



EMPLOYMENT TRIBUNALS

Claimant: Mr R Morgan

Respondent: Mr S Burton

Heard at: Carlisle

On:

1 June 2018

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person

Respondent: Ms Levene of Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The tribunal has no jurisdiction to determine the complaints of unfair dismissal or a redundancy payment since the claimant was not continuously employed by the respondent for 2 years at the point of termination.
2. The tribunal has no jurisdiction to determine the complaints of unfair dismissal, failure to pay notice pay, holiday pay or wages since they were presented out of time.

REASONS

1. By a complaint presented to the Tribunal on 14 June 2017 Mr Raymond Morgan made claims against Mr Stuart Burton of Bracken Bank Lodge in Lazonby, Cumbria, for unfair dismissal, age discrimination, a redundancy payment, notice pay, holiday and arrears of pay. The respondent defended the claims.
2. The history of the litigation has been complex. There have been a number of adjournments, but most recently the matter came before Employment Judge Knowles in Carlisle on 26 March 2018 where he directed that the following issues should be determined at this preliminary hearing:

- (1) When did the claimant last work for the respondent?

- (2) Had he, assuming that he is an employee which is not agreed between the parties but can be determined at a later date, at that time two years' continuous service?
 - (3) Which of his claims were brought in time and which were not?
 - (4) Should time be extended because it was not reasonably practicable for the claimant to bring his claims in time?
3. Employment Judge Knowles made orders for the preparation for the determination of those issues. None of those orders were relevant to the claim for age discrimination because that was withdrawn by the claimant at that time and a judgment was made by Employment Judge Knowles to that effect.
4. Before me today the claimant has represented himself as he did before Employment Judge Knowles and Ms Levene of counsel has appeared on behalf of Mr Burton.
5. I have heard evidence from the claimant, from Mr and Mrs Burton, and I have been provided with witness statements from all of them, and I have seen a large volume of documents.
6. The relevant history goes back to when the claimant started working at the respondent's premises in 2015/2016. The reason that it is relevant is because the respondent objects that the claimant, even if he was employed, did not have two years' continuity of service to entitle him to claim unfair dismissal or a redundancy payment.
7. However, both on the basis of the claim form and what he has said to me, it is clear that at the outset of his engagement the claimant considered that he was self-employed. That is hardly surprising bearing in mind that at pages 43-51 of the bundle before me there is a contract for services signed by Mr Morgan dated 13 July 2010 clearly in terms which suggest that as a contractor or subcontractor Mr Morgan acknowledged that he was acting in that capacity. It was expected that the work signed for in July 2010 would take until March 2011 to continue. This was work at Bracken Bank Lodge Estate. It was described in a schedule (page 51). It was work on the lodge, the kennels and roofing and work to complete what is called an "ESA contract", which is essentially woodland and scrub management and tidying.
8. The work arrangement between the parties was still continuing when in May 2014 a fresh contract for services was entered into by Mr Morgan and Mr Burton. I should say that the first contract was signed by Mrs Burton who was then the manageress of the business at Bracken Bank Lodge. Between the two contracts she ceased to do any work at Bracken Bank Lodge.
9. Bracken Bank Lodge Limited, of whom a director is Mr Burton, is an estate providing holiday accommodation, bed and breakfast, kennelling for dogs and at one time was a wedding venue. After Mrs Burton ceased to work as manager, the business continued on a much more limited basis. It is not necessary for me to say what the terms of the continuation were.

