Appeal No. UKEAT/0266/12/ZT

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 12 November 2012
Judgment handed down on 21 November 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR B R WELTON — APPELLANT

DELUXE RETAIL LTD t/a MADHOUSE (IN ADMINISTRATION) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR B R WELTON (The Appellant in Person)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

JURISDICTIONAL POINTS – Continuity of employment

An employee worked at a store in Sheffield, which closed down, and his employment was terminated as a result. During what would have been the next working week, he agreed to accept employment with the same employer in Blackpool, with the first working day falling in the following week. A few months later he was dismissed. An EJ found there was no continuity of employment. Three points arose – whether an agreement made in one week to start work in the next was a contract of employment such that under Part XIV ERA 96 there was no break in continuity; whether there had been a cessation of work (being temporary) to which s.212 applied; and whether the EJ was right to regard an "arrangement" in the phrase "arrangement or custom" in s.212(3) as one which could not be made retrospectively (a point upon which there was conflicting EAT authority).

Held (1) There was a contract of employment, notwithstanding that work had yet to be performed under it; (2) the absence was on account of cessation of work, and could only be regarded as temporary (such that the appeal was allowed) but (3) the judge was right that an arrangement could not be entered retrospectively so as to confer continuity. **London Probation Board v Kirkpatrick** which had decided the contrary should no longer be followed by Tribunals.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal from a judgment of Employment Judge Slater in Manchester at a Pre-Hearing Review raises difficult questions in respect of the operation of the continuity of employment provisions in the Employment Act 1996. Some have been the subject of conflicting decisions before this Tribunal.

The Facts

2. The Claimant began working for the Respondent ("Deluxe") on 5th January 2009 at their Sheffield store. The store closed on 23rd February 2010. The working week ran from Sunday to Saturday and so ended on Saturday 27th February 2010.

3. On 8th March 2010 (therefore more than a week after the working week ended) the Claimant began work at the Blackpool store operated by Deluxe. He resigned from that employment by letter dated 11th December 2010. If, therefore, his employment at Blackpool was in the sense meant by statute continuous with that in Sheffield, he had sufficient length of employment for the Tribunal to have jurisdiction to hear his claim. If, however, the employment at Blackpool was not continuous with that in Sheffield, he did not.

4. At a Preliminary Hearing to determine that issue of jurisdiction, the Claimant maintained that he had been offered the post at Blackpool during the last week of his employment at Sheffield. The Employment Judge found on balance of probabilities that no offer of employment was made to the Claimant before the Sheffield store closed. The Respondent's case was that the offer was made in a phone call on 4th March. The Tribunal made no specific finding of fact to that effect, but in paragraph 19, the Judge indicated her view that the earliest an offer of employment as such, which would be binding if accepted, could have been made

was 1st March, which echoed the Respondent's case that that was when there had been a meeting between the Claimant and the Area Manager who was responsible for the Blackpool store (but not for the Sheffield one). The offer was of employment with effect from 9th March 2010.

The Law

5. The right not to be unfairly dismissed conferred by Section 94 of Part X of the **Employment Rights Act 1996** does not apply to the dismissal of an employee unless he has had the requisite period of continuous employment (section 108): at the time relevant to the present claim that was one year.

6. Continuous employment is dealt with in chapter 1 in part XIV of the 1996 Act. Section 210 ("**Introductory**") provides that:

> **"References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this chapter."**

7. There follow detailed provisions over ten sections (210 – 219). The last of these (219) provides for the possibility of the express contrary provision to which Section 210(1) refers, for it provides, under the heading "**Reinstatement or Re-engagement of Dismissed Employee**" as follows:

> **(1) Regulations made by the Secretary of State may make provision –**
>
> > **(a) for preserving the continuity of a person's period of employment for the purposes of this Chapter or the purposes of this Chapter as applied by or under any other enactment in the regulations , or**
> >
> > **(b) for modifying or excluding the operation of section 214 subject to the recovery of any such payment as is mentioned in that section.**
>
> **In cases where… a dismissed employee is reinstated, re-engaged or otherwise re-employed by his employer… in any circumstances prescribed by the regulations."**

8. Regulations were made in December 1996 to come into effect 13th January 1997, some 4 months after the **Employment Rights Act 1996** itself came in to force. These – the **Employment Protection (Continuity of Employment) Regulations 1996** provide in Regulation 2 for a number of situations in which an employer's reinstatement of a dismissed employee will have the effect that the reinstated employee will have continuity of employment dating back to the start of the employment from which he was originally dismissed.

