EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123729/2018 Preliminary Hearing at Dundee on 8 April and 14 June 2019

Employment Judge: M A Macleod

Teresa Coull	Claimant Represented by Mr R Russell Solicitor
DPD Group UK Limited	Respondent Represented by Mr R Bradley Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal is dismissed for want of jurisdiction.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 19 December 2018, in which she complained that the respondent constructively unfairly dismissed her.

2. The respondent submitted a response in which they resisted the claimant's claim, and denied that the Tribunal had jurisdiction to hear the claim, on the

basis that the claimant lacked the necessary minimum qualifying service upon which to found a claim of unfair dismissal.

3. A Preliminary Hearing was fixed to take place on 8 April 2019, although a further day was required in order to conclude the hearing. The claimant was represented by Mr Russell, solicitor, and the respondent by Mr Bradley, advocate.

4. The parties presented documents to the Tribunal, including a supplementary bundle on the adjourned date, to which reference was made during the course of the hearing. Where this Judgment makes reference to documents from the original bundle, the page number is recorded without prefix, and from the supplementary bundle, the page number is recorded with the prefix "S".

5. The claimant gave evidence on her own account. The respondent called as witnesses Lynsey Marie Harkness, HR Business Partner; Alan James Paterson, General Manager Designate; and Steven Kington, Regional Manager.

6. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

7. The claimant commenced employment with the respondent on 7 January 2013, and worked in their Dundee depot as a Shift Manager (Collections and Deliveries).

8. The claimant was dissatisfied with the manner in which the then Depot Manager, John Catling, was managing the depot, and raised her concerns with the respondent in 2015 and 2016 or early 2017.

9. The claimant resigned from her position with the respondent on 27 December 2016. She emailed Mr Catling (46) to say:

"Hi John

As per our numerous conversations last week it is with regret I am resigning from DPD.

My last day of employment will be 27th January.

I hope Dundee depot will grow with success. I am sure with the right team it will.

Many thanks for the last 4 years, although there has been ups and downs, your support during all personal issues I have had was outstanding. I thank you for that.

Teresa"

10. The respondent acknowledged receipt of that email, and confirmed, by letter dated 11 January 2017 from Sharon Hughes, HR Manager, that her resignation would take effect on 27 January 2017 (53).

11. The claimant had secured alternative employment with a company called Viridor, and was due to commence in that new employment on 1 February 2017. The evidence does not disclose when she was interviewed for that position, though she was headhunted by Viridor in November 2016, and was offered the position on the day of interview. She accepted that offer at that time.

12. On 17 January 2017, the claimant met with Steve Kington, Regional Manager, at Mr Kington's suggestion, in the respondent's Edinburgh depot. He wanted to discuss with the claimant why she had decided to resign. She explained that she had become frustrated working in the depot with Mr Catlin. He asked her to reconsider her resignation, but she declined to do so.

13. On 25 January 2017, the claimant emailed Lynsey Harkness to set out, following an earlier conversation, the issues giving rise to her resignation at that time (55). It is not necessary, for the purposes of this Judgment, to narrate her reasons. However, she did say, towards the end of that email:

"I feel it is a real shame I have been left with no choice but to accept alternate employment as I am unable to work in this environment any longer. Had John acted on the basic fundamental duties then emotions would not be so high, if we employed the right people and not just make do with what we have we would have a stronger team that brings structure and accountability into the workplace. Instead there is none of what matters."

14. On 1 February 2017, the claimant contacted Mr Paterson and advised that she had told Viridor that she did not wish to take up the position, and would like to return to work for the respondent, on the basis that Mr Catlin would no longer be working for the respondent. Mr Paterson expressed pleasure at this, and confirmed that he would pass this on to Mr Kington.

15. 2 February 2017, a number of conversations took place between Mr Kington, Mr Paterson (his deputy) and Ms Harkness.

16. The claimant was interviewed by Ged Reilly on 6 February 2017 in Dundee as part of his investigation into allegations relating to the conduct of John Catlin (S75). She reiterated that she loved her job with the respondent, but had had to leave as she did not have the support she would have wanted.

17. A disciplinary hearing took place on 10 February 2017 in which Steve Kington heard the case against Mr Catlin in relation to alleged gross misconduct. Following that hearing, Mr Kington took the decision to dismiss Mr Catlin without notice, and confirmed that decision to Mr Catlin by letter dated 13 February 2017 (S77ff). The letter referred to the disciplinary hearing having taken place on 10 January 2017, but it is clear that this was a typographical error, and that the hearing took place on 10 February 2017. Mr Kington first saw the claimant's statement (S75) when he received the disciplinary hearing pack in advance of that hearing, shortly before 10 February.

18. On 24 February 2017, Mr Kington called the claimant to confirm that Mr Catlin's appeal against dismissal had not been upheld, and therefore to assure her that he would no longer be managing the depot in Dundee. On

that basis, he offered the claimant her job back. The claimant accepted that offer.

19. On 28 February, Lynsey Harkness emailed Steph Swain, also in HR, to say (63):

"Hi Steph

We would like to go ahead and offer Teresa Coull her C&D role back with a continuous start date. I believe this has been authorised as her role was never replaced."

