



EMPLOYMENT TRIBUNALS

Claimant

Respondent

O Singh

v

MAC-RK Precision
Engineering Limited

Heard at: Watford
Before: Employment Judge Anderson

On: 21 April 2022

Appearances

For the Claimant: Mr G Singh (lay representative)

For the Respondent: Mr N Sharma (respondent's operations manager)

JUDGMENT

1. The claimant's claim for night time allowance pay is dismissed upon withdrawal.
2. The claimant's claim for unfair dismissal is dismissed.
3. The claimant's claim for notice pay is dismissed.

REASONS

1. By a claim form presented on 17 June 2020 the claimant complained of unfair dismissal, failure to pay notice pay and failure to pay a night time allowance.
2. By a response form received on 28 November 2020 the respondent resisted the complaint.

The Issues

3. At a preliminary hearing on 12 August 2021 before EJ Bloch QC the parties agreed the following list of issues:
 - a. Is the correct respondent (employer) Mr Sharma (trading as MAC/RK Engineering), as the claimant contended, or MK-RK Engineering Limited, as Mr Sharma contended.

- b. Was the claimant continuously employed for a period of not less than two years ending with the effective date of termination pursuant to s108 of the Employment Rights Act 1996?
- c. The respondent concedes that if (which the respondent denies) the claimant had the necessary qualifying period of employment under s108 of the Employment Rights Act 1996, the claimant was unfairly dismissed.
- d. Is the claimant entitled to notice money?
- e. Is the claimant entitled to claim a night allowance for time spent working at night?

The hearing and evidence

- 4. The claimant agreed at the outset of the hearing that the proper name of the respondent is MAC-RK Engineering Limited.
- 5. Part way through the hearing Mr Singh, for the claimant, withdrew the claimant's claim for an unpaid night working allowance.
- 6. The claimant was represented by Mr G Singh, a lay representative, throughout the proceedings, and had the assistance of a Punjabi interpreter throughout. The respondent was represented by Mr N Sharma, the respondent's operations manager.
- 7. The tribunal received an agreed bundle of documents running to 83 pages. This included witness statements from the claimant and from Mr R Sharma (witness for the respondent). Both witnesses attended to give evidence in person.

Submissions

- 8. For the respondent Mr N Sharma said that the P45s were reprints showing a reprint date and that the originals had been posted. He said that the contract between the claimant and respondent though not formalised in writing clearly benefited the claimant in particular as he was able to return to India for lengthy periods of indeterminate length. Mr Sharma said the claimant had provided little evidence of continuous employment and had given multiple reasons for his employment breaks whereas the respondent had provided clear evidence of multiple periods of employment, showing a new employee number for each period, enrolment to the pension scheme and holiday pay. He noted that the respondent had offered re-employment to the claimant which he had declined. He said the respondent was within its rights to terminate his employment in March 2020.
- 9. For the claimant Mr G Singh said that the claimant had not received any P45s and so he thought his job was continuing. He noted that Mr R Sharma said that he was the only person without a contract but in written evidence the respondent said that there were many people with the same arrangement. Mr Singh said that the respondent claimed the last P45 was issued in March 2020 but this was not referred to in Mr N Sharma's letter of 1 June 2020. Mr Singh said that the claimant was sacked while others were working. There was no reason given for sacking him rather than other people, or making him redundant.

The Law

10. S94 of the Employment rights act 1996 sets out that an employee has a right not to be unfairly dismissed by his employer.

11. S108 (1) of the Employment Rights Act 1996 states as follows:

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.

12. S212 of the Employment Rights Act 1996 concerns weeks counting in the 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.

[...]

(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,[or]2

(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.

Findings of Fact

13. The claimant commenced employment with the respondent, an engineering company, as a machine operator in or around 1994.

14. The claimant was never provided with an employment contract. He was enrolled in the respondent's pension scheme and had statutory minimum paid holiday allowance from at least 19 March 2016 during his periods of employment. Print outs of the wages paid to the claimant show clearly that pension payments were made and indicate that accrued holiday entitlement was paid at the end of a period of employment.

15. The claimant, who is of Indian origin, with family in India, returned to India for periods of up to two months each year. The time of travel, at least from 2016 to 2020, was during the months of January to March.

16. The respondent terminated the claimant's employment at the beginning of each visit to India, as evidenced from 2016 to 2020 by P45s provided to the tribunal. The P45s show that the claimant's employment with the respondent ended on 28 January 2017, 3 February 2018, 31 January 2019, 5 July 2019, 17 January 2020 and finally 27 March 2020.

