Appeal No. UKEAT/0257/19/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 24 April 2020
Judgment handed down on 15 May 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR R O'SULLIVAN — APPELLANT

DSM DEMOLITION LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr C Milsom (of Counsel) Instructed by: Wace Morgan Ltd 21 St Mary's Street Shrewsbury SY1 1ED
For the Respondent	Mrs S Fraser Butlin (of Counsel) Instructed by: Pinsent Masons LLP 5 Colmore Row Birmingham B3 2FG

SUMMARY

JURISDICTIONAL POINTS – CONTINUITY OF EMPLOYMENT

The Employment Tribunal dismissed the Claimant's claim of unfair dismissal on the basis that he did not have two years' continuous employment. The dispute turned on the start date. Section 211(1)(a) **Employment Rights Act 1996** provides that, for these purposes, a period of continuous employment begins "with the day on which the employee starts work". This means the start date of work under a contract with (subject to provisions which did not apply here) the employer in question. The Respondent's case was that the start date in this case was 2 November 2015; the Claimant's case was that it was 26 October 2015.

The Tribunal found that the Claimant had done work on the Respondent's site in the week of 26 October 2015. However, it also properly found that a Statement of Terms had been drawn up with a 2 November 2015 start date, he had been put on payroll with effect from that date, and had begun completing worksheets from that date. The Respondent's client was also not charged for his work in the week of 26 October 2015. Further, he had been paid £100 in cash on site for the week of 26 October 2015, and had not complained to the Respondent about his pay.

The Tribunal correctly directed itself as to, and correctly applied, the law. **Koenig v The Mind Gym Limited**, UKEAT/0201/12, considered. In light of the foregoing and other factual findings, the Tribunal had been entitled to conclude that the Claimant had worked in the week of 26 October 2015 under an unofficial arrangement and not under a contract of employment with the Respondent. Its decision was also **Meek**-compliant. The appeal was dismissed.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I shall refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent. The Claimant was employed by the Respondent as a Demolition Safety Supervisor. Following his dismissal he presented a claim form to the Employment Tribunal ("the Tribunal") including complaints of unfair dismissal and disability discrimination. In the claim form he gave his dates of employment as 19 October 2015 to 21 October 2017.

2. A Response Form was entered. It gave the dates of employment as 2 November 2015 to 11 October 2017. The Grounds of Resistance asserted that the Tribunal had no jurisdiction to consider the unfair dismissal claim as the Claimant had insufficient service.

3. Following a case management Preliminary Hearing on 17 August 2018 a further Preliminary Hearing took place before Employment Judge Self sitting at Birmingham on 28 November 2018. The Judge decided that the Claimant did not have two years' continuous service and dismissed the unfair dismissal claim. He also decided that the Claimant was not, in law, a disabled person, and dismissed his disability discrimination claims. Written reasons were subsequently requested and these were sent to the parties on 15 March 2019.

4. The Claimant appeals against the dismissal of the unfair dismissal claim. The appeal asserts that the Tribunal erred in law in its determination of the start date of employment and/or that it gave inadequate reasons for its decision in that respect. I will therefore confine my summary of the Tribunal's Reasons to the passages that are relevant to that aspect.

The Tribunal's Decision

5. The Tribunal heard oral evidence from the Claimant and from Carol Wood for the Respondent, both of whom were cross-examined. It identified that there were issues as to both the start date and the end date of the Claimant's employment, and a further issue as to whether there was a break in continuity, which had been raised in Ms Wood's witness statement, but which the Judge considered, as the Claimant's representative was able to address it. At [20] the Judge noted the dates given by the parties in the claim and response forms. He observed: "It is fair to say that these positions have not remained stable and have shifted from time to time and their respective uncertainty and inconsistency is noted and will be considered."

