EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110118/2021

Open Preliminary Hearing Held by Cloud Video Platform (CVP) on 22 October 2021 and on considering later written material from both parties

Employment Judge: Russell Bradley

Velizar Kosev — **Claimant**
Not present but written representations

Secur-it Group Ltd — **Respondent**
A Mcleod
Security Operations Manager

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

1. The claimant's effective date of termination was not 14 March 2021
2. A final hearing should be fixed to consider all issues including; what was the claimant's effective date of termination?

REASONS

Introduction

1. In an ET1 presented on 21 June 2021 the Claimant maintained a claim of unfair dismissal and for a redundancy payment. He also indicated in it that he was owed "*other payments*" and for furlough payments. The claims were resisted. The ET3 attached 5 exhibits. The parties disagreed as to the dates of employment. While the disagreement on the start date was minor (11 May or 14 May 2019) the disagreement on the effective date of termination (15 June (ET1) or 14 March 2021 (ET3)) raised the question of whether the claimant had the necessary service to claim unfair dismissal. In an email of 27 July 2021 the respondent asserted that all of the documents submitted to that point in time (including the 5 exhibits) contain dates of when the incidents occurred "*which clearly prove that the claimant had less than 2 years' service*."
2. By letter dated 10 August 2021 the tribunal advised parties that an open preliminary hearing would be fixed to determine the question of whether the claimant has qualifying service (2 years) to claim unfair dismissal. A notice of hearing convening this hearing gave notice of that issue.
3. On the morning of 22 October and prior to the start of the hearing, the claimant emailed the tribunal to say that he would not be appearing in person. He said "*I no longer reside in the United Kingdom. Due to personal reasons, and responsibilities that I now have, I will not be able to attend the hearing*." The respondent was represented by Andrew Mcleod who also gave evidence.
4. The respondent relied on the 5 exhibits attached to the ET3. With his email of 22 October, the claimant provided 11 screenshots of What'sApp messages spanning the period 5 January to about 15 March 2021 albeit not all of them show dates. Mr Mcleod saw them.
5. In the course of this hearing reference was made to a written contract between the parties. After the conclusion of the hearing Mr Mcleod provided it by email (copied to the claimant). I directed that the claimant should provide written comment on it within 7 days of 25 October, which he did by email on 1 November. To the extent relevant I have taken it into account.

The issues

6. The primary issue for determination as per the notice of hearing was whether the claimant has qualifying service (2 years) to claim unfair dismissal. The particular issue was what was the claimant's effective date of termination? And in turn was it, as asserted by the respondent, 14 March 2021?

Evidence

7. Evidence was heard for the respondent from Andrew Mcleod.

Findings in Fact

8. From the evidence, the tribunal forms and file, and written representations, I found the following facts admitted or proved.

9. The claimant is Velizar Kosev.

10. The respondent is Secur-it Group Ltd. The respondent provides three types of service being IT/cyber security, CCTV/camera security and "*guarding*" for high end retailers. The claimant was employed as a security officer in the guarding service. His employment began on 11 or 14 May 2019. There is no written contract or statement of terms and conditions of employment bearing the claimant's name, details or signature. The claimant indicated in his email of 1 November 2021 that he recognised that the terms produced by the respondent refer to a period of notice (to be provided by either party) of four weeks. Those terms provide that notice by the employee should be in writing. There is no indication that the employer should do likewise.

11. For a time prior to early 2020 the claimant was employed by the respondent to work at stores operated by Sainsbury's. In January or February of 2020 he began work at Jenner's department store, Princes Street, Edinburgh. His primary duties were to deter and/or detain shoplifters. Mr Mcleod was the claimant's line manager. His opinion was that the claimant was an intelligent, able officer.

12. Between about March and about August 2020 and as a result of lockdown, the claimant did not work at Jenner's. He received furlough pay in that period. He returned to work in or about August 2020.

13. In early January 2021 the respondent hosted group chat webinars for some of its staff. One purpose of doing so was to advise them (including the claimant) of the fact that Jenner's store was to close. The respondent understood at that time that it was to close on or about 3 May 2021. At or about that time there were What'sApp messages between the claimant and Mr Mcleod in which the claimant complained that the amount of his pay was incorrect and less than it should have been. That dialogue appears to have continued until at least early March. By 13 February 2021 the respondent knew that Jenner's store on Princes Street was definitely to close. At about that time, Mr Mcleod was speaking to his management team about looking for other contracts. He had in mind possible contracts with Sports Direct and Matalan. Part of his intention was to attempt to retain the claimant (and a colleague) in employment. That was because the claimant was a good employee.

14. On or about 13 February 2021 Mr Mcleod had a video call with a number of the employees affected by the closure of Jenner's. The claimant was not able to attend it. On that call, Mr Mcleod told them all that Jenner's was definitely closing. Some employees of the respondent were dismissed shortly thereafter.