9. Section 212 of the **ERA 1996** ("**Weeks Counting in Computing Period**") provides:

> **"(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 –**
> **(a) incapable of work in consequence of sickness or injury,**
> **(b) absent from work on account of a temporary cessation of work, or**
> **(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**
>
> **(4) Not more than twenty-six weeks count under subsection 3(a) … between any periods falling under subsection (1)"**

10. Section 214 ("**Special Provisions for Redundancy Payments**") provides (in summary) that where a redundancy payment has previously been paid to an employee the continuity of his employment is broken.

11. Section 218 ("**Change of Employer**") provides, materially:

> **"(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer**"

The Tribunal's Decision

12. The Employment Judge considered section 212(3) as potentially relevant to her decision. She concluded in four central paragraphs as follows:

> **"28. I have found that there was no offer.." [**i.e. of work at Blackpool**] ".. made before the ending of the Claimant's employment at Sheffield.**
>
> **29. I conclude that the Claimant's absence from work was not on account of a temporary cessation of work. His absence was because the Sheffield store closed. He was subsequently offered employment at Blackpool. Even if the offer had been made before the employment at Sheffield had ended, I doubt that this provision would apply. It does not appear to me to be relevant to a situation where one employment ends and another starts, rather than a situation where work at the same place temporarily ceases and then starts up again.**
>
> **30. I conclude that the Claimant was not 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. If the offer had been made before the end of employment in Sheffield, I consider there would be such an arrangement. However, I have found that the offer was not made until after that employment had ended. The provision does not, therefore, operate to make the interval between periods of employment count towards continuous service.**
>
> **31. The Claimant had two separate periods of employment which the rules on continuity of service do not allow to be counted together. The final period of employment was less than 12 months. The Claimant, therefore, does not have sufficient continuous service to claim unfair dismissal and the Tribunal has no jurisdiction to hear that claim."**

Submissions

13. The Claimant represented himself before me. The Respondent (in liquidation) did not appear.

14. The Claimant argued (1) that he should be seen as being subject to a contract of employment during the currency of the first working week after the termination of his contract at Sheffield; (2) that if not, his absence from work was on account of the temporary cessation of work; (3) if not, there was an arrangement – albeit reached after the event – that his absence should not break continuity of employment.

(1) Relations Governed by a Contract of Employment?

15. The employer's working week ran from Sunday to Saturday. The Claimant was dismissed on a Tuesday. He did not work during the rest of that week, nor during the following week (beginning Sunday 28th February). Although his primary case was that the finding of fact by the Employment Judge as to the date when an offer of re-employment was made was wrong, he realistically recognised the difficulties in appealing a finding of fact. However, although the Judge did not identify when precisely he accepted the offer, it could realistically be no later than 4th March (a Thursday). That fell within the week following the determination of his contract at Sheffield, and during the week before he began work in Blackpool. There was thus not one complete week between his dismissal in Sheffield and his re-engagement at Blackpool.

16. The Employment Tribunal reasoning rested upon the employee's work in Blackpool beginning more than one clear week after the working week in which his contract at Sheffield terminated. This begs the question whether there was a contract of employment at some stage during the week commencing Sunday 28th February. On the findings of the Employment Judge it would be wholly unrealistic to suppose that the offer (said by the Respondent to have been made on the 4th March and by the Claimant to have been made on 23rd February) was not accepted before the first day of work on 8th March. Accordingly, although the Employment Judge does not set this out in the clearest of terms, I conclude that the Claimant made a contract with Deluxe in the week commencing 28 February for him to begin work for Deluxe in the week beginning 7th March.

17. On acceptance of the job offer, there was plainly a contract: was it *for* employment or was it *of* employment? To construe it as the latter would have the consequence that employees in the service of employer A who apply for a job with employer B, receive an offer of employment by B and accept it, to begin at the end of the notice period applicable to the service

of employer A would be under contracts of employment with both A and B at one and the same time. To construe it as the former would be to construe the contract as being one whose nature changed the moment work was first done under it, despite the terms of the contract not having altered in the meantime: and it may also be difficult to know what term might be applied to describe it if not "contract of employment".

18. Statute, principle and case-law assist in determining which it is.

19. As to statute, section 230 of the **Employment Rights Act 1996** adopts a circular definition of "contract of employment":

> **"(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing."**

Leaving aside apprenticeship therefore, a contract of employment is a contract of service: this provides no illumination, and it is thus to the common law that resort must be taken to understand the essential nature of a contract of service (or employment, the terms being identical in meaning). However, there appears to be a distinction drawn by the section itself between factual employment, consisting of performing work for an employer, and the contract of employment, containing the obligation to do so. Subsection 5 provides:

> **"In this Act 'employment' –**
> **(a) in relation to an employee, means… employment under a contract of employment…"**

On a natural reading, this envisages the possibility that the contract of employment, and employment under it, are two separate things. The contract of employment may exist without there being employment in fact under it.

