



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109422/2021

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Held in Glasgow on 3 May 2022

Employment Judge B Campbell

10	Mrs B Rulka (Deceased)	Claimant Represented by: Ms A Rulka - Daughter
15	APL Domestic Services Limited t/a Servicemaster	Respondent Represented by: Mr A Muir - Director
20		JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the claimant did not achieve sufficient continuous service to make a complaint of unfair dismissal, and the claim is dismissed.

REASONS

Introduction

- 25 1. This claim arises out of the claimant's employment by the respondent. The respondent is a company which offers cleaning services to domestic clients. The claimant worked as a cleaner. The parties were agreed that she was an employee and that her continuous service began on 1 June 2018. There was a dispute over when her employment ended. The outcome of that would determine whether she had completed sufficient service for a complaint of unfair dismissal to be validly decided by the tribunal.
- 30 2. The claimant presented her claim on 11 May 2021. She died in March 2022, which had the effect of bringing some of her original complaints to an end. By an earlier judgment of the tribunal in April 2022 those complaints were

dismissed and only her claim of unfair dismissal was allowed to proceed to a hearing.

3. The claimant's complaint was pursued on her behalf by her daughter. She is referred to as Ms Rulka in this judgment. She was appointed as an 'appropriate person' in terms of section 206(4) of the Employment Rights Act 1996, by virtue of her sufficiently close relationship with her mother and there being no executor or other person qualifying as a 'personal representative' under that section. Ms Rulka gave evidence with the aid of an interpreter.
4. The respondent was represented by Mr Alex Muir who is one of its directors. He also gave evidence.
5. Generally each witness was found to be credible and reliable in the evidence they gave. There was little direct conflict between the evidence that each gave.
6. Both parties provided some productions. References in square brackets below are references to those documents, where 'C' denotes one of the claimant's documents and 'R' signifies one of the respondent's.

Legal issues

7. The following legal issues had to be decided, as agreed with the parties:
 1. When did the claimant's period of continuous service with the respondent come to an end?
 2. If the claimant had completed sufficient service to gain the right to make a claim of unfair dismissal, was she dismissed?
 3. If so, was her dismissal on 12 August 2021 for a potentially fair reason within the scope of section 98(1) and (2) of the Employment Rights Act 1996 ('ERA')?
 4. If so, did the respondent satisfy the requirements of section 98(4) ERA by acting reasonably when treating its reason as sufficient to dismiss the claimant, taking into account its size

and administrative resources, equity and the substantial merits of the case?

5. If not, and the claimant had been unfairly dismissed, what compensation should be awarded?

5 Applicable law

8. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that analysis.
9. An employee must complete at least two whole years of service with their employer before they are entitled to raise a 'general' complaint of unfair dismissal – section 108(1) ERA. There are certain exceptions to that rule, for example where the dismissal is for a discriminatory reason relating to a protected characteristic identified in the Equality Act 2010, or where the employee has been dismissed because they made protected disclosures ('whistleblowing') or genuinely reported valid health and safety concerns.

25 Findings in fact

10. The following findings of fact are made as they are relevant to the issues.

Background

11. The claimant was employed as a cleaner with the respondent. Following a period when she was a self-employed contractor, she joined the respondent

as an employee on 1 June 2018. She was given a written summary of her terms and conditions of employment [R1].

12. There were no issues initially and the claimant worked as normal. In June 2019 the claimant had a medical issue with her leg and as a result could not perform her normal cleaning duties, which were physically demanding. She reported this to Mrs Maria Muir, a director of the respondent, one morning when she arrived for work. She went home and began a period of absence caused by her incapacity.
13. The respondent paid the claimant Statutory Sick Pay for the full 28 week period. This took the claimant up to January 2020 when her SSP was exhausted, and she had no further entitlement to pay. She was still physically unable to carry out her normal duties.
14. Mrs Muir wrote a letter to the claimant dated 6 January 2020 to enclose an SSP1 form and to confirm that the claimant's SSP would run out on 13 January 2020 [R2].
15. Around the beginning of February 2020 Mrs Muir asked the claimant to come into work to have a discussion about where things stood with her employment. The meeting took place on 11 February 2020. Mr and Mrs Muir were at the meeting. Mrs Muir had given thought to whether there were any less physically demanding duties which the claimant could be given, but there were none. Essentially all the respondent did was provide cleaners to its clients. At that point there was no reason to expect the claimant to recover sufficiently to be able to return to work, although both parties wished that that could have happened. Mrs Muir said that regrettably that as there were no options for the claimant to work, her employment was being brought to an end. Mr Muir understood that the claimant's employment ended at that moment.
16. Mrs Muir wrote to the claimant the following day, 12 February 2020 [R4]. Her letter read as follows:

30 “Dear Bozenka,

Thank you for coming in to see us yesterday. I was sorry to learn that you are still not fit enough to return to work and that you cannot say when/if that situation will change.