10. I note that the second contract in 2014, which again is clearly a contract for services, identifies the same work as was identified in the earlier contract, I suspect that the work had not been concluded, and that is set out at page 58. That contract was signed by Mr Burton and by Mr Morgan, and it was witnessed by Mrs Burton who was present at the time and is dated 26 May 2014.
11. The claimant would attend the premises. He would sign a timesheet when he arrived and when he left, and insofar as there is dispute between him and Mr Burton I am satisfied that Mr Burton's evidence is more likely to be correct. The timesheets kept by the respondent broadly accorded with invoices issued by Mr Burton on a pro forma dated on the date usually at the end of the week when the work had been completed, identifying the hours of work, totting up the hours, deducting some time, usually an hour a day, for tea breaks and lunch breaks, and then he was paid at the rate of £13 per hour. Most of the invoices indicate that money was paid because Mr Morgan has written the word "received" and signed each of the invoices insofar as I have seen them.
12. There were discrepancies in the invoices to start with, particularly Mr Morgan complains that a number of invoices were not disclosed. Mr Burton's evidence was that he disclosed what he had at the time. Mr Morgan has been able to make up the shortfall. He has been able to identify the invoices that were not originally disclosed by the respondent and he has included his, effectively, carbon copies and they have been included in the bundle as well.
13. At some point Mr Morgan has identified his copies which show that at times when Mr Burton recorded him as not working he had worked. What is of significance is that for the vast majority of those, and it is not necessary to identify them individually, there is a discrepancy between the invoices that are marked as "paid" or "paid and received" in which Mr Morgan has written his name at the top of the invoice, typically: From - R V Morgan, Keeper's Cottage, Bracken Bank Lodge, Lazonby, To - Bracken Bank Lodge, Lazonby. Those which he has now produced in copy form significantly, in my judgment, do not contain those written addresses, although they do look similar in other respects.
14. What is of significance is that there are periods of time, even allowing for that, when looking at consecutive invoices, and the books are obviously numbered when printed, at times when the claimant says he is working consecutive invoices show that that is unlikely.
15. But none of that matters to any great significance for although there were said by the respondent to be gaps in his service, and particularly in the months of June, August and September 2015, the significant gaps occur, in my judgment, from June 2016 onwards.
16. Mrs Burton, who has been married to Mr Burton for some 17 or 18 years, tells me, and I accept, that she owns a property in the South of England, which she had acquired in her own name and solely in her own name and paid for herself, prior to marrying Mr Burton. At some time in the past she had wanted to use part of this property as a holiday home and some part of it had been converted. At some point prior to June 2016 she had engaged builders to carry out work as contractors and subcontractors to carry out further works. Those builders were

either unsatisfactory or refused to work for Mrs Burton, it does not matter which, maybe they had other work to do, I know not.

17. As a result of conversations, as I find, between Mr Burton and Mr Morgan in Cumbria, at a point in time when most of the work required under the contracts I have mentioned had been completed, although there was still some ESA work to be done, in June 2016 Mr Burton communicated to Mr Morgan Mrs Burton's wish that she would like him to go and perform work on the property in the South of England.
18. It is common ground between the parties that a calendar drawn up by the respondent from timesheets and invoices for the years 2016 and 2017 (pages 388 and 389) indicates:
 - 18.1. with blue highlighting when Mr Morgan was in Cumbria;
 - 18.2. with a red circle when he was not at work, typically on Saturdays and Sundays for some of the period although other dates are marked in that way as well, and
 - 18.3. with brown or yellow highlighting dates when Mr Morgan was working in the South of England
- 19., It is not in dispute that when working in the South of England that was on Mrs Burton's property in the South of England. It is not suggested by anybody that Mr Morgan did other work in the South of England.
20. What that calendar shows is this.
 - 20.1. Up to 24 June 2016 with some breaks, on Saturdays and Sundays, and some other breaks as well, Mr Morgan worked in Cumbria for the respondent.
 - 20.2. From 22 June until 8 July (a Friday) he worked in the South of England.
 - 20.3. In the following week commencing Monday 11 July he worked in Cumbria.
 - 20.4. He recommenced work in the South of England on 18 July and worked continuously for the rest of that month.
 - 20.5. He worked throughout the month of August taking only 28 August, a Sunday, off.
 - 20.6. He then continued working on 1-2, 5-9 and from 12-26 September. On 27 September he is recorded as not working.
 - 20.7. On 28-30 September and throughout the working days, that is the Monday to Fridays of October, and in November up until 11th of that month in 2016 he was recorded as working in Cumbria.
 - 20.8. He did not work on 14 November, according to the record, and throughout the weeks then commencing 15 November through to 4 December, without break, he worked in the South of England.

