

IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

Case N° 14 of 2015

BETWEEN:-

SAMANTHA DRAPER

COMPLAINANT

-AND-

CENTURION ADMINISTRATION LIMITED

RESPONDENT

No appearance by or for the Complainant
John Viales for the Respondent

JUDGEMENT

BACKGROUND

By originating application dated the 24th March 2015, filed by the Complainant, she alleged that she had been unfairly dismissed on the 22nd December 2014, on the grounds that upon returning to work after a medically certified sick leave period, and her informing the Respondent that she was pregnant, she was dismissed instantaneously. The originating application further states that the Complainant was employed on the 13th October 2014. As stated, the originating application is dated the 24th March 2015, but there is some controversy as to when exactly it was handed in at the offices of this Tribunal; but to this I will revert later on in this judgement.

By Notice of Appearance dated the 22nd May 2015, filed by Mr Thomas Hillman on behalf of the Respondent, the Respondent contested the application filed on the grounds that (a) the Complainant was self employed providing services to the Respondent and not employed by the Respondent and (b) the Complainant had not informed the Respondent that she was pregnant as alleged or at all.

By letter dated the 8th July 2015, I was appointed as tribunal chairman for the purposes of this case.

This case first came before me on the 15th October 2015, on which date there was no appearance by the Complainant, and Mr Thomas Hillman, on behalf of the Respondent, applied to have the complaint dismissed on the grounds that:-

- (1) even on the Complainant's own version of the facts, which the Respondent did not accept, this Tribunal did not have jurisdiction to hear the complaint as the Complainant had only been employed for two months and therefore did not comply with the requirements of section 60 (i) (a) of the Employment Act, which requires an employee to be employed for twelve months before they are entitled to apply to this Tribunal for unfair dismissal; and
- (2) even if the Tribunal had the necessary jurisdiction to hear and determine the complaint, the complaint had been filed out of time by at least two days.

As the Complainant was not present or represented I refused to deal with Mr Hillman's application and adjourned the matter so that the Secretary could attempt to contact the Complainant and advise her of the date on which Mr Hillman's preliminary point would be heard. The matter was adjourned to the 17th November 2015 (subsequently changed to the 11th December 2015) and on the 26th October 2015, the secretary to the Tribunal ("the Secretary") sent to the Complainant's e-mail a copy of the Notice for a directions hearing on the aforementioned date.

On that same day the Complainant replied by e-mail stating:-

"I think perhaps I was unclear in my last correspondence to you, I am no longer in Gibraltar as I had to leave as I was unable to support my son or myself. I am in the UK and will not be able to afford to return to Gibraltar."

On the 27th October 2015, the Secretary sent the Complainant by e-mail a Notice of Withdrawal and stated:-

"If you wish to withdraw your claim could you please fill in the form and return it to us at your earliest convenience so that we may up date our records."

On the 7th November 2015, Mr Thomas Hillman, on behalf of the Respondent, wrote to the Secretary inviting the Tribunal to dismiss the case and setting out his rationale for so applying.

On the 12th November 2015, the Secretary wrote to the Complainant by e-mail stating:-

"Attached please find Notice of Withdrawal it would be appreciated if it could be signed and forwarded to us in order for the Tribunal to have closure in respect of this claim. If no notice of Withdrawal is received the Tribunal will convene on the 11th December 2015 at 9.30 am at the John Mackintosh Hall to discuss preliminary issues in respect of your claim."

This e-mail was repeated on the 23rd November and 7th December 2015 without response.

On the 9th December 2015, the Complainant replied stating "I do not wish to sign this", to which the Secretary replied, "attached please find letter e-mailed to you on the 26/10/2015." To this, the Complainant stated:-

"I am sorry but I fail to see what I am meant to action. I do not wish to pull my complaint but not sure what you are asking me to do. If you could possibly clarify."

I am informed by the Secretary that upon receipt of this e-mail she telephoned the Complainant on the 10th December 2015, and basically informed the Complainant that she either had to attend the hearing if she wished to proceed with the case, or, file a Notice of Withdrawal if she did not wish to proceed with the case. Since this conversation occurred nothing further has been heard of the Complainant. There has been no application to adjourn the hearing of the 11th December 2015.