6. The Respondent's position was that the Claimant's start date was 2 November 2015. That date was given in a Statement of Main Terms and Conditions of Employment. This document was not signed, or posted to the Claimant, but he was paid in accordance with it. It stated that it was issued on 6 November, but the Judge said he had no evidence as to how. A weekly labour sheet showed that the Claimant was working in Derby from Monday 2 November "which is consistent with the start date shown on the contract of employment." [22]

7. The payroll records were also consistent with that start date. Had he started on 2 November, the Claimant would have handed in his work sheet at the end of that week, or the start of the week following, and it would have been processed on 11 November and paid on 13 November. The work sheet showed the correct number of hours for the week of 2 November. There was no payment processed on 4 November, which would have been the process date for the week beginning 26 October. [23]

8. The Claimant got what I will call his basic health and safety test certificate on 22 October 2015, which would be sufficient for him to be allowed on some sites. The more stringent sites required an additional certificate which he obtained on 2 December 2015. [24] However, as of 22 October 2015 he could have worked on the Derby site. [25]

9. Although in his claim form the Claimant had given a start date of 19 October 2015, in a letter to the Tribunal, of 14 May 2018, he asserted that his employment was from 22 October 2015. He relied on the basic health and safety registration in that regard and asserted that the offer of employment was accepted on that date. However, the Judge observed that agreement having been reached on a certain date, that the Claimant should work for the Respondent, did not necessarily mean that the employment itself commenced on that same date. [26] – [28]

10. I will set out the next passage, leading to the Tribunal's conclusion on this issue, in full.

> **"29. The Claimant further asserted that prior "to the start date of 2 November proposed by the Respondent" the Claimant had participated in a number of work activities directly related to his role including attending for uniform and mask fitting and 5 days' work dismantling a lift system in Derby. That was also his position at the first PH on 17 August 2018. In his statement he asserted that the lift job in Derby started on 26 October.**
>
> **30. I have considered all the evidence before me on this point and I conclude as follows. I do not accept that the Claimant started work on 19 October as he asserted in his Claim Form. That predates his health and safety certificate and I do not consider he would have been allowed on site without it. I accept that there was an agreement that the Claimant should work for the Respondent on 22 October 2017, but I do not accept either that that was the date when the contract of employment started. The Claimant himself says in his May letter that the proposed start date was 2 November.**
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> **31. The issue is whether the Claimant started on 26 October 2015 or on 2 November 2015. I am satisfied on the evidence before me that the Claimant did undertake some work in Derby on the week before the official start date of 2 November. I am satisfied that his recollection of working with Mr Duffy and the site was sufficiently precise to allow me to conclude that he did undertake work on that site and that he had the necessary paperwork to do so. That however is not the end of it because I also must consider whether that work was part of that encompassed in the contract of employment or other work that predated and was collateral to that contract.**
>
> **32. The evidence from the Claimant was that he was not paid by the Respondent for the week he worked and that someone called Kieron paid him £100 out of his own pocket. I am satisfied that the Claimant's work sheets are accurate and that they did not charge the client for the Claimant's work and I am also satisfied that the Claimant did not put in a work sheet to the Company for the work done. There is no claim before this Tribunal for an unlawful deduction of wages and I can see no evidence at all the Claimant raising the non-payment of monies allegedly legally due during his employment. Having seen and heard from the Claimant I consider it very unlikely that he would have not raised the**

issue of outstanding monies over the course of his employment if he genuinely believed it was due from the Respondent for work done.

33. I have considered the case of Koenig v The Mind Gym (2013) EAT 0201/12. The legal question in that case was how a tribunal should approach activities undertaken by an employee at the request, but not the requirement of an employer prior to the date they have agreed between them that the contract of employment would start. In what circumstances would continuous employment start from a date earlier than that agreed.

34.Under section 211(1)(a) of the ERA an employee's period of continuous employment for the purposes of any provision of the Act begins with the day on which the Claimant starts work. It was accepted in Koenig that work under that section must mean work under and not collateral to the contract (para.5 Koenig).

35. At paragraph 19 of Koenig it is made clear that the start date under section 211 is a question of fact and the date to be adopted was the date which common sense dictated on the facts.

36. In this case I am quite satisfied on the facts that the work that was done from 26 October was collateral to the contract and not part of it. There is agreement that the contract of employment was agreed to start on 2 November (e.g. the Claimant's own letter at page 30) and it is from that date that the Claimant worked pursuant to the Respondent's payment systems and was invoiced for the work he did to the client and was paid according to the systems.

37. Whilst the Claimant did undertake work in the week before 2 November it seems to me that he did so "unofficially", and his status was as a subcontractor / extra pair of hands helping out on site for which he was paid cash in hand by one of the other workers for his help. There is nothing within any of the facts founds that could lead me to a conclusion that he was working under a contract of employment with the Respondent for that week. The Claimant himself did not believe that he was due money for that period from the Respondent and that is why I find that he never escalated the matter of wages due at a later stage. My conclusion is that the Claimant's contract of employment started on 2 November 2015 as per the Respondent's case."