20. Similarly, section 230(3) defines a worker as (so far as material)

> **"An individual who has entered into or works under…**
> **(a) a contract of employment, or**
> **(b) any other contract… whereby the individual undertakes to do or perform personally any work or services for the other party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual…"**

The emphasis there is on the individual's undertaking – i.e. entered into under the contract. It does not depend on performance of the contract.

21. As to case-law, in **Gunton v Richmond Upon Thames London Borough Council** [1980] ICR 755 Buckley LJ dealt with an argument that factual employment was coterminous with the contract of employment – the argument for the employer being that its wrongful repudiation of the contract by dismissing the employee automatically terminated the contract of employment. He rejected that conclusion (thereby supporting the distinction between performance and obligation apparent from statute). In the course of doing so he made observations which appear to relate not to the contractual position pertaining after dismissal from factual employment but with that operating before factual employment began (at p. 771 E-G):

> **"Why should the doctrine…** [of the acceptance of repudiatory breach] **…operate differently in the case of contracts of personal service from the way in which it operates in respect of other contracts? I for my part can discover no reason why it should do so in principle. It cannot be because the court will not decree specific performance of a contract of personal service, for there are innumerable kinds of contract which the court would not order to be specifically enforced, to which the doctrine would undoubtedly apply…** ***If one party to a contract of personal service were to repudiate it before the time for performance had arrived,*** **there would be no breach of contract until the time for performance and no cause of action until then, unless the innocent party chose to create one by accepting the repudiation. I can only conclude that the doctrine does apply to contract of personal service as it applies to the generality of contracts."** (emphasis added).

22. Brightman LJ agreed that the "rupture of the status of master and servant" amounted to a breach of contract, but it did not follow that the contract of service had thereby been terminated:

> **"What has been determined is only the status or relationship."**

On this reasoning, the court upheld the grant of a declaration that a notice of dismissal given to the claimant by his employer was ineffective lawfully to determine the employee's contract. What was said by Buckley LJ, to the effect that a contract was one of personal service even although there had been no actual service performed under it before it was repudiated, is useful but obiter. The decision itself demonstrates that work need not be done under a contract of employment for it to be a contract of employment.

23. Though loyally followed in **Boyo v Lambeth London Borough Council** [1994] ICR 727, C.A., two members of the Court (Ralph Gibson and Staughton L.JJ) expressed regret that they were bound by **Gunton**. In **Societé Generale London Branch v Geys** [2011] EWCA Civ. 307, however the Court of Appeal followed it. The House of Lords in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2011] UKSC 58, [2012] ICR 201 considered an argument that **Gunton** had been wrongly decided. Lords Dyson and Walker thought it unnecessary to decide the point, as did Lord Mance (paragraph 89) though he wondered if it were correct (paragraph 108). Lord Philips did not cast express doubt upon the decision (see paragraph 87). Lords Kerr and Wilson did not comment. Baroness Hale appeared content to adopt the decision without criticism, but at paragraph 114 noted, of particular relevance to the question in the present case, that:

> **"…the difference of opinion in the Court of Appeal was as to the effect of a repudiatory breach of contract by the employer – whether it automatically brought the contract to an end or whether it only did so if accepted by the employee, an important point which does not arise in this case but does arise in another which may shortly come before this court."**

This is a reference to the upward appeal in **Geys**, in which judgment is currently awaited.

24. **Hochster v de la Tour** (1853) 2 Ellis and Blackburn 678, 118 E.R.922 concerned a contract under which the defendant had agreed to employ the plaintiff as a courier at a future date. The day before employment itself was to commence, he refused to perform the agreement

and put an end to it. He was held to be in breach of the contract, even though there had been yet no performance under it. Though this demonstrates that a contract to work for another from a specified date is a contract prior to that date, it does not entirely answer the question whether the contract is one *for* employment or one *of* employment. Once, however, it is accepted that a contract of employment is not coterminous with the employment to which it relates (whether because of the statutory phrasing or by application of the principle adopted by the majority in **Gunton**) the answer would seem to be the latter. This is consistent with principle, since once a contract to start work at a future date is entered into, it is plainly a contract in law: as to its essential legal nature, that must depend upon the agreement itself, and not whether parties do or do not work under it, for otherwise a contract to start work at a future date would not be a contract of employment till the work began, but would be such when it began, despite the fact that none of its terms had changed or been altered in the remotest degree.