- 20.9. He returned to Cumbria and worked there on 15 and 16 December, throughout the following week leading up to the Christmas break, on 28 and 29 December, and worked finally in Cumbria on 1 January 2017.
- 20.10. Then from 4 January 2017, but with some breaks not only at weekends but occasional breaks, some eight days in the period I describe, until 1 March 2017 he worked in the South of England.
- 20.11. Mr Morgan did not work either in the South of England or at Cumbria for the respondent or Mrs Burton thereafter.
21. The significance of that pattern is that assuming for the sake of argument that on 1 January, to put the case at the highest for Mr Morgan, his employment, if he were employed, was terminated by Mr Burton, he then had the period of three months within which to make claims in respect of employment by or work for Mr Burton.
22. Mr Morgan's case however is that when he was working in the South of England that was also work done for Mr Burton. He points to the fact that Mr and Mrs Burton are married. He suggests that it was a repeated request by Mr Burton that he perform work for Mrs Burton. He suggests, although without any evidential foundation, that Mr Burton was funding the work.
23. I have clear evidence from Mr and Mrs Burton that the work was funded only by her. There was been no application by either party for the production of bank statements in this case. It seems to me that it is an assumption made by Mr Morgan that because work was done by Mrs Burton, his employer's wife, on her property that it might have been funded by him. Indeed that might have been done. Spouses are sometimes generous and fund the business undertakings or the personal undertakings of their spouses or partners.
24. In the course of his final submissions Mr Morgan seemed to agree at one point that the question of who in fact funded the South of England work was irrelevant but then submitted that it was not, and I remain confused as to what his final position was in relation to that. The reality is that on the evidence before me I have nothing which casts doubt on Mrs Burton's evidence as to the funding of the work in the South of England. She was not seriously challenged in cross examination that the work in the South of England on her property from 22 June 2016 was done as a result of an agreement between her and the claimant.
25. Indeed, it was not really suggested by Mr Morgan beyond the matters I have described that there was an agreement between him and the respondent that the work in the South of England was to be done for Mr Burton. Mr Morgan points to the fact that he had, since early 2010, worked for the Burtons in one way or another over a period of 6½ years and then found himself out of work when these working arrangements came to an end.
26. There has been the most startling series of subsequent recriminations, allegations of money laundering, tax avoidance or evasion, stalking, criminal conduct and threats made in these proceedings between the parties. I declined to hear evidence about those because the issues I have to decide turn on the questions of the work that was done by the claimant, the basis on which it was

done and when and for whom it was done. I mention those other matters only to say that I attach no significance to them. I make no findings one way or the other as to whether the allegations are correct. They do not help decide any relevant issue.

27. Equally, although it has not been urged upon me, I note that in the course of his witness statement, and to some extent in hers, Mr and Mrs Burton suggest that Mr Morgan had other business interests: the selling of cars; some time that he worked in Kirkoswald for another person helping with a barn. Nothing turns on those matters either in my judgment. An employee may buy and sell cars for profit aside from his employment or do some other remunerative work unless he is restricted by his contract or the work is in conflict with his employer's legitimate interests.
28. The primary issue I have to decide is, on the assumption which I am far from certain is sound that Mr Morgan was an employee of Mr Burton, when did that employment come to an end?
29. If it did not come to an end formally but just expired by eventually, in early 2017, there being no more work nor offer of work and no more acceptance of work, then I can understand why Employment Judge Knowles has identified that date, 1 or 2 January, as to when that employment came to an end. It is often the case that parties do not bring to a formal end their relationships, whether they are terms of engagement of contractors or otherwise. In such circumstances the Tribunal has to infer whether there has been a termination and by what date.
30. The central plank of Mr Burton's case is that to acquire necessary length of service, although there would still be issues in relation to the time he did not work in 2015, but more significantly, latterly, depend largely upon my finding in relation to the relationship between Mr Burton and Mrs Burton over the South of England work.
31. If I were to find that a contract of employment with Mr Burton encompassed both work in Cumbria and in the South of England it would put a different complexion on the claimant's case, and certainly there would be no significant breaks as I apprehend after the week of 21 September 2015.
32. However, if I am not satisfied that that was all one contract, then I have to consider the statutory provisions in relation to the periods of time that I have identified, particularly the period of two weeks at the end of June/beginning of July, a period of ten weeks between July and September, and a further period of four weeks between the middle of November and the middle of December, where there had been more than a single week's break when no work was performed at Cumbria for Mr Burton but work was performed in the South of England for Mrs Burton.
33. If I am against the claimant that there was one contract, as I am, then even if Mr Morgan were an employee, he would not have continuity of service unless he can bring himself within the relevant part of the Employment Rights Act 1996.
34. Against that background and having heard the argument of both parties I turn back to the issues that were identified for me by Employment Judge Knowles,

and having regard to them I then set out the relevant legal provisions and my conclusions.

