



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Ahmed

**Respondent:** The Furniture Company (GB) Limited

**Heard at:** Manchester (by CVP) **On:** 21 December 2021

**Before:** Judge Cowx (sitting alone)

## REPRESENTATION:

**Claimant:** Mr B Henry of counsel

**Respondent:** Ms C Goodman of counsel

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This was a public preliminary hearing conducted remotely by CVP on 21 December 2021. The parties did not object to the case being heard remotely.
2. By a claim form presented on 25 June 2020 the claimant brought a claim against the respondent for unfair dismissal, redundancy pay, holiday pay and arrears of pay.
3. The respondent resisted the claims of unfair dismissal and to redundancy pay on the basis the tribunal has no jurisdiction because the claimant did not have the required 2 years of continuous employment. The issue the tribunal had to decide was whether there had been a break in continuous employment in 2018 when the claimant went to Pakistan for five weeks.
4. The claimant Mr Ahmed was represented by Mr Henry and the respondent by Ms Goodman.

5. I was provided with a copy of an agreed electronic bundle of documents together with witness statements from the claimant, the respondent and two witnesses for the claimant, Mr Bukhari and Mr Hussain.

6. Live evidence was given by the claimant Mr Ahmed and his witness Mr Bukhari, and for the respondent by Mr Shahzad Aslam and Mr Mohammed Aslam.

### **Facts**

7. In making my findings of fact, I have taken into account the submissions made on behalf of the parties and the documents that I have been taken to during the hearing.

8. The claimant was first employed the respondent from 8 September 2013 as a loader and packer in the respondent's furniture business.

9. In closing submissions, Mr Henry suggested that the conversation that took place between Mohammed Aslam and Mr Ahmed on 17 or 18 August 2018 was the "start and finish of this matter". I agree that that conversation certainly was a logical starting point for determining the facts of this case.

10. There is no dispute that a conversation took place between the two men, namely the employer and employee, and I find it makes no material difference whether the conversation took place face to face or on the telephone. I put this inconsistency down to an innocent lapse in memory due to the time elapsed.

11. The substance of the conversation is essentially agreed. Mr Ahmed informed his employer that an emergency situation had arisen in his home country of Pakistan, that he had purchased an air ticket to go there and was unsure when he would return. In fact, he returned some 5 or so weeks later.

12. It is the claimant's case that his job was left open for him, that is to say there was a contract of employment still in place and that his employment was not terminated. When he returned from his long absence in Pakistan, he carried on working as before with no break in continuity of employment.

13. Both Mr Mohammed Aslam and Mr Shahzad Aslam disagree. They assert it was company policy that whenever an employee wished to take more than 2 weeks leave, their employment was terminated.

14. I heard evidence from Mr Shahzad Aslam, who said this policy was applied consistently across the company to Pakistani and non-Pakistani employees. Approximately 50% of the company's employees were of Pakistani origin and many would return to that country for long periods, in which case it was not practicable for the company to retain those individuals on the company payroll.

15. If a job was available on their return, then very often they would be re-engaged but this was not guaranteed. Indeed, Mr Bukhari, a witness for the claimant, accepted that he understood he was not guaranteed work with the

company when he returned from long leave in Pakistan, although he refused to accept that his own employment was terminated. I found Mr Bukhari's evidence on this point to be incompatible with itself, by accepting that there was no guarantee of work when he returned, he must have understood that his employment was terminated when he took such long leave from the company.

16. It is unfortunate that the respondent relied upon no written contracts of employment which would have prevented any misunderstanding of the sort that may have arisen in this case and the tribunal was told that this has now been remedied. But the tribunal is reminded that this was a small company with a maximum of 35 employees and at times as few as 17, and so systems and processes may not have been as efficient as they might have otherwise been.

17. I find the claimant's assertion that his employment continued in circumstances when he himself did not know when he would return to the UK to be implausible.

18. Conversely, I find as entirely plausible the respondents' assertion that as a small business it could not permit its employees to take long and sometimes indefinite periods of absence. I found this position to be consistent with the realities of running a small business. It may be that on a case-by-case basis the respondent was in a position to grant longer periods of absence but equally I find the policy they say was in place was not unusual or unreasonable.

19. I found both Mr Mohammed Aslam and Mr Shahzad Aslam to be convincing witnesses. They provided detailed witness statements and Mr Shahzad Aslam in particular gave persuasive responses to questions in cross examination about the company's record keeping and why certain documents such as P45s were not provided. I am satisfied the reason he did not comply with the request for a copy of the claimant's P45 was because he was acting on the advice of a HR consultant which one would expect in the case of a small business without its own HR department to fall back upon.

20. Mr Ahmed provided a very brief witness statement, and the sum of his oral evidence was essentially to repeat that he believed his employment continued when he went on leave to Pakistan and that he was never provided with a P45 showing termination of employment on 17 August 18.

21. The burden of proof when it comes to determining continuity of employment falls on the respondent and I find that burden is satisfied by the respondent. Not only did the respondents provide persuasive oral testimony, but it was also supported by numerous pieces of documentary evidence.