25. After the hearing in this case had concluded, I found **Sarker v South Tees Hospitals NHS Trust** [1997] ICR 673, a decision of the Employment Appeal Tribunal presided over by Keene J. The Claimant was offered a job orally at interview in July 1995. In August that offer was confirmed in writing, and detailed terms were set out to which the Claimant agreed. Work was to begin on 1st October. In September, however, the Respondent Health Authority withdrew the "offer" of employment. The Claimant sued for breach of contract, alleging that her claim was one which arose or was outstanding on the termination of her contract of employment. The case thus centrally raised the issue whether the contract which the Claimant had entered into was one of employment. The Respondent argued it was not: it was one for employment. As to that, the Appeal Tribunal said (678 D – H):

> **"The argument of the Health Authority that this was an agreement to enter into a contract of employment on 1st October 1995 is not a persuasive one: no further contract between parties was required. As and when the applicant turned up to work on 1 October, she would have been performing the contract**

> **already entered into, not making a fresh offer which the Health Authority would then accept by allowing her to work and paying her. The mere fact that the duties would only be performed on a date subsequent to this contract having been entered into cannot take it outside the concept of a contract of employment. If it were otherwise a very large number of contracts would not be contracts of employment, even though they were entered into perhaps only one day before the individual began actually performing his or her duties for the employer.**
>
> **We can see no reason why one should postulate the need for a further contract between the parties in such cases, a contract which would then be described as the contract of employment. There is a single contract, of which there may be an anticipatory breach if one party gives unequivocal notice that he will not perform his side of it. That was exactly the situation which occurred in Hochster v de la Tour. Consequently on this issue, we agree with the Tribunal Chairman's decision that this was a contract of employment the performance of which was not to start until 1 October 1995."**

26. The decision in **Sarker** was relied on, and hence must be taken to be endorsed by, the Court of Appeal in **Tullet Prebon plc v BGC** [2011] EWCA Civ 131; [2011] I.R.L.R. 420 (see per Maurice Kay L:J at para.43).

27. The apparent approach of the draftsman of section 230 ERA, the principle adopted by the majority in **Gunton**, the reasoning in **Sarker,** and an argument from first principle all coincide: once a contract such as that in the present case was made, it was one of employment. Though not requiring performance of actual work until the week beginning 7th March, it governed the relations between the Claimant and Deluxe from its inception.

28. Accordingly, the week in which the contract of employment was made is a week which counts under section 212 (1), "week" being defined as it is in section 232 of the **Employment Rights Act 1996**. The Appellant tells me that it was not in dispute before the Tribunal that his pay week ended on a Saturday. Accordingly, the 23rd February fell part way through week one, and the date upon which he entered into the contract of employment under which he was to begin work on 9th March was made during week 2. There was no week during the whole of which his relations with his employer were not governed by a contract of employment. On this

basis, there was continuity of employment. The Judge's implicit assumption that there was no contract of employment during the second week was wrong.

Temporary Cessation

29. In case my judgment on the first issue is in error, I shall deal with the other two issues which arise. The second issue is whether the Judge erred in concluding that the Claimant was not absent from work on account of a temporary cessation of work such that under section 212 (3) (b) the working week beginning 1st March would count in computing the Claimant's period of employment.

30. The reasoning of the Judge in paragraph 29 is to the effect that if one place of work shuts down the "absence from work" is caused by that, and not by a cessation of work. Her reasoning limited "cessation of work" to work performed in the same work place after cessation as it was before.

31. **The Employment Rights Act 1996** is a consolidating statute. A previous manifestation of what is now section 212 was contained in schedule 1 of the **Contracts of Employments Act 1963**, at paragraph 5 (1). That paragraph was considered by the House of Lords in **Fitzgerald v Hall Russell and Co Ltd** [1970] AC 984. Lord Upjohn, with whom Lords Reid and Wilberforce agreed, construed the phrase "temporary cessation of work" as referring to work available to the particular workman concerned, and having no reference to the work available to other workmen. He said (at 1002 A – F):

> **"The question whether at the same time the whole works would close down or a department was closed down or a large number of other employees were laid off at the same time, would seem to be irrelevant in a computation essentially personal to the particular workman. But a different construction has been adopted in the Court of Appeal in Northern Ireland in Monarch Electric Ltd v**

McIntyre [1968] N.I. 163. … Lord MacDermott CJ in the leading judgment in the Monarch case said at p.173:

> **"One must look at the cessation from the point of view of the employers who conduct the work and of what is happening at the place of work. An employee can lose his job without any cessation in that sense. Orders may have fallen away and he may have become surplus to requirements; or he may have been dismissed because his performance has become unsatisfactory; or he may simply have taken french leave and gone on a holiday. In such cases there has been a cessation of work on the part of the employee but not, in my opinion a cessation of work within the meaning of paragraph 5 (1) (b) …"**