On the 11th December 2015, the Tribunal reconvened and Mr John Viales, on behalf of the Respondent, after noting that there was no appearance by the Complainant, applied for the case to be dismissed on the grounds that the Complainant had failed to appear and that the complaint had been filed at the very best two days out of time and, at worst, several weeks out of time.

With regard to the issue of when exactly the complainant was filed it is to be said that the matter is not exactly clear. It would appear from e-mails shown to me that the position is as follows.

It would appear that the Complainant was originally in touch with Mr Paul Costa, a labour inspector, and that on the 31st March 2015, he sent the following e-mail to the Complainant:-

"You'll see there are 2 separate forms. One for a case for unfair dismissal, the other is an open application".

This e-mail would suggest that on the 31st March 2015, Mr Costa forwarded to the Complainant the Origination Application form for an unfair dismissal case. This is curious in as much as that the originating application before this Tribunal is dated the 24th March 2015. However, this would explain why the Secretary has no record of receiving the originating application on the 24th March. The matter is somewhat clarified by an e-mail sent by the Complainant to Mr Costa on the 5th May 2015, since it states:-

"I hope you are well. I was wondering whether you could help me one more time as I delivered the above attachment to the office as instructed by yourself but I have heard nothing since and

wondered if you had a contact of someone that I could speak with so that I can chase it up.”

This e-mail suggests to me that the originating application form was completed after the 31st March. Such a view is further strengthened by an e-mail dated the 6th March 2015, sent by the Complainant to the Secretary, which states:-

“Please see attached a copy of the form which I previously hand delivered to your office about 5 weeks ago but I have not heard anything back yet so I wanted to ensure that these had been received by you”.

I take note that five weeks prior to the 6th May would put you around the 31st March/1st May time period. An e-mail to which the Secretary replied stating.

“This is the first I hear of your case, no worries I will at once process the claim”.

By e-mail dated the 7th May 2015 the Complainant stated, amongst other things, that:-

“This case has been on going and going back and forth between myself, Paul Costa, Sean and back to Paul and now with yourself since 22nd December 2014”.

It should be pointed out that Mr Costa, and whoever the referred to Sean is, are not part of the Industrial Tribunal staff although they do work within the building which houses the staff of the Tribunal.

I have no doubt that the Secretary of the Tribunal did not receive the Complainant’s originating application until the 6th May 2015. I also have no doubt that the Complainant did hand in the form to someone within the Employment Department at some point in time after the 31st March 2015 and that this form disappeared within the paper labyrinth that is that department. The upshot of all of this is that the originating application was filed with the Tribunal 45 days late. Even if I were wrong in so determining, the fact remains, as Mr Viales has pointed out, that if one accepts that the form was handed in on the same day it was dated, ie the 24th March 2015, the form was still filed two days late since according to the Complainant she was dismissed on the 22nd December 2014.

THE LAW

The right not to be unfairly dismissed is prescribed in section 59 (1) of the Employment Act (“the Act”) which provides that:-

“In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer”.

The right prescribed for by section 59 (1) of the Act is subject to the provisions of section 60 (1) (a) which provides that:-

“section 59 shall not apply to the dismissal of an employee from any employment if the employee:-

(a) was not continuously employed for a period of not less than 52 weeks ending with the effective date of termination

The above being the case, and bearing in mind the Complainant’s own assertion in the originating application that she was only employed with the Respondent between the 13th October 2014 and the 22nd December 2014, it follows that the Complainant’s application falls foul of the provisions of section 60 (1) (a) of the Act and must be dismissed.

Even if I were to determine wrongly with regard to the jurisdictional issue I would still dismiss the complaint for the following reason.

Section 70 (4) of the Act provides that:-

“The Tribunal shall not entertain a complaint presented under this section unless it is presented before the end of the period of three months beginning with the effective date of termination unless the tribunal is satisfied that in the circumstances it was not practical for the complaint to be presented within that period.”

As stated above the complaint was presented to the tribunal at worst, upto forty-five days late and, at best, at least two days late. The provisions of section 70 (4) therefore apply and the Tribunal has no jurisdiction to determine the complaint filed. Moreover, as there is nothing before this Tribunal to suggest any possible practicable reason for the complaint having been filed late the issue of granting an extension of time in which to file the complaint does not arise.

The upshot of all of the above is that this complaint is dismissed.

Dated this 23rd day of December 2015.


Joseph Nuñez
Chairman