EMPLOYMENT TRIBUNALS

Claimant: **Mr M Bancroft**

Respondent: **(1) Dijla Limited**
(2) DP Shayban Limited

Heard at: **Cardiff; by video** **On: 27 October 2022**

Before: **Employment Judge R Harfield**

Representation:
Claimant: Mr Bancroft represented himself
Respondent: Ms Hodgetts (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

1. The claimant's employer as at the effective date of termination of employment was the second respondent; the first respondent is dismissed from the proceedings;

2. The claimant's start date of his continuous employment was 14 February 2020;

3. The effective date of termination, and therefore whether the claimant ultimately had two years qualifying service to bring his unfair dismissal claim, will be decided as part of parcel of the final hearing on 14 and 15 December 2022.

REASONS

Introduction

1. The claimant presented his claim form on 24 April 2022 complaining of unfair dismissal and race discrimination. The respondents filed an ET3 and grounds of resistance resisting the complaints. Part of their grounds of resistance that the claimant did not have 2 years qualifying service to bring his unfair dismissal claim. The race discrimination complaint has since been dismissed upon withdrawal. Employment Judge Sharp conducted a case management hearing on 16 August 2022. She listed today's hearing to decide: "*the claimant's start date for employment, and if less than two years to strike out the claim for lack of jurisdiction under s108 Employment Rights Act 1996, to establish the identity of the claimant's employer as at the effective date of termination, and to make case management orders for the final hearing if required."*

2. I had before me a bundle of documents for the preliminary hearing extending to 112 pages. The claimant's witness statement is within that bundle at [50 – 53]. I had a written statement from Ms Thomas for the respondent. I had a skeleton argument with a copy of relevant authorities from the respondent's counsel. I heard oral evidence from the claimant and Ms Thomas and then brief closing submissions. For reasons of expediency I have not set out a summary of the parties' submissions here but I took them (together with the evidence) into account when reaching my decision. Time did not allow me to deliver an oral judgment, but there is to be a final hearing in this case in any event, so I conducted some case management to get the case ready for that hearing. Those case management orders are set out separately.

3. EJ Sharp listed today's hearing because of a dispute about the start date of the claimant's continuous employment, and how that affected whether the claimant had 2 years continuous employment as at the effective date of termination. The claimant's employment ended summarily on 11 February 2022. The claimant says that the start date of his continuous employment was 4 February 2020 or a date on or before 11 February 2020 (such that he had 2 years service by virtue of an earlier start date than that set out by the respondent). The respondent says the start date was 14 February 2020.

4. The claimant raised in his witness statement (and it had also occurred to me when preparing for this hearing) that he may also potentially have secured two years continuous service by reason of the potential to add on his statutory notice period to the date he was summarily dismissed to give

a later effective date of termination. This is by virtue of sections 97 and 86 of the Employment Rights Act 1996. The principle does not, however, apply under section 86(6), where the respondent can potentially treat the contract as terminable without notice by reason of the conduct of the claimant. That involves the Tribunal deciding whether the claimant was in repudiatory breach of contract entitling the respondent to accept that breach and bring the contract to an end without notice. In short hand, it involves the Tribunal deciding if the claimant had committed gross misconduct. In turn that necessitates hearing evidence from both the claimant and the respondent's witnesses, so the Tribunal can make findings of fact as to what actually happened, and whether the claimant was, in the judgment of the Tribunal, in repudiatory breach of contract.

5. I raised with the parties, and particularly the respondent, whether that could be dealt with at today's hearing. Ms Hodgetts took instructions and confirmed the respondent's preference was that the point be dealt with at the final hearing where evidence would be available from those directly involved in the events in question. Having given both parties the opportunity to comment I decided that I could not fairly decide today the complete question of whether the claimant had two years continuous service. That is because this dispute about the effective date of termination needs to be decided at a hearing where witness evidence would be available on both sides as to the alleged conduct of the claimant that is in question. This was not something that Ms Thomas had direct knowledge of as she was being called to give evidence about other matters. This particular dispute we now have about effective date of termination was not set out as an issue to be decided at this hearing in EJ Sharp's case management order because attention was focused at that time on the start date of employment, not the end date. I was satisfied there was a material change in circumstances meaning that it was not appropriate to decide at today's hearing all the matters relevant to whether the claimant had two years continuous service.

6. I decided, however, that I could still decide the dispute about the claimant's start date of continuous service (just not the end date) and the issue about the identity of the employer as at the date of termination (which were the key matters that EJ Sharp had listed to be decided at this hearing in any event).