5 *Unfortunately, as you know, we do not have any alternative positions which we could offer you, which means effectively your employment with us is now at and (sic) end.*

As discussed, if your position changes, please do not hesitate to get back in touch and we will do our very best to find you something.

In the meantime, best wishes for a full and speedy recovery.

10 *Regards,*

Maria P Muir."

15 17. Despite the terms of the meeting and letter, the claimant continued to receive payslips approximately every four weeks, albeit that they showed no hours being worked and no pay being earned [C2]. This occurred through a breakdown in communication between the respondent and its external accountants who managed its payroll. The respondent had not notified the accountants of the claimant leaving, and so they continued to issue payslips to the claimant without the respondent knowing that was happening. The same thing occurred around the same time in with approximately three other employees of the respondent who had left. As a result of this error the claimant was not sent a P45 or P60 certificate.

20 18. The matter came to light around February 2021 and the respondent's accountants stopped sending payslips to the claimant. The final payslip was dated 26 February 2021. The claimant was not notified that anything had changed.

25 19. In the interim, the claimant had been sending in fit notes to Mrs Muir, approximately every three months. So, for example, she submitted a fit note covering the period 28 July to 27 October 2020. It cannot be determined precisely why the claimant thought she was doing so, but the respondent

understood she was sending the fit notes as a way of periodically letting Mrs Muir know about her ongoing incapacity, so that if her situation improved Mrs Muir would see if there was any work to offer her at that point. It is found on the evidence available that the claimant providing fit notes served this purpose and did not in itself continue her employment, or act as evidence of her employment continuing. Had the claimant been able to return to work and had the respondent been able to offer her work, that would have involved a new period of employment and not a continuation of the first.

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20. By the end of April 2021 the claimant had not received payslips for two months. She sent a WhatsApp message to Mrs Muir on 30 April 2021 enquiring about them. Mrs Muir replied later that day to say that the claimant was 'not on the payroll' and should not have received any payslips since her SSP ran out. The claimant responded to say that she had received payslips up until February 2021. Mrs Muir confirmed that the accountants had stopped preparing payslips. The conversation ended with Mrs Muir stating that she did not understand why the claimant still understood herself to be an employee, as she had not done any work since the summer of 2019 and her sick pay had long since expired. Mrs Muir went on to say that she had told the claimant 'many months ago' that she didn't need to carry on sending in fit notes, and that there had been no work to offer her because of the pandemic. She said that if the claimant was now fit to work she was prepared to meet and discuss that. She also said that if the claimant had been continuing to receive payslips from the accountant, that was an error on their part. She reiterated that if the claimant became well enough to work, they could discuss whether suitable work could be offered.
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Discussion and conclusions

21. Before a general claim of unfair dismissal can be made, an employee must have completed at least two complete years of service – section 108(1) ERA.
22. The claimant's service as an employee began on 1 June 2018. It is not completely clear from the evidence when her employment ended. Both parties had a different view on that, with Mr and Mrs Muir understanding that they
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had terminated the claimant's employment at the meeting on 11 February 2019 and the claimant believing that her employment continued until at least 30 April 2021.

23. The tribunal had to make a decision on the evidence before it. There was more substantial evidence in favour of the respondent's position, by way of the oral evidence of Mr Muir to the tribunal and the letter of 12 February 2019. It is found on the balance of probability that the letter was sent to, and received by, the claimant. Against that the only evidence of a different termination date was the WhatsApp messages of the claimant in April 2021 which, at best, pointed to her not appreciating her employment had been brought to an end.
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24. It is understandable in the circumstances that the claimant genuinely did not realise that her continuous service came to an end on 11 February 2019, and that by sending in fit notes beyond that date she was keeping her employer informed about her condition in a normal way. But on the evidence it must be found that her employment did end on 11 February 2019, with the consequence that she did not gain the right to make a claim of unfair dismissal.
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Conclusions

25. As a result of the above findings it is not necessary to address further matters such as whether the reason for the claimant's dismissal was a fair one and whether the respondent acted reasonably in all the circumstances when dismissing her.
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26. On the evidence the claimant has no statutory right to submit a claim of unfair dismissal. Therefore, it is dismissed.

Employment Judge: Brian Campbell
5 Date of Judgment: 11 May 2022
Entered in register: 12 May 2022
and copied to parties