11. The Judge went on to find that there was no break in continuity of employment, as asserted by the Respondent, that the dismissal letter was received by the Claimant on 20 October 2017, and that the effective date of termination for the purposes of calculating length of continuous service was 27 October 2017. As I have noted, those findings were not appealed.

The Law

12. Section 211(1)(a) **Employment Rights Act 1996** (the "**1996 Act**") provides, so far as relevant, that, for the purposes of determining a period of continuous employment under **the 1996 Act**, the period "begins with the day on which the employee starts work".

13. This provision, and its identically-worded predecessor, have been considered in a number of cases. The arguments on this appeal principally focused on the authority cited by the Tribunal: **Koenig v Mind Gym Limited** UKEAT/0201/12/RN. In that case Ms Koenig signed a contract on 14 August 2009 which provided that her employment and continuous employment would start on 1 October 2009. She was asked to, and did, attend a meeting in advance of the start date, with a prospective colleague and a prospective client, which it was said it would be useful for her to do. Attendance was voluntary. She was not paid for attending. The Tribunal in that case found that this was collateral to the contract of employment, a decision upheld by the EAT (Langstaff P). At [8], and then further on at [21], the EAT said this:

> **"8. Here, therefore, it was, I accept, on the submissions of Mr Cheetham in response, that the Judge logically had to have in mind that the parties had agreed that work under the contract would begin on 1 October. Either the work on 29 September was not under the contract or the contract had to have been varied to include it. Mr Cheetham submitted, and I accept, that where an employee who has yet to start work accepts an invitation from an employer to, for instance, a social function or, for instance, to pop in for coffee to see a future manager, that would sit at one end of a spectrum of activities which are plainly work related, but neither would constitute work under the contract itself. At the other end of the spectrum he proposed was a person who in advance of a contractual starting date went into the office at 9:00 am, left at 6:00 pm being under the control of the supervisor throughout that period. That, he submitted, was plainly and obviously work. Even though the contract might provide for a later date, it would be plain to any observer that the parties had agreed that the employee in such a case would be working for the employer under a contract of employment at that time and, therefore, whether under a separate contract or whether under the original contract as varied would have continuity of employment starting from that date.**
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> **…**
>
> **21. Work outside a contract of employment, though it might have some relationship to it, cannot count. At times it may be difficult to see precisely where the dividing line is. That is the task of the Employment Judge. If he properly directs himself then it is unlikely that the answer will be wrong. In most situations in which any significant activity has been performed which is to the benefit of the employer, by someone who anticipates being in employment with that employer, it will be easy to infer that the parties have agreed that there will be a contractual relationship under which that activity is performed. But it all depends upon the evaluation of the activity: I accept entirely the submission that there be many different such activities and that it is a matter of fact and degree whether they give grounds for, or compel, the conclusion that the work done is work under a contract of employment bearing in mind that there may be a contract of employment separate and distinct from the one which is about to commence on a previously agreed date."**

The Grounds of Appeal

14. What was labelled as Ground 1 of the Notice of Appeal refers to the definition of an "employee" in section 230 of the **1996 Act**, as someone who "has entered into or works under"

a contract of employment. It asserts that the Tribunal erred because, on the facts found, by 26 October 2015 "the Appellant had clearly entered into the contract and commenced work under it." The work undertaken (in that week) was "clearly not collateral to the contract" but "an immutable part" of it. The start date was a question of law, not what the parties, accurately or not, putatively agreed. The Tribunal also placed too much weight on the fact that the Claimant had not claimed wages from the Respondent for the week of 26 October 2015. He had clearly carried out significant work to the benefit of the Respondent during that week.

15. Ground 2 contends that the Tribunal failed to provide adequate reasons. Specifically, it asserts that the characterisation by the Tribunal, at [37], of the work in the week in question as that of "subcontractor/extra pair of hands helping out" was not supported by evidence; and that insufficient findings were reached as to the payment received by the Claimant for that work, and as to the agreement reached on 22 October 2015.