I am unable to agree with this construction … for the reasons I have already given it does not seem to me relevant to consider the general work of the employer and the state of his business. …in my opinion the words "absent from work on account of a temporary cessation of work" mean that he was laid off or dismissed because his employer no longer had work available for him personally any longer and that was due in this case as the tribunal have found, to a shortage of work, but it might have due to other causes such as a serious fire or explosion, and such circumstances seem to fit into paragraph 5 (b) exactly. He was dismissed because there was no work for him: he was not dismissed because he was unsatisfactory; he was not dismissed because he took french leave; those seem to me with all respect to the learned Chief Justice of Northern Ireland to be quite different cases. Here was a willing employer and a good and willing employee but the former found that owing to business conditions he could no longer employ him. It would seem to me to be quite unjust to the workman … if the computation of the period of continuous employment was affected by the question whether upon the termination of his earlier employment, the employer was closing down his business or some department of his business or dismissing a large number of other employees. That seems, as I have said quite irrelevant."

32. The Employment Judge's approach in paragraph 29 was identical to the approach of Lord McDermott CJ in **Monarch** which was condemned by the majority of the House in **Fitzgerald**. As Lord Upjohn said, the computation of the Claimant's period of continuous employment could not fairly be affected by the question whether the employer was closing down a business or some department of it, as the employer here did at Sheffield. There was here a cessation of work for the Claimant in the sense that the Employer had no work further available for him to do once the Sheffield store closed.

33. Applying the words of the statute: (a) it is to be assumed that there was no contract of employment which governed the Claimant's relations with his employer during the week

beginning 1st March; (b) he was absent from work, in the sense of not being at work; (c) the reason for that ("…on account of…") was that the employer had no work further available for him to do. It was not that he had been dismissed for any other reason.

34. There is nothing in the statutory provisions which requires a cessation of work to be one which arises in any particular circumstances. It is a pure question of fact: was there work of the employer available for the employee to do personally, during the week in question? The position of other employees is irrelevant. The reason why there is a cessation of work is irrelevant. Given that no contract is in existence governing the relations during the week, any work subsequently taken up by the employee by the employer will be under a fresh contract. I see no reason why it should not be in another department or plant or location just as it may well often, even usually, be at the same work place. There is no requirement in the statute that the work be performed in any particular place (by contrast for instance with explicit provisions in respect of redundancy which are related to the place of work).

35. The Appellant submitted that whether the cessation of work was temporary or not could only be approached with the benefit of hindsight. This he took from **Ford v Warwickshire County Council** [1983] ICR 273, H.L. Lord Brightman (at 289 B-C) described it as "fundamental" to the construction and application of paragraph 9(1)(b) (the statutory successor to the paragraph 5(1)(b) considered in **Fitzgerald**) that:

> **"One looks backwards over the period of employment the continuity of which is in question and views the events which have happened, and then asks oneself whether the proper interpretation of those events is that, with hindsight, the employee has been 'absent from work on account of a temporary cessation of work.'"**

As Lord Diplock put it (285 C- E):

> **"… continuity of employment for the purposes of the Act in relation to unfair dismissal and redundancy payments is not broken unless and until, looking backwards from the date of the expiry of the fixed term contract on which the employees claim is based, there is to be found between one fixed term contract and its immediate predecessor an interval that cannot be characterised as short relatively to the combined duration of the two fixed term contracts. Whether it can be so characterised is a question of fact and degree…"**

36. The Employment Judge did not, in her paragraph 29, make a decision of fact as to whether the cessation of work was temporary. She reached the decision as a matter of principle – that the section simply did not apply to a situation where one employment ended and another started. If that is precisely what she meant to say, it is plainly wrong: for temporary cessation of work never falls to be considered under section 212 unless there is no contract governing the relations between the employer and employee at the time. There will necessarily have been a resumption at some time – and hence initially under a new contract. I consider what she meant, in context, was that cessation of work because of the closure of one store, and the opening of another elsewhere could not fall within the section. Applying **Fitzgerald**, however, the proper view depends upon the employee working for the same employer, and not upon where or in what circumstances he does so. As the Appellant urged upon me, Lord Denning said in **Wood v York City Council** [1978] ICR 840 at 843a:

> **"Even though a man may change his job from, say, manual work to clerical work, even though he may change the site of his work from one place to another, even though he may change the terms of his contract of employment and enter into a new contract of employment, as long as he is with the same employer all the way through, then it is continuous employment… the fact that a man changes his job and goes to a different department does not mean that he has broken the continuity of his employment so long as he stays with the same employer."**

37. The Employment Judge should therefore have assessed whether the cessation of work was temporary, viewed in hindsight, comparing the length of absence from work with the period of work which came before, and fell after it. Because of the approach she took, she never considered that factual question. Had she done so, there could on the facts of this case be

only one conclusion which she could properly have reached: that the cessation of work was, so viewed, temporary.

