



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs M Ntaka

v

Damask Catering Limited

Heard at: Watford, (In person)

On: 28 September 2023

Before: Employment Judge Bansal, (sitting alone)

Representation:

Claimant: In Attendance
(Represented by Mr Michael Loizou)

Respondent: Mr Liam Murdin, Counsel

PUBLIC PRELIMINARY HEARING JUDGMENT

1. The Claimant has not been dismissed and remains an employee of the Respondent.
2. The Claimant's complaints of unfair dismissal; dismissal on the grounds of disability; harassment on the grounds of disability; redundancy pay; notice pay; and holiday pay are struck out for lack of jurisdiction.

REASONS

- 1 This is a record of the Public Preliminary Hearing held on 28 September 2023
- 2 This hearing was listed by Employment Judge S Moore at a Case Management Hearing held by CVP on 13 July 2023, at which the claimant was in attendance. At this hearing, EJ Moore decided that a Public Preliminary Hearing was necessary to determine the following issues;
 - (i) whether the claimant was dismissed on 3rd May 2022;.
 - (ii) if the claimant was dismissed decide whether the complaint for unfair dismissal has been brought out of time and/or whether the tribunal has

- jurisdiction to hear it;
- (iii) If the tribunal considers it appropriate to do so, decide whether any of the complaints should be struck out on the grounds they have no reasonable prospect of success or a deposit order made on the grounds they have little reasonable prospects of success.
 - (iv) make case management orders necessary for the/any remaining claims to be heard at the Final Hearing on 25-28 March 2024.
- 3 In preparation for this hearing, EJ Moore made case management orders namely;
- (i) by 10 August 2023 the respondent to serve an Amended Response;
 - (ii) by 24 August 2023 the parties to give disclosure of documents to relevant to the issues to be determined at today's hearing;
 - (iii) by 7 September 2023 the respondent to send to the claimant the bundle for today's hearing;
 - (iv) by 14 September 2023 the parties to exchange witness statements.
- 4 In readiness for this hearing, the respondent representative filed at the tribunal an electronic bundle of documents containing 87 pages ("bundle"), and a witness statement of Mr Ali Bidarbakht for the respondent. The claimant has not disclosed any documents or served a witness statement.

The Hearing

- 5 In attendance was the claimant, who was accompanied by Mr M Loizou (family friend); her husband and Mr Bruno Ntaka. The claimant had the assistance of an Albanian interpreter. The respondent was represented by Counsel, Mr L Murdin, and also in attendance was witness Mr Ali Bidarbakht.
- 6 I first dealt with the claimant's non-compliance of the case management orders, in particular the failure to file a witness statement. Mr Loizou disputed that there was no compliance. He contended he had emailed to the respondent representatives, on 24th, 29th August & 5th and 14th September 2023 with the claimant's documents and the claimant's and Mr B Ntaka's witness statements. These emails were not included in the bundle. Despite my request for disclosure of these emails and documents, Mr Loizou was unable to find any of the emails in his paper file. Mr Murdin disputed this claim and confirmed no emails had been received by the respondent representatives. He drew my attention to the respondent representatives letter to the tribunal dated 21 September 2023 seeking an Unless Order due to the claimant's non-compliance, and highlighting the fact the claimant's representative had not replied to their emails of 24 & 29 August and 5 September 2023. (p86-87) Mr

Loizou did send an email reply to the respondent on 18 September 2023, acknowledging the respondent disclosure documents, stating, *“Currently, I am away from my desk, and will be back on the 20th instant. Once I communicate with our client, then I will make any further disclosures as necessary.”* (p84)

- 7 With regard to witness statements, Mr Murdin explained the respondent representative sent an email to Mr Loizou on 26 September 2023 at 10.57am enclosing a copy of the bundle with the statement of Mr A Bidarbakht. Mr Loizou denied receiving this email. This was surprising as he had earlier confirmed receipt of the bundle sent in the same email. Mr Loizou stated he had sent by email the statements for the claimant and Mr Ntaka. He was unable to confirm the date these were sent as he could not locate the email, and in response said he was unable to assist the Tribunal about this. Mr Murdin confirmed no statements had been received by the respondent representatives. In discussion Mr Loizou referred me to a statement in the bundle at pages 41-45, which he said was the claimant’s statement. I noted this statement was, in fact, that of the claimant’s daughter.
- 8 From these discussions, it became apparent the claimant had given no disclosure or exchanged witness statements for the purposes of this hearing. This non-compliance raised an issue of fairness to the respondent. Mr Murdin did not make an application for postponement and wanted to proceed with the hearing. He was content to cross examine the claimant, if she was allowed to give oral evidence.
- 9 I decided that in accordance with the overriding objective, it was necessary to continue with the hearing. In the interest of justice, I decided to allow the claimant to give oral evidence. However, I refused Mr B Ntaka to give evidence, as no statement had been exchanged, and he could not give direct evidence about the claimant’s alleged dismissal, as he was not present at the meeting on 3 May 2022. Mr Loizou needed time with the claimant to read Mr A Bidarbakht statement. I agreed to adjourn the hearing for 30 minutes.
- 10 It was regrettable the tribunal lost 60 minutes dealing with these preliminary issues, primarily due to the claimant’s non-compliance with the orders, and the lack of preparation by Mr Loizou.
- 11 After the adjournment, both the claimant and Mr Ali Bidarbakht gave oral evidence and were cross examined. I also asked questions of both witnesses to help clarify matters.

Findings of fact on whether the claimant was verbally dismissed.

- 12 Having considered all of the evidence, on the balance of probabilities I have made the following findings of fact on the primary issue of whether the claimant was verbally dismissed at the meeting of 3 May 2022, as asserted by the claimant. Any reference to a page number is to the relevant page in the bundle.
- 13 The respondent is an international business and owns and runs a chain of coffee shops in the UK and internationally. The claimant commenced her employment with the respondent as a pastry chef on 13th February 2020. She was on a zero hours contract and based at the central production unit. She is of dual Albanian and Greek ethnicity. She is considered to be a good employee when at work. However, some 6 months leading up to May 2022, the claimant's reliability and absence record became an issue. This caused concern to the Directors and management given the shortage of staff in their business.
- 14 In April 2022 the claimant had been absent from work for several weeks due to back pain. The claimant said in March she had an accident which injured her leg, and this caused back pain issues.
- 15 On 17th April 2022 Mr Bidarbakht sent a message to the claimant's phone, stating, "*Please can you let me know if you have decided not to come to work anymore. Over the past couple of months you have not been consistent in coming to work due to your sickness. But we have never got any doctor's note apart from 2 weeks off due to stress. Can you clarify if your sickness just due to stress or you have cold and flu. Please let me know what is your long term plan. I will not include you on rota this week because I am not sure what is going on and I need to sit with you to chat before you come to work-that is if you are coming back. I still not sure*". The claimant replied, "I have a sick note from the doctor due to bad back pain I will bring it to you and have a chat asap please give me some time thank you". (p70-71)
- 16 On 27 April 2022, the claimant sent a message to Mr Bidarbakht stating, "...I will be back on Monday at work.." Mr Bidarbakht replied, "*I will be back at work on Tuesday so please come see me on Tuesday so we can have a chat. No need to work on Monday*" (p71) This response is consistent with Mr Bidarbakht's oral evidence that he wanted to meet with the claimant to discuss a solution to her absence and unreliability. At this point Mr Bidarbakht was also concerned the claimant had attended at her son's wedding when her request for leave had been refused, but she remained absent from work.

Meeting 3 May 2022

- 17 The only undisputed facts between the parties about the meeting of 3 May 2022 was that it was held in the Mr Bidarbakht's office. The meeting was scheduled for 9.00am but Mr Bidarbakht was late in arriving as he had been held up at an earlier meeting in Central London. He arrived around 10.30am. The meeting lasted about 10 minutes. Only the claimant and Mr Bidarbakht were present. No notes were taken.
- 18 Both the claimant and Mr Bidarbakht's account of the discussions is in direct conflict with each other. I therefore set out their respective versions as given in oral evidence.
- 19 The claimant's account of the meeting is as follows. Mr Bidarbakht started the meeting by saying to her, you should have let me know before that you wanted to start to work, because the people from the company (i.e the boss and management – Mr Asim) have told me that you cannot start work because you did not come to work. The claimant said she explained to Mr Bidarbakht that he knew she had been ill because of the accident. She then told him she had a Fit Note which she showed him. He looked at it and then said, now everything changes as you have a Fit Note, I am going to discuss it with them and let you know. She then asked him how long she had to wait for him to contact her, he said 2 or 3 days.
- 20 Mr Bidarbakht's recollection of the meeting was that he started the discussion by asking the claimant what was happening and why she was absent from work when he had refused her holiday request. He had been told that the claimant had been absent because she attended her son's wedding. He told her she could now face disciplinary action for this absence as this was being considered by Mr Asim. He asked the claimant what he could do to help her return to work, and explained to her that her absence situation could not continue as management have said they cannot have employees missing because of staff shortages. He said he needed to speak to management about her returning to work. He admitted the claimant showed him a Fit Note which he read. He then told the claimant she cannot return to work as the Fit Note is to end on 12 May 2022. He told her to go home, as she cannot work until she is fit to return, and then he can discuss her return with her. The claimant then left the meeting.
- 21 On 7 May 2022, the claimant sent a message to Mr Bidarbakht stating, "*Do you have any update for me?*". She did not receive a reply. She sent another text

message on 12 May 2022, stating, *“The way off dismissal from work you can send me in writing that I didn’t understanding anything please.”* Again no response was received from Mr Bidarbakht, and on 22 May 2022, she sent a further message stating, *“I still have not heard anything from you. Can you please send me in writing why I have been dismissed from my job on 3 May 2022. (p71)* Again Mr Bidarbakht did not reply. In evidence he explained that this was not intentional but he did not open these messages as he is very busy and receives around 60 to 80 messages, 80 to 100 calls and 2 or 3 zoom calls each day.

- 22 Despite not hearing from Mr Bidarbakht the claimant did not make contact with anyone else from the respondent, namely the Operations Manager, Magda Luboszczyk, the Head Chef, Valentina Lositio or anyone else. Neither did she attempt to return to work. She considered herself as dismissed.

The Law

- 23 The burden of proof is on the claimant to establish that she was dismissed at the meeting on 3 May 2022, as maintained.
- 24 The standard of proof is that of the balance of probabilities. This tribunal must consider whether, on the facts, it was more likely than not the contract was terminated by the respondent.

Conclusion and analysis

- 25 Given the lack of documentary evidence, I have had to carefully consider the parties oral evidence in reaching my decision. I did not find the claimant to be a credible witness. She was evasive, inconsistent, and not a truthful witness as she made a series of contradictions and admissions in cross examination, In contrast, I found Mr Bidarbakht to be credible, consistent and candid.
- 26 I am not satisfied the claimant has discharged the burden to prove, on a balance of probabilities, that she was dismissed from her employment or at all as claimed. I do not find that at the said meeting Mr Bidarbakht told the claimant that she was dismissed or gave her any cause to believe that she was dismissed. I have come to this conclusion for the following reasons;
- (i) Despite the claimant being adamant that she was verbally dismissed by Mr Bidarbakht, she did not say in evidence that Mr Bidarbakht said the words, “dismissal; your employment is terminated; you are sacked or you are not to return to work again”. Mr Bidarbakht was not cross examined or challenged on

this key issue by Mr Loizou.

(ii) I accept the claimant was told “you cannot start work because you did not come to work in the past weeks”. These do not amount to words of dismissal or could be inferred to amount to a termination. Mr Bidarbakht provided the context to the use of these words, namely that the claimant decided to take time off as sick to attend her son’s wedding, for the period her leave request had been refused. This caused concern with management, in particular Mr Asim (Accountant) who was considering taking disciplinary action. Mr Bidarbakht explained to the claimant that he would need to speak with Mr Asim about her return to work given the issue of her absence.

(iii) I accept Mr Bidarbakht, did say to the claimant that she could not return to work whilst she was signed off sick. This does not, and should not have been construed by the claimant to amount to a dismissal.

(iv) On the facts the claimant was mistaken in her belief that she was dismissed. She had no reasonable grounds to believe that she was dismissed.

(v) Had the claimant been dismissed, I am satisfied the respondent would have notified her accordingly and issued her P45. To date no P45 has been issued.

27 If the claimant had been dismissed at the meeting of 3 May 2022, I also find that;

(i) Given how the claimant presented herself in oral evidence, and indicated how angry she was at losing job, which she said she loved, the claimant would have done something about it immediately, rather than wait nearly three weeks to seek written confirmation as she did in her text message of 22 May 2022, which she admitted in cross examination had been written by her daughter despite the claimant’s protestations she had written it herself.

(ii) I would have expected the ET1 Grounds of Complaint, (which was completed by Mr Loizou) to have been fully particularised with the dismissal complaint. The particularisation of this complaint was first made in an undated document, “Written opposition to Grounds of Resistance” prepared by Mr Loizou. (p33-37), presumably for this hearing. Although this is not a formal pleading, at Para 10, it specifically states, “ *The claimant was dismissed verbally in no uncertain terms by Mr Ali*”. In my judgment, the issue of dismissal has been introduced as an afterthought based on the Respondent’s Response.

- 28 I therefore do not find that the claimant has been dismissed from her employment, and that she remains an employee of the respondent.
- 29 The consequence of this judgment is that the claimant's claims for unfair dismissal; disability discrimination (s15); redundancy pay; notice pay and holiday pay; cannot proceed further as they have no basis at law and therefore the tribunal has no jurisdiction to consider these claims. These are therefore struck out.
- 30 Due to lack of time to deal with case management orders for the listed Final Hearing on **25-28 March 2024**, the tribunal has listed a Private Preliminary Hearing on 27 October 2022 at 2pm, by CVP.
- 31 In preparation for this hearing, I advised Mr Loiziou that he must be properly prepared and be able to provide full particulars regarding the direct discrimination complaints, giving precise dates; the names of the individuals involved in the alleged incidents; what was specifically said; the identity of comparators; and the particular protected characteristics relied upon for each complaint;

ORDER

1. There will be a preliminary hearing in private to held remotely by CVP on **27 October 2023 at 2pm** to clarify the remaining claims and make case management orders in preparation for the listed final hearing.

Employment Judge Bansal
Date: 29 September 2023

Sent to the parties on:
03/10/2023
N Gotecha
For Secretary of the Tribunals

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