20. Dawn Floyd, HR & Training Administrator, was asked to deal with this, and emailed Sharon Hughes, Head of HR, on 1 March 2017 (65):

"Hi Sharon

I have been asked to send an offer letter to Teresa Coull for her old position of Shift Manager C&D at Dundee Depot with a continuous service start date. Teresa originally joined the Company on 7 January 2013 and resigned on 27 January 2017.

How would you like me to proceed with this especially as Lynsey has requested that she keeps her continuous service.

I can confirm that Teresa's position was not replaced."

21. Ms Hughes replied to Ms Floyd on 2 March 2017 (68) to confirm that this was approved, and that the period between 27 January to her start date would be unpaid.

22. Ms Hughes then wrote to the claimant on 3 March 2017 (70) to confirm the position:

"Dear Teresa

Further to your reinstatement to the position of Shift Manager – C&D based at Dundee Depot and your discussions with Steve Kington, Head of Network North and Lynsey Harkness, HRBP, I am writing to advise that

your Contract of Employment will be reinstated with effect from 6 March 2017. Please also be advised your continuous service date will be 7 January 2013.

Please note that the period between 28 January 2017 and 5 March 2017 will be unpaid."

23. A provision was set out in relation to holidays, and then Ms Hughes confirmed that "All other conditions of employment remain unchanged". The claimant signed an acceptance of the offer on 6 March 2017. She returned to work for the respondent on 8 March 2017 as agreed.

Submissions

24. The representatives made short, oral submissions, which are summarised briefly here.

25. Mr Russell, for the claimant, submitted that the issue for this hearing was in sharp focus, and described it as "quite a troubling situation" where each party had a polar opposite view of events.

26. He invited the Tribunal to find that the claimant does have continuity of service. He made reference to what he called the crucial case of **Welton v Deluxe Retail Ltd t/a Madhouse (in administration) [2013] IRLR 166**. Mr Russell said that if the Tribunal were to find in fact that the claimant's version of events is the more likely – that on 2 February 2017 she received and accepted an offer of employment from the respondent – that means that on the basis of the **Welton** judgment, she was offered that employment within 6 days of the termination of her earlier employment. Section 212(1) of the Employment Rights Act 1996 provides that this would not then amount to a breach in service.

27. Mr Russell asked the Tribunal to find that the claimant was a credible and reliable witness. She was very specific in her recall of events. She turned down the post at Viridor which she had secured, and did not apply for any other jobs, because she had received the respondent's offer to return to her

employment. She gave evidence that she and her partner had opened a bottle of wine to celebrate.

28. He argued that the claimant's continuing contact with the respondent, including her agreeing to attend a meeting with Mr Reilly, following her resignation, is a clear indication that she already knew that she was being offered her job back.

29. The phone records which have been lodged support the claimant's version of events, other than the absence of a record that there was a phone call between herself and Mr Kington on 2 February 2017. In the call between Mr Kington and Ms Harkness, Mr Russell conceded that he did not know what was said in that call but submitted that it was more likely than not that it related to the call between Ms Harkness and the claimant on that date.

30. He submitted that the Tribunal should accept that the claimant was offered, and accepted, reinstatement to her previous role, in a telephone conversation between Mr Kington and her on 2 February 2017.

31. For the respondent, Mr Bradley observed that there is a single issue before the Tribunal, namely the claimant's length of service with the respondent. There is no dispute, he said, that the claimant's effective date of termination of 6 September 2018, nor that the claimant's contract had ended on 27 January 2017 by resignation. The dispute relates to when her service began. The respondent says it was 8 March 2017. The claimant says it was 7 January 2013.

32. For present purposes, he said, the Tribunal must disregard what the parties actually agreed, as this jurisdictional point is one properly taken by the respondent. Section 108 of the Employment Rights Act 1996 requires a claimant to demonstrate that they have two years' continuous service in order to qualify for the right to raise an Employment Tribunal claim of unfair dismissal. He then referred to sections 210 to 219 of the 1996 Act, and submitted that on the face of the immediate facts, there was a break in service between 27 January 2017 and 8 March 2019, longer than one week.

33. Referring to the **Welton** case, Mr Bradley pointed to paragraph 28, and submitted that if the Tribunal accepts that there was an offer and acceptance of employment on 2 February 2017, there is no break in the claimant's continuity of employment. However, he invited the Tribunal to find that there was no offer made on that date.

34. He said that Mr Kington clearly denied that he had made such a call on 2 February 2017. He suggested that it would be impossible to find that Mr Kington's evidence was other than credible or reliable. He denies making the call on that date. There is no record of any call from his mobile phone supporting that suggestion, and he gave evidence to the effect that he would never use his landline for a number which would be readily accessible on his mobile phone. The absence of that record in his mobile phone records is a fact which counts against the claimant.

35. Mr Bradley observed that the claimant asked why the respondent would wait until 24 February to call and offer her reinstatement, but proffered the view that there was a perfectly credible explanation, which was that they would only make that offer once Mr Catlin's contract had ended. It would be unprofessional for Mr Kington to have made the offer until he could be sure that the claimant would not require to work with him again. He also submitted that if there had been an offer and acceptance on 2 February, the paperwork would have been completed much more closely to that date.