35. When did the claimant last work for the respondent? On the evidence, I find that he last worked for the respondent on Monday 2 January 2017.
36. Had he at that time two years' continuous service? That depends upon the application of sections 210 - 217 of the Employment Rights Act 1996.
37. The material parts of the sections result in the following analysis of the law relevant for the purposes of determining this case.
- 37.1. Continuous employment is to determine week by week and a week which does not count in computing the length of period of continuous employment breaks continuity of employment (section 210 (3) (4));
- 37.2. employment shall unless it is shown otherwise be presumed to have been continuous (section 210 (5));
- 37.3. continuous employment begins with the day on which the employee starts work (section 211 (3));
- 37.4. any week during the whole or part of which relations are governed by contract of employment count in computing the period of employment and up to 26 weeks in which the employee is incapable of work by reason of sickness or injury, or because of a temporary cessation of work, or because he is absent by arrangement or custom, count in computing the employee's period of employment (section 212);
- 37.5. those provisions are subject to sections 215-217. These relate to employment abroad, industrial disputes and reinstatement after military service. None of those are relevant in this case.
38. So the question then is: which weeks count in computing the period of employment?
39. It was not suggested that in any of the periods that I have identified from 2016 onwards the claimant was incapable of working as a consequence of sickness or injury. One period when he was off as a result of an accident at work it is now common ground occurred in 2012 and is not relevant for today's purposes.
40. Was there a temporary cessation of work? As to that, and as to arrangement or custom as regard the employment continuing, those are matters that have to be looked at as at the time when the cessation or the arrangement or custom occurred. No evidence was put before me by Mr Morgan to suggest that when he went to work in the South of England that was a temporary cessation of work for the respondent, or that there was any arrangement such that he was regarded as continuing in the employment of Mr Burton for any purpose.
41. In those circumstances I find that even if Mr Morgan were employed by Mr Burton under a contract of employment, as to which I have already expressed uncertainty but make no finding, I find that the weeks I have identified are weeks in which there was no work performed under the contract and even if there was a

contract of employment the employee's relationship with his employer was not governed by that contract of employment while he was working in the South of England. In those circumstances I hold that he does not have continuity of service in relation to the complaints of unfair dismissal or for a redundancy payment, for both of which by law he is required to have two years' continuous service, and "continuous" meaning week on week, in order to qualify for those rights.

42. That conclusion is sufficient to dispose of the claims of unfair dismissal and for a redundancy payment. I turn to the separate issue of time limits. The reasoning set out below in respect of unfair dismissal applies equally to the complaints of failure to pay notice pay, holiday pay or wages. The same or identical statutory provisions apply.
43. The primary time limit in the case of the unfair dismissal claim is one of 3 months.
44. For the reasons that I have identified I find that the contract such as it was, whether a service or a contract for work to be done personally with Mr Burton, came to an end on Monday 2 January 2017.
45. The primary time period in which a claim must be presented would then require the claim to be lodged with the tribunal on or before 1 April 2017.
46. That time is extended by an application of the early conciliation provisions. They operate to extend time by the number of days starting with the day after which conciliation begins and ending with the day upon which the certificate is issued.
47. Alternatively, if time expires in the period between conciliation being commenced and one month after the certificate is issued time is extended to the end of that period.
48. Conciliation in this case commenced on 11 April 2017 and the certificate was issued on 19 April 2017.
49. The primary time it had already expired before the claimant began the process of conciliation. Thus he is entitled to assert that the primary time it was extended by eight days which would take it until 9 April 2017.
50. However the claim was not presented until 14 June 2017. On the application of either of the early conciliation extension provisions the claim was not presented in time.
51. In those circumstances the tribunal only has the power to consider extending time if it is first satisfied that it was not reasonably practicable for the complainant to bring the claim in time. Even then the tribunal can only extend time for a further period which it considers reasonable.
52. In this case Mr Morgan therefore had to satisfy me that it was not reasonably practicable for the complaints to be presented by 9 April 2017 and also that an extension of time of over two months beyond that date was a reasonable extension.