22. Mr Shehzad Aslam produced screenshots from the company's payroll system, the first of which showed the claimant's first period of employment ended on 17 August 2018. Mr Henry contends that those screenshots are unreliable sources of evidence because they are not contemporaneous, as they were printed off on 23 February 2021. Mr Henry did not go so far as to say the documents were false or fabricated, simply that they were not contemporaneous. I am satisfied that the fact they were printed off for the purpose of these proceedings at a later date does not mean the data contained in the documents is unreliable. I accept Mr Shehzad

Aslam's evidence that it was not possible to alter such data, and this was not challenged by the claimant.

23. Similarly, the P45 which indicates the first period of employment ended on 17 August 2018 was challenged by Mr Henry as unreliable, because the document in the bundle was dated 18 February 2021. I was satisfied by the explanation given for this by Mr Shahzad Aslam that the document was reproduced for the purpose of these proceedings, but the data contained on the form is accurate.

24. Payroll data for the claimant was also introduced which shows that in 2018 the claimant's payroll number changed from 44 to 52 and on 6 October 2018 Mr Shahzad Aslam arranged for Barclay's, the respondent's bank, to set up a new payment to the claimant's bank account. I find that the change in payroll number and the setting up of a new employee payment supports the respondents' case which is that Mr Ahmed's employment was terminated then restarted at a later date.

25. The most compelling piece of documentary evidence which supports the respondent's case, and the termination of employment, is the letter dated 13 November 20 sent by HMRC to the claimant which clearly shows two separate periods of employment; the first period ending on 24 August 18, which is consistent with the termination of employment at about that time, as asserted by the respondent, when one takes a week's notice into account.

26. Whilst it is possible documents produced by a respondent company might be manufactured (and I stress I do not find that to be the case in this instance), the letter from HMRC comes from a reputable and independent source, which I give substantial weight to as evidence supporting the respondent's case.

27. I have taken into account the evidence of Mr Bukhari and Mr Hussain, even though the latter did not appear to give oral evidence and was not tested in cross examination.

28. With regard to the latter, I note that Mr Hussain also challenged the respondents' assertion that his own continuity of employment was broken and on this Mr Shazad Aslam wrote to Mr Hussain on 10 July 20, explaining the reasons why his continuity of employment was broken. The reasons given in that written explanation were, I found, consistent with the explanation given to Mr Ahmed.

29. I find this also supports the respondent's case that this was a policy applied consistently across the company and this was the well understood custom and agreement between employer and employee.

30. Mr Henry contends that Mr Ahmed did not resign therefore his employment must have continued. Although Mr Ahmed may not have used the words "resignation", either orally or in writing, I find that his actions alone clearly amounted to resignation. Having satisfied myself that the respondent company did have a policy in place to the effect that employment would be ended by agreement if employees wished to take more than two weeks absence, then any employee who chose to do so was in practice accepting that his employment was coming to an end.

## The Law

31. There is no dispute on the law in this case.

32. The relevant law is to be found in the Employment Rights Act 1996 at:

*Section 94(1) An employee has the right not to be unfairly dismissed by his employer, and*

*108(1) Section 94 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.*

Section 210(5) creates a presumption of continuity of employment, but I find that the respondents in this case displaced that presumption by satisfying the Tribunal that there was a break in continuity.

Section 212, specifically 212(3(a)). Whether or not the five-week period the claimant was absent in 2018 counted in computing his period of employment. In this case the Tribunal found that the claimant's absence from work was not in circumstances that he was regarded as continuing in the employment of his employer.

## Applying the law to the facts

33. There is no dispute that the claimant was an employee. What I have to determine is whether the claimant had been continuously employed for a period of not less than two years ending with the date of effective termination?

34. The precise issue is whether there was continuous employment between 18 August 2018 and 25 September 2018?

35. For aforementioned reasons I find there was a break in employment between 18 August 2018 and 25 September 2018 because I find the claimant's first period of employment ended on or about 17 August 2018 when he chose to terminate his employment in order to take a long holiday to Pakistan.

36. I also find that the claimant was not absent from work by arrangement or by custom as he claimed. I find the custom was not for employees to take long and potentially undetermined periods of leave whilst retaining their employment, nor was it the arrangement between the respondent, the claimant or other employees.

37. I find that the custom, practice and agreement within the respondent company at the time was that no more than 2 weeks leave was permitted at any time and those who wished to take a longer period had to terminate their employment. The nature of the respondent business was such that it was sometimes able to offer further employment to employees such as the claimant come on Mr Bukhari and Mr Hussain, but this was not guaranteed.

38. For the above reasons, the claimant's claims for unfair dismissal and a redundancy payment were struck out for lack of jurisdiction.

39. The claimant's claims for notice pay, holiday pay and arrears of pay were dismissed unless the claimant applied for those matters be listed for hearing within 28 days of the sending of the written judgment.

Judge C J Cowx  
15 March 2022

REASONS SENT TO THE PARTIES ON

25 March 2022

FOR THE TRIBUNAL OFFICE