16. On consideration of the Notice of Appeal on paper HH Judge Eady QC (as she then was) considered that there were no reasonable grounds for bringing the appeal. However, at a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, Lavender J permitted the appeal to proceed to a full hearing. He also directed that the Tribunal be requested to answer certain questions about the evidence that it had had.

17. The Judge replied to that request in a note of 13 November 2019. It referred to the Claimant's statement, in his letter to the Tribunal of 14 May 2018, that the work he did in the week of 26 October 2015 was "work dismantling and removing a lift in Derby", and his having referred in oral evidence to pictures of him in the lift shaft, and to his evidence that "Jack Duffy was running the site and it was Jack Duffy's job and he worked all week at the site and he was

taken down in Jack Duffy's car." He had also said that someone called Kieran "paid him £100 out of his own pocket." As to the evidence of Ms Wood, she had no recollection of the Claimant working that week in Derby although "she accepted that the Company had been involved in a job in Derby that week. She stated that she did not believe that the Claimant would have been on that site before 2 November 2015."

18. The Respondent's Answer contended that the Tribunal properly followed the guidance in **Koenig**. In particular, it highlighted the finding that someone else on site paid the Claimant, not the Respondent, which, the Answer asserted, properly supported the conclusion that he was not working under a contract "with the Respondent". The absence of a wages claim was properly regarded as relevant. The reasons were adequate. The reference complained of in Ground 2 was simply a descriptive label for the Tribunal's impression of the Claimant's work, which had to be read together with the rest of the Reasons.

The Arguments

Claimant

19. Mr Milsom and Mrs Fraser Butlin, both of counsel, appeared at the Hearing of this appeal, respectively, for the Claimant and the Respondent. I had the benefit of written skeleton arguments and oral submissions from them both. What follows is only a summary of what appear to me to have been the most material submissions made by each of them.

20. Mr Milsom identified as salient findings, that there was an agreement that the Claimant should work for the Respondent, entered into on 22 October 2015, that he in fact worked on the Respondent's Derby site from 26 October 2015, that it was agreed that he would be remunerated for that work "albeit by an employee of the Respondent from his own pocket" and that the

A Respondent's documentation in respect of the issue date of the contract, and indeed, as found by the Tribunal, the break in service in 2016, failed to reflect the reality of the situation.

B 21. Mr Milsom submitted that there was a tension between Section 211(1)(a) of the **1996 Act**, with its focus on when the employee "starts work", and Section 212(1), which provides that 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 a continuous period of employment.

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22. Citing from **Uber BV v Aslam** [2019] ICR 845, Mr Milsom submitted that the Tribunal was required to take a "realistic and worldly wise" approach to an issue of this sort. It was also

D concerned with an exception from a protective statutory right, which should be read narrowly. As to that, he cited **Barrasso v New Look Retailers Limited** [2020] ICR 448, which was concerned with the employee-shareholder exception to unfair dismissal protection.

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23. Mr Milsom submitted that "starts work" in section 211(1) does not mean the day on which the employee "actually turns up physically to begin work". He cited **General of the Salvation Army v Dewsbury** [1984] ICR 498. In that case the employee was offered a teaching post to

F start on a Saturday. The following Monday was a Bank Holiday and teaching duties could not actually begin until the Tuesday. There was no evidence that any work had been performed before the Tuesday, but continuity from the Saturday was nevertheless established. The EAT

G held that the phrase "'starts work' … is not intended to refer to the undertaking of the full-time duties of the employment: it is intended to refer to the beginning of the employee's employment under the relevant contract of employment."

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24. Mr Milsom cited from **Koenig**, in particular the observations at paragraphs [8] and [21]. Whilst the Tribunal had cited this authority, it had not specifically considered these passages. The Claimant did work that benefited the Respondent on the Derby site in the week of 26 October, under the supervision of Mr Duffy (who was employed by the Respondent as site manager), much as he continued to do in the week of 2 November. The existence of a contract of employment was not dependent on whether a written contract had been issued. Applying the guidance in **Koenig**, performance of demolition duties under the control of the site supervisor for the benefit of the Respondent could not be regarded as anything other than "significant activity", notwithstanding the finding as to who paid the Claimant.