53. Mr Morgan said that even in December of the previous year, seeing how things were, he had been to the Citizens Advice Bureau. I have seen a document included in the bundle which has clearly been written by a member of the team at the Citizens Advice Bureau office in the South of England identifying the date of 1 March when Mr Morgan could attend an appointment with a CAB adviser. He told me that he did not attend that appointment because he was not in the South of England at that stage. However the documents, the pay record and the diary, which he agreed was a broadly accurate record, show that he was there, and indeed he accepted in evidence before me that on 1 March at the end of that day he drove back to Cumbria and did not return to the South of England. He said he did not speak to that adviser. He then said he probably did. By then he was clearly aware of the Employment Tribunal process. He tells me he was not aware of the time limits. He did have access to the internet. He did have contact with ACAS, at least by March 2017 because he tells me that he did, and I find on the balance of probabilities that he did speak to the employment adviser at the CAB. He tells me, and I have some difficulty in accepting this, that the time limits were not mentioned by any of those persons. He tells me that he did look on the Government website, the address was given to him by the CAB advisers, about bringing Employment Tribunal claims, and either he did not read, did not see or did not appreciate the time limits and what had to be done in these cases.
54. I did not receive any clear evidence from him as to why he approached ACAS as he did on 11 April 2017 to start early conciliation, nor any direct evidence from him why having got a conciliation certificate dated 19 April it took him until 14 June 2017 to present his claim.
55. The best I had was that between the beginning of March 2017 and 11 April 2017 he was waiting to see whether something would turn up in the way of work in Cumbria, but it did not and that is why he went back to ACAS.
56. I regret to say that I am unable to say that I am persuaded by the claimant that it was not reasonably practicable for him to present his claim within time. He says he did not know of the time limit. Had he done so he would have presented his claim. That is a statement that is often made and understandably made by claimants in the position in which Mr Morgan regrettably finds himself. The position is this: it is for him to satisfy me. Ignorance is only a permissible excuse if it is in itself reasonable. He had access to the internet, he had access to the CAB and he had access to ACAS, and the common experience is that while those bodies, certainly ACAS, do not advise claimants, it is clearly the case that claimants are potentially made aware at all stages of the time limits and the need to comply with them. In those circumstances I regret to say I find that it is not a finding I can make that it was not reasonably practicable for the claimant to present the claim within that period.
57. Even if I were so persuaded I would need to have specific evidence to help me understand why, after the time expired, at the latest as I say 8 days after 1 April 2017, it took the claimant a further 2 months after that date to bring the claim in. I had no evidence that enabled me to do that.
58. All these matters had been canvassed with the claimant by Employment Judge Knowles. All of this information was available to him had he sought it in the course of preparing for this hearing. I recognise that he is a lay person.

59. The position is slightly different in respect of the complaint for a redundancy payment. Here the initial period is 6 months (section 111) and thus that claim was presented in time.
60. I deal with two specific points that I have not touched on: one is that I am satisfied that the calendar produced in relation to 2015 contains at least one error, and that is for 21 August 2015 which I do not think I have mentioned before. There is a date when the claimant is not marked as at work when clearly there is an invoice for the work on that day marked "paid and received" in the bundle before me. Nothing turns on that in the event.
61. Secondly, there was some confusion when the claimant submitted an earlier claim form on 12 June 2017. That claim was withdrawn and dismissed. I recognise that that was a claim presented two days before the claim I am dealing with, and I am satisfied that no difference would have resulted if I was considering the date of presentation to be 12 June rather than 14 June.
62. For those reasons, the conclusion I am driven to is that in respect of all the claims the Tribunal has no jurisdiction to determine them.

Employment Judge Tom Ryan

Date 13 August 2018

Corrected version signed:

Employment Judge Horne

18 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 August 2018

Corrected Judgment and Reasons sent to the parties on:

19 May 2022

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