Can an "Arrangement" be Retrospective?

38. The Appellant argues that the Employment Judge was wrong to conclude that an arrangement within section 212(3) (c) must be made before the absence occurs if the period of absence is to count towards continuity. Instead, she applied the decision in **Murphy v A. Birrell and Sons Ltd** [1978] IRLR 458, EAT. He argued that this decision was contrary to a more recent decision of this Tribunal, presided over by HHJ McMullen QC, in **London Probation Board v Kirkpatrick** [2005] IRLR 443.

39. HHJ Clark, when giving permission for a full hearing in this case, rightly observed that there is a conflict of authority in the Appeal Tribunal as to whether the arrangement referred to in section 212 (3) (c) can be made after the absence has concluded.

40. First in time of the relevant authorities is the decision of the Appeal Tribunal, presided over by Lord McDonald in **Murphy v A. Birrell and Sons Ltd** [1978] IRLR 458, EAT. An employee was absent from work between August and October 1976. When re-employed in October 1976 she was told that her old contract stood. That referred to her having continuous employment from May 1957. The EAT decided that the break nonetheless deprived her of the continuity necessary to enforce the statutory right not to be unfairly dismissed, whatever the contractual position might be. There were two principal reasons and one subsidiary one for this. The first was one of construction: an absence fell to be regarded as continuing employment only if '*by arrangement or custom*'. 'Custom' has necessarily to exist at the time when the absence began: the same should apply to 'arrangement'. Second, the Tribunal agreed with an earlier case which pointed out that if an 'arrangement' could be made retrospectively it

could open the way to calculated fraud. The subsidiary support was derived from Lord Parker CJ's suggestion in **Southern Electricity Board v Collins** [1969] ITR 277, to the effect that paragraph 5(1)(c) was intended to apply to a situation where an employer lent his workman to another man for a short period on the understanding and intention that he would return to work for the first employer.

41. The first reason seems to me one of principle; but the second is an argument by regard to consequence as to the presumed intention of Parliament – an approach which requires caution since it is not normally difficult to be able to point to apparently unintended consequences of each of two rival constructions. The subsidiary reason seems to me in truth none at all, for it is an example of a situation in which there might be an arrangement rather than a definition of that which necessarily falls outside it.

42. In the second authority, **Ingram v Foxon** [1984] ICR 685, an Appeal Tribunal presided over by Balcombe J declined to follow **Murphy v A. Birrell**. A chef was dismissed from employment, and was absent from work for more than one week before his employer agreed to re-instate him with effect from the date of dismissal. Balcombe J observed:

> **"We are, of course, aware of the decision of the Appeal Tribunal in Murphy v A. Birrell and Sons Ltd that the arrangement contemplated in the paragraph cannot be made retrospectively at the conclusion of the absence from work. The ratio for that decision appears to depend, at least in part, on the argument that if an arrangement could be made retrospectively it could open the way to calculated fraud which presumably was never intended by the legislature… no such argument could be adduced in the present case: indeed we believe, as we have already said, that it can never have been intended by the legislature that an employee who has been unfairly dismissed, and whose employer recognises that fact and is prepared to reinstate him, must nevertheless present a complaint to the Industrial Tribunal if his continuity of employment is to be preserved."**

43. The reasoning does not engage with the first, principal, ground upon which **Murphy** was determined. As to the second ground, it, too, seeks to argue the meaning of the legislative words by reference to the consequences of the interpretation adopted. In this case, however, the consequences thought to be adverse argue in the other direction.

44. The point at issue is one of construction of the scope of that permitted by the statutory words. The fact, assuming it to be such, that no argument could have been adduced in **Ingram** that the employee was engaged in a 'calculated fraud' is invalid as a reason for construing the statute as the Appeal Tribunal did. It misses the point that the argument was one from consequence to construction. If the construction was appropriately reached by that route, the fact that in a given case there was no fraud would be beside the point. (The point is that there *might* be fraud *in some cases* if one construction of the wording were adopted).