The legal principles

7. Section 94 ERA provides for the right not to be unfairly dismissed. However, section 108(1) goes on to say that right 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

8. Section 86 ERA provides for a minimum statutory notice period to be given by an employer to terminate a contract of an employee who has been continuously employed for one month or more. It cannot be less than 1 week's notice if the period of continuous employment is less than 2 years. After 2 years, it is one week's notice for each year of continuous employment up to a maximum of 12. Section 86(6), however, states: *This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party*."

9. Section 97 ERA defines the "effective date of termination", and says where a contract is terminated without notice, it will ordinarily be the date on which the termination takes effect. However, 97(2) goes on to say that where the contract of employment is terminated by the employer, and the notice required to be given by the employer under section 86, would if given on the material date, expire later than the effective date of termination, the later date will be the effective date of termination.

10. In essence the statutory notice period can be added on to give a later effective date of termination. But that does not apply where the respondent was entitled to treat the contract as terminable without notice by reason of the conduct of the claimant.

11. Section 211(2) ERA says that a period of continuous employment "(a) (subject to subsection (3)) begins with the date on which the employee starts work, and (b) ends with the date by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

12. Section 230 ERA defines "employee" to mean an individual who has entered into or works under a contract of employment.

13. The case law in this area was set out in Ms Hodgetts skeleton argument and accompanying authorities. In summary, "the date on which the employee starts work" is not intended to refer to undertaking the full duties of the employment, but the beginning of relevant employment under the relevant contract of employment; General of the Salvation Army v Dewsbury [1984] ICR 498.

14. There is a difference between entering into a contract of employment and starting work under the contract of employment. They may be, depending on the particular circumstances of a case, two different things; Koenig v The Mind Gym UKEAT/0201/12. There the Employment Appeal Tribunal said: "*Taking the clause as a whole it refers to an employee starting work. Since "employee" is defined as it is in section 230 the work referred to*

must necessarily be work in respect of which the individual concerned is an employee; that is somebody who has entered into or works under a contract of employment… [The] natural reading of those words in context means that work is work under and not collateral to the contract of employment."

15. In Koenig the claimant was short of continuous service by one day. She sought to rely on an earlier client meeting she had attended which she had been told would be useful for her to attend. The Employment Appeal Tribunal said that work outside a contract of employment (though it may have some relationship to it) cannot count. But in situations in which any significant activity has been performed which is to the benefit of the employer, it will be easy to infer the parties have agreed a contractual relationship under which the activity is performed.

16. In O'Sullivan v DSM Demolition Ltd UK EAT/0257/19 the Employment Appeal Tribunal upheld a tribunal decision on the facts of that particular case, that where the claimant did some work on site prior to his official start date it was collateral to the contract of employment, and not part of it. On the facts as found it was "unofficial" work not done under a contract with the respondent. The Employment Appeal Tribunal said "*Work under a contract of employment may, and often does, start on a later date than the date on which the contract itself is made. Neither the formation of such a contract, nor the start date of work under it, is dependent on the employer having provided a statutory statement of written terms at, or by, that time. The parties may agree on a start date, but then later agree to bring it forward. The formation, and/or variation of a contact of employment, may come about orally, in writing, by conduct, or by some mixture thereof. But one way or another, there must be agreement as to the essential terms."*

17. The Employment Appeal Tribunal said of the distinction between work done under a contract of employment and work that is collateral to it "*the distinction being drawn here is simply between work done under the contract relied upon, and work not done under that contract, though that work may, in the ordinary linguistic sense, be collateral to it or… be "outside of a contract of employment, though it might have some relationship to it.""*

Findings of fact

18. On 2 February the claimant spoke with an old work colleague who made an introduction between the claimant and the store manager of Domino's, Cwmbran. The claimant says that on conclusion of that call the store manager, Adam, offered him a job as pizza maker with potential progression to management. He accepts that Adam also invited the

claimant to come into the store to discuss things further and the claimant could have a day or two to think about things.

19. The claimant went to see Adam in store on 4 February. The claimant says that he was again offered the job and he accepted it. He also says in his witness statement that Adam explained an email would be sent for company training and the claimant would have a two week grace period to complete the training. The claimant also handed over personal documents for checking. The claimant accepted in cross examination that on 4 February there were right to work checks to be done. He agreed there was training to be completed but again submitted that he had a two week period to complete it, and that staff could start work once the training email was received, when the store manager called the staff member in. I return to this point.

20. After a few days, as the claimant had not heard any more, he telephoned Adam and asked if everything was ok with his documents as he had yet to receive the email about training. Adam said everything was fine with the documents, he had just been side tracked and had forgotten to send them off. The claimant says Adam said he would do it that day.

