time (expiry 17th May 2020 under S207B Employment Rights Act 1996). The second period of conciliation does not extend time for the issue of proceedings in relation to the matter of the first period of early conciliation. The second period of early conciliation has no statutory relevance: **HM Revenue and Customs v Garau 2017 ICR 1121**. The monetary claims were subsequently dismissed on withdrawal.

41. That leaves only the unfair dismissal claim to consider. If the claimants had issued tribunal proceedings within the statutory time limit, ie. by 17th May 2020 as extended by S207B, for their monetary claims, (which they did not) they would have been able to apply to amend those proceedings to add subsequently a claim of unfair dismissal and redundancy pay without entering into a second period of ACAS Early Conciliation.

42. There is insufficient evidence to reach a conclusion that the claimants could and should have filed an unfair dismissal claim by 17th May 2020 because they must have known their employment had been terminated by that date. That, in any event, is not the respondent's expressly pleaded case. The respondent only states without further explanation that the unfair dismissal claim is out of time. It clearly is not out of time as it was filed within three months of the dismissal date in respect of each claimant.

43. I addressed my mind to whether the employer/employee relationship had broken down much earlier than 16th June in Ms Hadley's case and 2nd July 2020 in Ms Creech's case. I am aware from the very limited evidence that there had been a souring of the relationship at the very least between Ms Hadley and the respondent as early as February 2020. I also note that the claimants failed to respond to Ms Prosser's emails of 1st and 3rd June on a timely basis that they wished to return to work, or that they did not wish to return. That is also unsatisfactory and suggests that by early June 2020 neither claimant wished to return to work and wanted satisfaction of their monetary claims only. However I can only base my decision on dismissal on the available evidence to the extent that it satisfies the civil standard of proof in a situation. In a situation where there has been a complete sustained failure of open communication between the parties for which the Covid pandemic cannot be blamed, I am not in a position to fill in the gaps in the evidence and must make the decision on what is available.

44. The claims for unfair dismissal as stated, are in time under S111. **Compass Group UK & Ireland Ltd v Morgan [2017] ICR 73** is the authority that a second Early Conciliation certificate to bring the unfair dismissal claims is not required and it did not matter that the first Early Conciliation certificate had preceded a subsequent event (in this case, the claimants' respective dismissals).

The word “matter” in section 18A(1) Employment Tribunals Act 1996 was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed.

45. I am satisfied that under S95(1)(c) Ms Hadley was dismissed on 16th June 2020 and Ms Creech on 2nd July 2020 when they each finally accepted that the respondent’s wholly unacceptable prevarication regarding their employment could not longer continue. The effective dates of termination were 16th June 2020 and 24th July 2020.

46. It is the responsibility of the business owner as employer, with the assistance of their professional advisors, to provide clarity on their employees’ status and to meet the business’s statutory employment obligations. It is an essential part of running a business to comply with employment law, with no exemption for lack of knowledge even for small businesses. There is ample information free of charge on the internet, plus access to the ACAS helpline.

47. The unfair dismissal claim is not time barred because it post dated the expiry of the first conciliation certificate prior to the existence of the unfair dismissal claim. The unfair dismissal claim can rely on the first period of conciliation as it related to the ‘matter’ of that first period of Early Conciliation.

48. The claim to go forward is one of unfair dismissal on the basis of an irrevocable break down of trust and confidence which the claimants accepted on 16th June 2020 and 2nd July 2020 respectively.

**Employment Judge Richardson
Date: 17 August 2021**

Sent to the Parties: 26 August 2021

FOR THE TRIBUNAL OFFICE