45. In **Morris v Walsh Western UK** [1997] IRLR 562, the third in the chain of authority, a decision of the Appeal Tribunal presided over by HHJ Peter Clark, at this Tribunal, followed **Murphy** and not **Ingram**. For a month in 1996 there had been a break in the employment of the Appellant, following summary dismissal. On re-employment, he was told that his period of absence was to be treated as a period of unpaid leave. It does not seem to have been argued as it might have been following **Fitzgerald v Hall**, and **Ford v Warwickshire** that the absence from work was on account of the temporary cessation of work, perhaps because the reason seems to have been dismissal for some reason other than the cessation of work. The issue, rather, was one of construction: could the arrangement contemplated by section 212 (3) (c) be one made after the period of absence? HHJ Clark said:

"as a matter of construction, the statutory provision envisages that the arrangement is in place when he *is* absent from work, not afterwards"

46. He emphasised that the judgment in **Ingram** did not refer to the provision now manifested as section 210 (1) of the 1996 Act, which provides that a period of continuous employment is to be computed in accordance with chapter 1 of Part XIV of the Act *"unless provision is expressly made to the contrary"*. HHJ Clark plainly contemplated that the answer to the argument from consequence to construction adopted by Balcombe J was that Parliament had the opportunity (which it had taken in both 1976, in the Labour Relations [Continuity of Employment] Regulations and their successor regulations in 1993) to provide for particular circumstances in which notwithstanding the other provisions of Part XIV continuity was to be presumed. As I understand his reasoning, he concluded that therefore such an argument was of no assistance in construing the scope of the statute – Parliament had a separate power to deal with what might be thought anomalous, with the result that there was little scope to argue that the apparent unfairness of circumstances arising on what would otherwise be the literal construction should have the result that that construction would be rejected.

47. In **Joseph Ltd v Heath** EAT 881/97 HHJ C Smith QC presided over a Tribunal, which agreed with the EAT in **Morris** that as a matter of construction of the wording of the section an arrangement had to be in place at the time absence from work began.

48. In **London Probation Board v Kirkpatrick** the Appeal Tribunal, presided over by HHJ McMullen QC, declined to follow **Murphy v Birrell** , **Morris v Walsh Western UK Ltd**. and **Joseph Ltd v Heath**. This was a case in which an employer dismissed an employee, two months later decided to uphold the employee's appeal and reinstate him, but then a further month later reneged on that promise and restored the original dismissal. The employer argued that when the employee was reinstated by agreement, his continuity of employment was broken

such that he did not have the necessary period of employment to make a claim when re-dismissed. HHJ McMullen QC said (at paragraph 21):

> **"As a matter of construction of section 212 (3) (c) there is no temporal qualification to the "arrangement". An arrangement can be in place without it ever being put into operation in any specific case. An arrangement can be made and applied in a specific case. Logically the "custom" should exist prior to the gap but we see no reason to add words to this statute to mean "*arrangement* prior to the break in continuity". The only reason advanced in the Authorities for that construction, to which we will turn in a moment is to avoid fraud. But the ability of an employer to acknowledge it has made a bad or unfair decision and put it right by reinstatement without troubling an Employment Tribunal or an ACAS officer seems to us to be a consideration more in tune with reality."**

49. Of **Morris v Walsh Western UK** HHJ McMullen QC commented that there were written representations only from the employee, that the EAT had regarded **Ingram** as having been decided without the benefit of full argument as both parties were unrepresented but that was true of **Morris** too, and that there was no analysis why the view of Balcombe J's judgment was "not permissible". He said (para.26):

> **"In our judgment it is correct to follow Ingram. Purely as a matter of construction there is no qualification on "arrangement". Thus, free of authority we would hold that an arrangement can be made retrospectively. This also fits the policy of dispute resolution at the workplace. As Balcombe J's EAT put it why should it matter that a Claimant has presented a claim to a Tribunal in order for an arrangement to take effect. If parties agree on the sort of arrangement made in this case, and the Claimant goes back to work without the original dismissal taking effect as a dismissal (as occurred in Roberts v West Coast Trains Ltd [2004] EWCA Civ 900) it could rightly be described as an abuse of process for a claim form to be presented claiming unfair dismissal. Yet on the application of the Murphy principle this artifice would be a requirement. We are, of course concerned that the EAT in Murphy and again in Joseph (albeit not necessarily for its judgment) decided the point as one of construction. Given that a custom must be in place before the gap, neither EAT shows us why it is necessary to add words to the statute so as to limit arrangements to those made in advance of the gap. No judgment except Balcombe J's deals with the policy reasons. The need to exclude fraud did not arise in any of these authorities nor in our case so it seems odd to base a construction on that premise. What is the fraud envisaged? An employer and a dismissed employee agree to reinstatement. He has continuity of employment so can complain if dismissed a second time and his employer is exposed when, without the arrangement, it would not be. There is no public finance aspect to this as redundancy pay, based on continuity of employment, is paid by the employer. Furthermore,… an employer facing large redundancy costs could dismiss the employees, reinstate them after a week but without continuity of employment, and then declare redundancies to a workforce who have no entitlement to claim unfair dismissal, redundancy pay**

or notice. Besides, committed fraudsters and genuine conciliators alike need only present a claim form and can then make any arrangement they wish."