21. The claimant says that in that phone call Adam asked the claimant if he would come in for a trial/induction for a few hours to familiarise himself with the store, toppings and sides, at some point in that week commencing 3 February. The claimant says "*to the best of my knowledge this was done on the Saturday of that week that would have been the 8th February 2020*." The claimant says that 14 February, Valentine's day, is a busy day so Adam had asked him to go in before that as it would be difficult to learn on such a busy day. The claimant says he was given a pizza toppings chart and a codes chart. He told me in evidence that he had also helped with making some pizzas and some sides.

22. The respondent does not accept that the claimant did a trial shift or any work on or around 8 February 2020. On the evidence before me, on the balance of probabilities I agree with the respondent and I do not find it established that the claimant did work that day (or on a day around 8 February). Whilst I accept the claimant is now being asked to think back about events from over two years ago that probably did not seem significant at the time, I still found the claimant's evidence vague and unconvincing. He did not mention the trial shift in his initial correspondence with the respondent post dismissal when the respondent raised the point the claimant did not, on their analysis, have two years' service [101]. He did not raise it at the case management hearing with EJ Sharp other than a passing reference to saying there may be other start dates he could rely on. At that hearing the EJ Sharp recorded the claimant as saying "*He hoped that his employment commenced when he was*

interviewed and offered the job on 4 February 2020, though he accepted that his first shift was on 14 February 2020. The claimant added that the start date might be 11 February 2020 when he was sent an email about training, which he undertook on that day, but he did not recall if he was paid for this" [45]. The suggestion of an earlier trial shift featured for the first time as a direct assertion in the claimant's witness statement prepared for this hearing. Unlike the claimant's attendance on 4 February for interview [55-56], where there are whats apps between the claimant and his friend who worked in store, and the claimant's email sending in his P45, there are also no emails or whats app messages disclosed about the arrangements for this alleged trial shift. I find that odd if the claimant was in store on 8 February. The claimant's own witness statement is also tentative about the date.

23. On 11 February the claimant received the training email [57-58] which says "*Congratulations on being offered a position and welcome to Domino's pizza! This offer is made subject to the successful completion of our On-line Training Programme prior to your first shift. This training has been created to give you a better understanding of the Company and your role within the business."* The email then set out how to log into the training. It says all employees must complete "*Domino's Induction (This is a 10 Step Module, please complete all sections)."* It also says that training may need to be completed at home as not all stores currently had facility to accommodate the training and it would be paid as part of the monthly wage "*following the successful completion of your first shift*."

24. The claimant, in evidence, suggested that he had started the training on 11 February. He did not say when he had completed it, other than referring to a two week grace period, which he also said in his witness statement [52]. The training records disclosed appear to show the claimant completing the training on 14 February [105-106]. The claimant in his cross examination of Ms Thomas suggested these records may not be accurate, and questioned how all the many training modules could all show the same completion time. Ms Thomas said that this was the data they were given by the provider, SkillSlice, and denied it had been edited. She said the individual training modules were all part of one larger induction programme which she said may then all show as having been completed when the whole package is completed. The claimant said in his own evidence that he may have done some training on 14 February (which by implication was suggesting he had not done all the training credited to him on that day). Again, I found his evidence about the sequence of events as vague. On the balance of probabilities, I find it likely that the training records are correct and that it was on 14 February, not 11 February, that the claimant undertook the online training.

25. The claimant has a statement of main terms of employment in the name Dijla Limited. It has a start date of commencement of employment of 14 February 2020 [103]. The claimant told EJ Sharp that this was the day he did his first shift. It is not in dispute that the claimant went into the store that day, and was given his statement of particulars of employment. As stated, the training records also show the claimant completing his on line training that day. It seems likely to me that if the claimant did in fact do a trial shift at all (mentioned above) that it is more likely that this also happened on 14 February, with multiple activities happening that day to get the claimant ready to start.

26. The respondent's HR records show that the claimant's "hire date" was the next day, 15 February [104], which has a logic to it as it is the day after the completion of the training which the claimant had been told in the email of 11 February had to be completed prior to the first shift. Ms Thomas said in evidence that when the training is completed the store is told that the new employee can do their first shift, and that the manager then arranges the first shift and the date is entered into the Dom FD HR database, giving in the claimant's case the date of 15 February.

27. The clocking in records at [54] also appear to show the claimant completing his first clocked in shift on 15 February which again appears to fit with that being the date on which he completed his first substantive shift. The claimant put it to Ms Thomas in cross examination that this record could have been altered or earlier shifts deleted. She said shift times can be altered rather than deleted (for example if someone has forgotten to clock in or out) but that the system would show the amendments. I accept her evidence. For completeness I should add that she also said the Dom FD record was likely to be, from her perspective, the most accurate record of the date of the first shift, (as provided by the manager), because the pulse clocking in and out records were set up separately and locally for the purpose of clocking in and out.