36. He pointed to the ET1 in which the claimant alleged that the offer was made "in the middle of February". There is not a single piece of evidence to support her contention.

37. It is more likely that the offer and acceptance took place on 24 February because the dismissal and appeal decisions relating to Mr Catlin were concluded by that stage.

38. Mr Bradley therefore concluded by submitting that the Tribunal should find that due to a break in service between 27 February and 8 March 2017 the claimant lacks continuity of service for two years, and therefore the Tribunal lacks jurisdiction to hear the claim.

The Relevant Law

39. Section 108(1) of the Employment Rights Act 1996 provides:

"Section 94 [the right not to be unfairly dismissed] 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."

40. Section 212(1) of the 1996 Act provides:

"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."

41. In the case of **Welton v Deluxe Retail Ltd t/a Madhouse (in administration) [2013] IRLR 166**, Mr Welton began working for the respondent in their Sheffield store in January 2009, and on 23 February 2010, the store closed. The working week ran from Sunday to Saturday and so ended on Saturday 27 February 2010. On 8 March 2010, more than a week after his last working week at the Sheffield store ended, Mr Welton commenced working at the respondent's Blackpool store. On 11 December 2010, he resigned and claimed unfair dismissal before the Employment Tribunal. There was a dispute between the parties as to when the offer of employment at the Blackpool store had been made.

42. Paragraph 28 lays out the court's approach to this issue:

"Accordingly, the week in which the contract of employment was made is a week which counts under s212(1), 'week' being defined as it is in s232 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, 23 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 9 March was made during week two. 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."

Discussion and Decision

43. In this case, as both parties observed, the relevant provisions of the law, nor the application of those provisions, are not a matter of dispute here. The issue is very sharply focused: when was the claimant's contract of employment made between the parties, following her resignation with effect from 27 January 2017?

44. I am confronted with two divergent factual positions. The claimant insists that in a telephone call made on 2 February 2017, Mr Kington offered her her job back, and she accepted that. The respondent insists that not only was no such offer and acceptance made, but that that telephone call did not take place at all. The respondent's position is that the offer of reinstatement was made in a telephone call of 24 February 2017, and was accepted at that time.

45. Both representatives submitted that their respective clients were entirely credible and reliable in their evidence. In this case, I am not persuaded that either the claimant or Mr Kington was in any way deliberately seeking to mislead the Tribunal as to what had happened here.

46. The only evidence in support of the claimant's version of events comes from the claimant herself, in her insistence that the telephone call took place on 2 February 2017. There is no written evidence to support that assertion; the claimant does not point to any email which she sent to Mr Kington or Ms Harkness to confirm the terms of such a conversation, as might be expected to happen, particularly in the event of a delay following thereon in issuing the paperwork confirming the contractual position.

47. The claimant points to a number of telephone calls taking place, according to the phone records, in which Mr Kington was involved with Mr Paterson and Ms Harkness. There is no evidence to support her contention that Mr Kington was telling Ms Harkness that he had offered the claimant her job

back. Both Mr Kington and Ms Harkness, whom I found to be credible and reliable, were quite straightforward in denying that any such offer was discussed at that stage.

48. The mobile telephone records which were produced by the respondent following an Order of the Tribunal sought by the claimant do not support her assertion that there was a telephone call between her and Mr Kington on 2 February. Those records were sought by her on the basis that they would prove her position, and she was unable to account for the absence of any such record appearing on them.

49. I am not prepared, on the basis of the evidence before me, to find that the claimant was offered her job back by Mr Kington on a telephone call of 2 February 2017. There is simply insufficient evidence upon which to come to any such conclusion. Mr Kington denies it, and he is supported in that denial by the objective evidence of the mobile phone records.

50. Further, it is my judgment that the overall circumstances in which the claimant was offered her job again entirely support the evidence of Mr Kington, that the offer was made on 24 February 2017. The reason for that is that the claimant, in her conversation with Mr Kington on 17 January, made it quite clear that she would not reconsider her resignation while Mr Catlin remained in position at the Dundee depot. It would be quite illogical then for Mr Kington to offer her reinstatement to that depot while Mr Catlin remained there, or while there remained the possibility that he may return following his appeal against dismissal. It would be even more illogical for the claimant to suggest that she had accepted reinstatement to a position from which she had resigned when the impediment to her returning still remained in place.

51. Accordingly, it is my judgment that the claimant was offered reinstatement to her position by the respondent on 24 February 2017, and not on 2 February 2017. There was therefore a break in service between her resignation with effect from 27 January and that conversation on 24 February 2017, and accordingly the claimant's continuity of service began

on 8 March 2017. Given that her employment then ended by resignation with effect from 6 September 2018, it is quite clear that the claimant lacked the necessary two years' continuous service upon which to base a claim for unfair dismissal.

52. The Tribunal therefore lacks jurisdiction to hear this claim of unfair dismissal, and it is dismissed.

Employment Judge: **Murdo A Macleod**
Date of Judgment: **16 July 2019**
Date sent to parties: **17 July 2019**