50. It is of interest that the Employment Appeal Tribunal would have reached the same result by application of the statutory wording to the facts before it, whatever the correctness of the view that an arrangement could be made retrospectively. The employee though dismissed had appealed internally to his employer under a provision of his contract of employment providing for such an appeal. Section 212 (3) (c) does not refer simply to continuing "in the employment of his employer" but adds the words "…for any purpose…". The Appeal Tribunal held that remaining in employment not for work, but for the purpose of making an appeal under pre-existing arrangements (the disciplinary procedures agreed contractually) therefore fell within section 212 (3) (c). This constituted an alternative basis for the decision.

Discussion

51. Continuity of employment is a statutory concept. Whether an arrangement may be reached retrospectively must be determined as a matter of statutory construction. That involves looking at the words of the statute in the light of their apparent purpose, being prepared to modify an initial view of the wording if that interpretation leads to absurdity.

52. The important words in 212 (3) (c) are "…circumstances such that, by arrangement or custom, he *is* regarded *as continuing in* the employment of his employer…"

53. As Lord MacDonald and HHJ Peter Clark point out, the word is expressed in the present tense: "is". I would place greater weight however, upon the later words "as continuing in". This wording also refers to the present. It takes the view that the relevant employment is current or prospective, but not retrospective. The regard which is to be had is in respect of the period of absence from work (the opening words of 212 (3) (c)). The words are conspicuously

not "regarded *as having continued* in the employment of his employer despite the absence from work", or similar. The regard is thus to be had contemporaneously with the "week… during the whole or part of which an employee *is*… absent…". The circumstances are therefore those which are present at the time of absence, or have preceded it: that is the natural meaning of the subparagraph.

54. This view is supported by the fact that the central word is part of a phrase: it is "by arrangement or custom". The meaning of a word may in part be derived from its companions. In this context, "custom" necessarily pre-dates the absence. The placing of "arrangement" in the same phrase together with "custom" indicates that it, too, is something made before or at the time of the absence from work.

55. The distinction between "custom" and "arrangement" would seem to be that the former, as hallowed by long usage, is to be assumed to be the case, and is likely to be applicable to all employees similarly situated: "arrangement" would seem to be of more recent origin, is a wider concept than "agreement", but arguably may apply less generally. Otherwise, however, both have in common that when applied to the circumstances pertaining they show that the employee concerned is regarded (not "is to be regarded") as continuing ("not having continued") in employment.

56. I draw comfort from the fact that all who have considered the construction of the statutory words themselves - I note that Lord MacDonald regarded his view as supported by academic commentary (Professor Gruntfeld) - take the view that I have of them, save only HHJ McMullen QC. His sole construction point was that the wording placed no qualification on "arrangements". That is so, unless and until the word is seen in context of the whole

subparagraph, which in my view makes it plain that the arrangement precedes or is contemporaneous with the period of absence.

57. The conclusion reached does not give rise to absurdity, such as to compel a different meaning. In a case where a Tribunal orders reinstatement, continuity is preserved by legislation. The 1996 regulations provide for specific cases. Parliament could have included the situation in **Kirkpatrick** amongst them, if had wished to do so. But even so, the second ground upon which the Appeal Tribunal decided **Kirkpatrick** would apply to any case where an employee had been reinstated following successful internal appeal, without need to alter the construction of s.212(3) reached on a first view of the wording of that subsection.

58. Though initially tempted by the policy considerations which appealed to HHJ McMullen QC, I am satisfied that the proper approach is that of Lord MacDonald, HHJ Peter Clark and HHJ Smith. Employment Tribunals should hereafter follow their ruling and not **Kirkpatrick**: and "arrangements" within the meaning of section 212 will not have effect to bridge the gap in the continuity of employment unless the arrangement is in existence before, or arises contemporaneously with, the relevant weeks of absence from work during which there is no contract of employment governing relations.

Conclusion

59. Most of the time in the hearing was devoted to the third point with which I have dealt. The appeal does not succeed on that ground: but it does succeed on each of the first two grounds taken independently. Accordingly, the case must be heard and determined by an Employment Tribunal on the footing that the Claimant has sufficient continuous employment to bring a claim. Given that the employer is in liquidation, and compensation might be limited,

there is much to recommend the parties entering into early discussions to see if the matter may be resolved financially.