17. There was some dispute between the parties on the matter of P45s. The claimant said that he had never received a P45 and Mr G Singh for the claimant noted that all of the P45s in the bundle had a date of 17 or 19 April 2022. Mr R Sharma said in oral evidence that a P45 was issued to the claimant when his employment terminated, and agreed with Mr N Sharma that the date shown at the bottom left of the P45s was the reprint date. The respondent provided a print out of wages paid in each period of employment which corresponded to the dates shown on the P45s. On balance I find that the P45s were produced on or around the leaving date shown on each document and I accept that the date shown on the bottom right is a reprint date. I also find that it is likely they were sent to the claimant. I received no evidence other than the word of each witness but I prefer the evidence of the respondent as the claimant changed his evidence in relation to two important matters during the hearing (reasons for his extended leave and knowledge that he had been offered further employment through his wife), as well as being unable to recall whether he had asked for a reference in 2018 when the reference was in the bundle, whereas I do not find there were such discrepancies in the respondent's evidence.
18. On return from travel the claimant contacted the respondent to ask about employment and the respondent would tell him that he could return. This was the evidence of both witnesses.
19. The claimant returned from a break in India on around 15 March 2020 and was taken back on as a machine operator by the respondent. On 23 March 2020 the lockdown commenced, and the respondent told the claimant not to come to work. The claimant has not worked for the respondent since that time and a P45 shows his last day of employment as 27 March 2020.
20. In or around May 2020 Mr R Sharma of the respondent spoke to the claimant's wife and offered further re-employment. The claimant was too unwell to work and did not return the call.
21. On 18 May 2020 the claimant wrote to the respondent asking it to confirm whether he had been dismissed or made redundant. Mr N Sharma of the respondent responded in a letter dated 1 June 2020 that the claimant did not have sufficient qualifying service for a redundancy payment and had been dismissed a week after he had been last re-employed due to the lockdown.
22. In this letter he also said that a number of the respondent's employees were employed under the same arrangement, in order to facilitate extended breaks of indeterminate length. Mr G Singh for the claimant noted that Mr R Sharma had said in oral evidence that the claimant was the only employee with that arrangement. In oral evidence Mr R Sharma said the claimant was the only employee with a written contract, not that he was the only one who had an arrangement where employment terminated on a long break.

Decision and reasons

23. The claimant claims that he was unfairly dismissed. In order to bring such a claim, he must show that he has been continuously employed for a period of two years or more in accordance with s108 of the Employment Rights Act 1996. Only if he can show this can the tribunal go on to consider whether he was dismissed and if so whether the dismissal was unfair.
24. The claimant claims that he was employed by the respondent from around 1994 and by arrangement, he went away for a couple of months early in each calendar year, returning to work for the respondent on his return to England. He said that he was never issued with a P45 and believed that his employment continued during the periods that he was out of the country.
25. The respondent says that the claimant was employed for various periods from at least 2016 but by arrangement his employment terminated when he went on an extended break and he was re-employed on return if work was available.
26. In counting weeks amounting to a period of continuous employment statute makes allowance for periods of unpaid leave to be counted towards that period where an employee is '*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.*' S212 (3)(c) Employment Rights Act 1996.
27. I do not find that in this case there was any such arrangement. I find that when the claimant took an extended break his employment would be terminated and the respondent would offer work on his return if available. The respondent's evidence was that the claimant would leave for India at short notice and without giving a firm return date. The claimant said that he mentioned to the respondent before he left that he was going and that when he returned, he would call up the respondent and ask about employment. He did not say that he called up the respondent to confirm a pre-arranged return to work date. I do not accept that an employer would operate on the basis that employees could take leave of an indeterminate length with no fixed return to work date and the employer would simply hold open that job for whenever the employee returned.
28. The claimant said that he did not receive any P45s. I have found that it is likely that P45s were sent but even had they not been sent, when Mr N Sharma drew the claimant's attention to a print out which he said showed that the claimant had been issued with holiday pay accrued on termination of his employment in 2017, the claimant agreed that that was what the document showed. I do not find that the claimant could receive accrued holiday pay on termination of employment and remain of the view that his employment was continuing. And I refer again to the claimant's evidence that he would call the respondent on return from a break to see if there

was employment, rather than that he knew he was returning to certain employment, as a further indication that there was no arrangement between the parties that employment continued during the claimant's absences.

29. For these reasons I find that the claimant was not continuously employed for a period of not less than two years ending with the effective date of termination and therefore does not have the relevant qualifying period of employment in order to bring a claim for unfair dismissal. His claim is dismissed.

30. As I have found that the claimant's employment was not continuing, the final period of employment, from 15 March 2020 to 27 March 2020 was for a period of less than one month and therefore the claimant is not entitled to notice pay. The claimant's claim for notice pay is dismissed.

Employment Judge Anderson

Date: 21 April 2022

Sent to the parties on:

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For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.