28. There is a receipt for uniform and property not signed by the claimant but completed by Adam with two different dates of 25 February 2020 and 3 March 2020. There is a different copy of a statement of main terms of employment which is dated 14 March 2020 but has no date for the date of commencement of employment. It identifies the employer as being Shorja Limited. It is different to the typed version the claimant holds. It is handwritten and some information is different such as the name of the employer and the job title. The claimant also has some messages about other employees where contracts had not been uploaded for staff who were already working.

29. Ms Thomas said the handwritten version of the contract is the version they have uploaded on their records. She cannot explain why there are two

different ones. She said that Shorja Limited would have been the correct employer for the claimant when recruited but that a decision was made in 2021 to move all employees across to the first respondent. She said 5 companies make up the Domino's franchise group but that having employees working across different outlets that crossed over the companies was causing administrative problems for payroll. She says therefore everyone was moved to one employing entity, which had happened by the time the claimant was dismissed. I accept her evidence in that regard.

Discussion and Conclusions

Start date for continuous employment

30. The claimant asserts that his continuous employment started on the 4 February when he was offered and accepted the job. He says that the employment contract was formed that day. The test, however, under section 211 ERA is not the date of the formation of the contract, but the date on which the employee starts work under a contract of employment. I do not find that the claimant had started work on that date. He attended for interview. That is not work, but a step that happens (if successful in the job application process) prior to starting work. As at the time of interview itself no contract had been formed either. The claimant was then made a conditional job offer which he accepted, but it was conditional upon the right to work checks being completed and his completion of the online training. I do not find that the claimant was given a 14 day grace period to complete the online training. The email he received is very clear that the offer of employment is conditional upon it being successfully completed, and it must be completed before the first shift. The online training covers some important topics such as food safety, and allergens so it is understandable that the respondent would have a policy it should be completed before a first shift can be done.

31. The claimant's next assertion is that his continuous employment started on or around 8 February when he attended for a trial shift. I have not, however, found as a matter of fact, that it has been established on the balance of probabilities that the claimant undertook a trial shift at that time. It therefore cannot be, as a matter of fact, the day on which the claimant started work. In any event, I would not have found that this was work undertaken under the contract of employment because the contract of employment was not fully formed at that point in time, with the right to work checks being completed, and the online training outstanding. It would have been an activity that related to but was collateral to the formation of the contract of employment. It would have been, in effect, a preparatory step.

32. The claimant's next assertion is that his continuous employment started on 11 February when he started to complete the online training. Again I have not found as a matter of fact that the claimant did undertake some online training that day. It therefore cannot amount to work undertaken under the contract of employment if I have not been satisfied that it actually occurred. The contract of employment would also not have been fully formed until it was successfully completed.

33. I therefore do not find that the claimant's continuous employment started on any of the earlier dates that have been put forward by the claimant.

34. The earliest start date for his continuous employment can therefore only be 14 December. The contract of employment became fully formed once the claimant had completed his online training. He was in the store that day and I have found that the claimant may well have also undertaken a trial shift that day, so that he was ready to go for his first official shift the next day. I am satisfied that at that point he would have started work pursuant to the contract of employment. His training, once completed, and the contract of employment formed, also then became considered as paid work by the respondent under their terms, and again I would find amounted to the claimant starting work under the contract of employment that day.

35. Whether the claimant had two years qualifying service starting from 14 December 2020 will be determined at the final hearing when the effective date of termination will be identified.

The claimant's employer as at the effective date of termination

36. The claimant's terms and conditions of employment identify the first respondent as the employer. The oddity of that situation is that this was not the employer for the Cwmbran store at the time the claimant started. But the Cwmbran staff (along with other employees) later transferred across to that employer so that everyone had a common employer. The employer named on the contract at the time therefore appears to have been an error. Why that was I do not know. But as it happened as at the effective date of termination it was in any event the correct employer. How the second contract came to be produced, signed, misdated and uploaded to the respondent's records I do not know. Possibly if the store did not hold a copy of the original that was given to the claimant, there was an attempt to replicate it for their central HR records. That appears plausible but is speculation on my part. But fundamentally it does not appear to matter for my purposes.

37. Ultimately the parties did not seem to dispute that the first respondent was the correct employer. Generally an employee will only have one

employer for one contract of employment. I accept Ms Thomas' evidence as to the relationships within the group of companies and the decision to transfer all staff over to one employer, the first respondent. I therefore find that the first respondent was the correct employer as at the effective date of termination. The proceedings against the second respondent are dismissed. The claim proceeds against the first respondent alone.

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Employment Judge R Harfield
Dated: 24 October 2022

JUDGMENT SENT TO THE PARTIES ON 27 October 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche