



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr W Lautaro Ruiz Hidalgo

**Respondent:** Britannia Services Group Limited

## PRELIMINARY HEARING

**Heard at:** London Central (by CVP)

**On:** 16<sup>th</sup> November 2021

**Before:** Employment Judge Hopton

### Representation

**Claimant:** Mr Simon Bennett (Legal Caseworker)

**Respondent:** Mr Paul Roberts (Solicitor)

## RESERVED JUDGMENT OF PRELIMINARY HEARING

1. The claimant had less than two years' service on 24<sup>th</sup> December 2020 when his employment was terminated by reason of redundancy.
2. The tribunal therefore does not have jurisdiction to hear his claims of unfair dismissal and for redundancy pay and those claims are dismissed.
3. The claim for notice pay will proceed to the full hearing on 11<sup>th</sup> and 12<sup>th</sup> January 2022.

## REASONS

### Claimant's employment

4. The claimant started work for the respondent in March 2011. He worked as a cleaning operative on one particular floor of Top Shop on Oxford Street.
5. Between 6th of November 2018 to 4th February 2019 the claimant went to Ecuador to deal with a family matter. The claimant's employment was terminated by reason of redundancy on 24th December 2020.

### Claims and issue

6. The claimant claims unfair dismissal, a redundancy payment and notice pay. A full merits hearing is listed in this case (joined with two other cases) on 11<sup>th</sup> and 12th January 2022. The purpose of this preliminary hearing is to establish the claimant's length of service. The claimant says he has nine years' service. The respondent says the claimant has one full year's service as his employment was terminated when he went to Ecuador and he was re-employed on his return.

### Procedure, documents and evidence heard

7. I was referred to an agreed bundle of 40 pages and witness statements from the claimant, and from Ms Jordan and Mr Estefanous for the respondent. The claimant is a Spanish speaker and Ms Hurtando was the court appointed translator. I heard oral evidence from the witnesses. The hearing was listed for three hours and due to the short timeframe both parties gave their submissions in writing after the hearing. Mr Bennett also provided a copy of *Welton v Deluxe Retail Ltd (t/a Madhouse)* [2013] IRLR 166.

### The facts

8. These findings are confined to the facts relevant to the legal issues.

### The claimant's role

9. The claimant worked for the respondent as a cleaner at Top Shop in Oxford

Street. He started working for the respondent in March 2011. It was common ground that he was a good worker, and a responsible and reliable employee. His employment continued without incident until November 2018 when he went to Ecuador for three months.

### Staff handbook

10. The respondent had a staff handbook which set out a number of restrictions on the holiday employees could take, including that *“YOU MAY NOT TAKE MORE THAN TWO WORKING WEEKS CONSECUTIVELY – anyone not adhering to this rule will face disciplinary procedure which may result in termination of contract.... **You are not permitted to take annual leave in December.**”* (Original emphasis) The handbook was provided in English and in Spanish.
11. The handbook was not contractual but was an important document that all staff were aware of. The claimant had always taken holiday in line with the handbook’s rules until November 2018. Given Mr Estefanous’s emphasis, in evidence, on the importance of the handbook and the claimant’s compliance with its complex rules on holiday for seven years, I conclude the claimant was aware of the handbook and its importance.

### Claimant’s request for three months’ leave

12. On the 28th of July 2018 the claimant booked tickets to Ecuador leaving on Tuesday 6th November and returning 29th January 2019.
13. A few days before he booked, the claimant discussed his trip with his immediate supervisor, Samuel. Samuel agreed he could take the time off work and said he would raise it with the respondent. Samuel did not have the authority to approve the trip himself. Shortly afterwards, Samuel left the company.
14. The claimant was concerned that he had had no confirmation from the respondent about his trip. As the claimant does not speak English, his wife wrote a letter to his manager, Mr Estefanous. The claimant took this letter to Mr Estefanous who told him that if he went away for three months he would lose his job and all his details would be taken off the computer.

15. The claimant then spoke to a different supervisor, Francis, who tried to assist but in the end was not able to help him, and the claimant's son attempted to contact head office. His wife also sent two emails to head office, dated 30<sup>th</sup> September and 12<sup>th</sup> October 2018. The claimant, and his family on his behalf, tried very hard to contact the respondent about the claimant taking time off work. Many of their attempts at communication were not responded to, or perhaps went to the wrong place. These communications or attempts at communication took place between July and October 2018.
16. The email dated 12th of October was forwarded that day to Ms Jordan, HR Manager. She wrote to the claimant the same day to say that his holiday request had been denied. She explained his proposed leave would be a breach of the holiday rules which only permitted two weeks to be taken at one time and did not allow any holiday to be taken in December. The letter said that if the claimant failed to attend work the respondents "*will have no alternative other than to commence disciplinary action against you.*" The letter was sent by first class post. Mr Bennet says it is peculiar that the letter was not sent by email when the original correspondence was by email.
17. The claimant says he did not receive this letter and that he heard nothing from the respondent as a result of his family's emails. I have considered whether the letter was sent to him, and conclude it was. It was not unreasonable for the respondent to send an important letter to an employee by post.
18. However, regardless of whether the claimant received that letter or not, Mr Estefanous had made it very clear to him that if he took more than 2 weeks' holiday, or holiday at all in December, he would lose his job and his details would be removed from the company database. The claimant admitted that Mr Estefanous had been very clear with him on the consequences of him taking three months off.
19. The claimant went to Ecuador on 6th November as he had planned.

P45

20. When he was away, the respondent sent him a P45. This showed his leaving date as 10th November 2018. The respondent did not write to the claimant

about disciplinary action, and did not provide him with any notice of termination, or any details about notice or holiday pay.

21. The claimant says he did not receive the P45, although his wife was at home and available to receive it and it shows his correct address. The respondent provided evidence from a post book which shows a handwritten note of the letters sent each day. There is an entry on 15<sup>th</sup> November 2018 "*W Hidago – P45*". The respondent also refers to a print out from its payroll system that shows the claimant as a leaver on 10<sup>th</sup> November 2018. On the balance of probabilities therefore, based on the evidence the respondent has provided, I conclude that the P45 was sent to the claimant on 15<sup>th</sup> November 2018 (a Thursday), and it was therefore received by his wife and was communicated to him by Monday 19<sup>th</sup> November.

#### New starter paperwork

22. During the claimant's absence, his work was covered by other cleaners. In the three-month period he was away many cleaners at the store joined and left.

23. The claimant returned to work at the respondent on 4th February 2019 and he was given the same job, cleaning the same floor.

24. When he returned to work, the claimant was asked to sign a new contract and a new starter form. He was given a new employee number. The respondent says the claimant was asked to sign the new starter form on one of his first few days back, in February 2019. The claimant says that the signature on the claimant's new starter form is not his.

25. The timing of the new contract is unclear. The date on the contract is 18th February 2020 although it was signed by a supervisor on the 9th May 2019 and the claimant said in his witness statement that he was given it a few months after starting in February 2019.

26. Mr Estefanous gave evidence about the process he had to go through when new cleaners joined. He goes through this process very regularly due to the very high turnover of staff. He explained that when the claimant re-started he

had to bring in his ID documents and go through all the new starter forms. The new starter form was signed straight away as it gave access to payroll, but it could sometimes take some months to sign the contract. Ms Jordan explained that the new starter form was the important one and the contract was generally signed after the notice period. Mr Estefanous made it very clear he was delighted that the claimant wished to return to work, as he was such a reliable worker. He gave him the same floor back because it was a floor which required lighter duties, which better suited the claimant's physical capabilities.

27. Given that more than two years has elapsed between the signing of the documents and the hearing, memories have faded. However, I found Mr Estefanous's evidence about the mandatory new starter process to be credible and reliable. The claimant had been recorded as a leaver. As the claimant could not have accessed payroll without a new starter form, and his bank details are on that document, and his own evidence is that he signed the contract a few months after starting, I have concluded that he did see and agree to the new starter form in February 2019, and that he signed a new contract some months later. He therefore understood that his employment was re-starting rather than continuing.

## **Law**

28. S.212 Employment Rights Act (ERA) 1996 c. 18

*s. 212 Weeks counting in 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...*

*(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.*

29. S. 94 ERA 1996

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

30. S.108 ERA 1996

*S108(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.*

31. S.155 ERA 1996

*S.155 An employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date*

## Conclusions

32. The respondent says that the claimant resigned. I do not accept this. The claimant was keen to agree with the company he could take the holiday and return to work. Although I conclude that the claimant took a three-month break understanding the consequences were that his employment would end, this did not amount to a resignation. I considered ***Harrison v George Wimpey and Co Ltd 1972 ITR 188, NIRC*** that the respondent refers to and London ***Transport Executive v Clarke 1981 ICR 355, CA*** which confirms that dismissal is needed and a repudiatory breach by an employee does not end a contract in itself.

33. Part of the claimant's case is that documents such as the P45 and the letter of 12<sup>th</sup> October 2018 were not sent when the respondent said they were, and that he was not shown new documents such as the new starter form. His argument is essentially that these documents have been retrospectively invented to try to prove the claimant has under two years' service. I do not accept this. Although the lack of documentation around the claimant's termination is unhelpful (and may or may not have given him grounds for employment tribunal claims at that time), I do not conclude that the respondent has invented the 2018 termination in order to avoid liability for the claimant's current claims.

34. The claimant knew from his discussions with Mr Estefanous that if he took three months off, he would lose his job. The respondent sent him a P45, and when he returned to work required him to fill in new starter paperwork and gave him a new employee number. The claimant's receipt of the p45 was sufficient in the circumstances to amount to a termination. ***Kelly v Riveroak Associates Ltd***

EAT 0290/05.

35. There was therefore no contract of employment governing the claimant's relations with the respondent from 19<sup>th</sup> November 2018 when he received the P45 to 3<sup>rd</sup> February 2019 (s.212(1) ERA 1996). There was also no arrangement or custom as required by s.212(3)(c) ERA 1996. At the time of the absence, the claimant had been told very clearly that his job would end if he took three months off. *Welton v Deluxe Retail Ltd (t/a Madhouse)* [2013] IRLR 166 is distinguished therefore.
36. The claimant's start date of employment relevant to his current claims was therefore 4<sup>th</sup> February 2019 and his termination date was 24<sup>th</sup> December 2020. He had one full year's service at the date of termination.
37. As the claimant does not have two years' service, the tribunal does not have jurisdiction to hear his claims for unfair dismissal (s.108 ERA 1996) or for a redundancy payment (s.155 ERA 1996). Those claims are therefore dismissed.
38. Given that the value of the claim is now limited to notice pay, the parties are urged to attempt to resolve this matter without a hearing.

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Employment Judge Hopton

25/11/2021

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Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 November 2021

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FOR EMPLOYMENT TRIBUNALS