15. On 5 March Mr Mcleod told the claimant by telephone that his last payment would be on 19 March. On 5 March and in the course of What'sApp dialogue with the claimant about pay, Mr Mcleod said, "*Also next pay run will be your last payment as jenners is closing. We cant keep you on the job retention scheme after a week on Monday as jenners will not be reopening*." The claimant replied saying, "*Hahaha. Thanks. I appreciate that*." This exchange is shown on the respondent's exhibit 4. Mr Mcleod replied and said, "*Sorry buddy I'm trying to get them to continue the payments until may when it officially closes I will keep you updated as soon as I know more*." The reply is on one of the 11 pages provided by the claimant. The conversation continued on 19 March. The claimant replied that day saying, "*Hello Andy. Hope you're well. Is today's payment the final payment I will be receiving? Because it makes no sense as the job retention scheme is extended to the*

end of April and we officially close the store on the 3rd of May. If the £574.01 I received today is redundancy payment, please let me know. I have asked the office countless times, if they've submitted my tax and I received a £100 fine notice that they have not for the period 2019-2020." Mr Mcleod replied that day saying, "*Send me the fine notice please and I will get that sorted and I'm still challenging them about his being your final payment as it stands it is but I'm working on it*." Very shortly thereafter, the claimant forwarded a screenshot of a self-assessment unique taxpayer reference which showed a balance owed of £100. He followed it with a message saying, *"Okay, I understand. When they do confirm whether or not that is the case, let me know if I need to hand in my uniform or anything else. I will expect them to proceed with the redundancy payment. Thank you, Andy.*" The next message is the latest in time which was produced. Mr Mcleod replied in it saying "*will do sir*."

16. On 19 March the claimant spoke with his area manager. That conversation was the last contact between the parties.

17. The respondent's 5 exhibits were:-

    1. Email of 15 March from the respondent's sales ledger/credit control manager to Amanda (to which the claimant was not a party) referencing a P45 for him dated 14 March 2021

    2. P45 showing a leaving date for the claimant of 14 March 2021

    3. Respondent's internal log of employment record for the claimant

    4. Screenshot of What'sApp messages on 5 March 2021

    5. Table of 6 payments in the period 21 December 2020 to 14 March 2021

18. The claimant was not formally or informally contacted by the Respondent after 19 March.

19. He began early conciliation on 2 June 2021. The certificate was issued on 15 June 2021.

20. He was made aware on or about 15 June 2021 of his dismissal when an ACAS appointed conciliator successfully established contact with the Respondent. He was not informed of when he was made redundant.

Comment on the evidence

21. Mr Mcleod gave open and honest evidence. He had seen the claimant's material.

Submissions

22. Mr Mcleod did not make an oral submission. I summarise here the respondent's written position on the issue. The claimant was told verbally and by message on 5 March 2021 that he would no longer be kept of furlough. "*Therefore, he was provided with almost 2 weeks' notice*" (see the ET3 form at box 5.4.) "*All the documents submitted (*meaning the 5 exhibits*) contain dates of which the incidents occurred, which clearly prove that the claimant had less than 2 years' service*." (email of 27 July 2021 from the respondent to the tribunal noted above).

23. In his email of 22 October the claimant said that on 5 March he was not informed that he would not be kept on furlough, rather he was misled into believing it was an issue in the process of being resolved. In his email of 1 November he said, "*At the time I was still disputing the inconsistency with the Furlough payments, and the later unexplained complete stoppage of these payments. There was no clear response as to why these payments were stopped mid March, when Jenners' official closing date was the 3rd of May. This can be seen in the Whatsapp messages on the 5th of March*."

The law

24. Section 108(1) of the Employment Rights Act 1996 provides that 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.

Discussion and decision

25. It appears to me that this hearing was fixed primarily on the respondent's contention that the contract between the parties ended on 14 March 2021. The factual basis for that contention was that the claimant was given notice of termination of almost 2 weeks on 5 March. That notice is said to have been by What'sApp message in the terms noted at paragraph 15 above. Three points occur to me. First, it is not notice of termination of the contract. It is, instead, notice that the next payment would be the last as the respondent could not keep the claimant on the job retention scheme because Jenner's would not be re-opening. Given Mr Mcleod's wish to retain the claimant in the respondent's employment irrespective of the store's closure and given the ambiguous terms of the message, my view is that it is not notice to termination his employment. Second, looked at in the context of the following messages it is not clear that the claimant's next payment would indeed be his last. In other words those messages increase the uncertainty on the question of notice by the respondent. Third, the message is not notice which conforms to the contract which provides, "*We may terminate your contract by giving you four weeks' notice*." On the respondent's own case the period of notice was not honoured. In my view therefore the effective date of termination was not 14 March 2021. Exhibit 4 which was produced by the respondent does not reflect the whole series of messages between the parties at about the relevant time.

26. Regrettably, however, that does not resolve the issue for this hearing. It is obvious that to make claims of unfair dismissal and for a redundancy payment there requires to be a "*dismissal*". The issue for this hearing was not a competition between two dates from which one would, on the evidence, be

preferred. The claimant asserts in his ET1 that his effective date of termination was 15 June 2021. However, he appears to be relying on that date because, and only because, by then contact had been made by ACAS with the respondent. Early conciliation began on 2 June. The certificate was issued on 15 June. I do not have any evidence that would support a finding that the claimant's effective date of termination was 15 June. I see no basis to assume that it is. I am not convinced that I can decide, solely on the basis that the respondent's position is incorrect, that the claimant's effective date of termination is as he asserts. The question as to when was the claimant's effective date of termination remains a live one. If it was before 11 May 2021 then he does not have the necessary two years' service.

27. The claims should proceed to a final hearing. An issue to be decided at it will be; what was the claimant's effective date of termination?

Other matters

28. As noted above, the claimant no longer resides in the United Kingdom. This hearing was by CVP. The claimant's ET1 indicates that he is able to take part in a hearing by video. It is a reasonable assumption that he remains able to do so irrespective of his place of residence. When listing for a full hearing, parties should be asked to confirm that they remain able to take part by video.

Employment Judge: Russell Bradley
Date of Judgment: 15 November 2021
Entered in register: 17 November 2021
and copied to parties