25. Mr Milsom submitted that the finding that the work in the week of 26 October was not under a contract "with the Respondent" was problematic. The Tribunal made no finding that the Claimant's work was for anyone other than the Respondent. The Respondent had advanced no positive case as to what had occurred that week. The suggestion that his contract was with another person was also counter to its case that he would have been refused entry to the site had he not by then received health and safety certification. It provided no answer to his case that he was under the Respondent's supervision and wearing its uniform. Mr Milsom referred also to Section 210(5) of the **1996 Act**, which creates a presumption of continuity.

26. In his written skeleton Mr Milsom also argued that, if there had been a change of employer, that might engage Section 218(6) of the **1996 Act**, which provides that a change from one employer to an associated employer of the first employer does not break continuity. However, in the course of oral argument, he properly acknowledged that this could not apply to an individual under the Respondent's control, only a company (see Section 231).

27. Mr Milsom also argued that the Tribunal erred at [30] when it referred to the Claimant himself saying in his May 2018 letter to the Tribunal that the "proposed start date" was 2 November 2015. The Claimant was not (he argued) referring there to what happened in 2015, but to the Respondent's case in the Response Form. There was neither evidence before the Tribunal, nor a finding, of a start date of 2 November 2015 having been discussed at the time. The failure to bring a wages claim or raise concerns about non-payment at the time were unsurprising. Mr Milsom referred to other passages in the Judge's letter to the EAT which I do not need to set out, as they went beyond provision of the information about the evidence.

28. In relation to Ground 2 Mr Milsom reminded me of the familiar key authorities on adequacy of reasons. I do not need to set them out. The Tribunal must address the issues necessary to its decision, and sufficiently explain its reasoning. He submitted that there were inadequate findings or reasoning in relation to the following matters: the nature of the agreement reached on 22 October 2015, the nature and manner of performance of the work performed in the week of 26 October 2015, the conclusion that the Claimant was a sub-contractor, and the material said to support a start date of 2 November 2015.

Respondent

29. Mrs Fraser Butlin submitted that Section 210(5) was of no application. There was no tension between Section 211 and Section 212. The appeal simply turned on whether the Judge had properly understood and applied Section 211(1)(a) and sufficiently explained his decision.

30. She, for her part, also referred to **Dewsbury** and to **Koenig**. She highlighted that the work relied upon as marking the occasion on which the employee "starts work" must be work under a contract of employment with the same employer (although, she acknowledged, it does not have

to be the same contract). It must not be work which is merely collateral to, but not under, such a contract (see **Koenig**). That decision also indicates that there is a spectrum of situations in which an employee does something before the start date in their contract of employment. Where a given scenario sits on the spectrum is a question of fact for the Tribunal. Where the Tribunal has properly self-directed on the law, its decision can only be overturned where it is perverse. All of these points were encapsulated in **Koenig** at [21].

31. The present Tribunal had, submitted Mrs Fraser Butlin, correctly directed itself as to the law. It also made permissible factual findings, which were not, as findings of fact in themselves, challenged as perverse. These included: that the payroll records and weekly labour sheets were consistent with a start date of 2 November 2015, that the Claimant did work in the week of 26 October 2015, that he was not paid through the Respondent's systems for that work, that he was paid cash in hand for that work, not by the Respondent but by Kieran, and that the Respondent did not charge the client for his work that week. It also properly drew an inference from the Claimant's failure to bring a deduction from wages claim. She also referred to Judge Self's account of the Claimant's evidence that Kieran paid him "out of his own pocket." (She also referred to another passage in Judge Self's note, but, again, this passage did not refer to the evidence.) The Tribunal was also entitled to interpret the reference in the Claimant's May 2018 letter's reference to the "proposal" of a 2 November start date in the way that it did.

32. So, submitted Mrs Fraser Butlin, the Tribunal properly concluded that the Claimant was not working under a contract of employment "with the Respondent" in the week beginning 26 October 2015, but, rather, was working "unofficially" as a "sub-contractor/extra pair of hands".

33. As for Ground 2, Mrs Fraser Butlin submitted that the Reasons were **Meek** compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250 at [8]). The parties could understand why they had won or lost, in particular from the Reasons at [36], which was the "operative paragraph", setting out the Tribunal's conclusions, drawing on its earlier factual findings. Paragraph [37] provided further explanation. The word "subcontractor" was simply a label to describe the impression that the Judge had formed about the nature of the work, which was "firmly rooted" in the earlier factual findings. He was entitled to find, in effect, that, if the Claimant had a contract that week, it was not with the Respondent itself.

34. There were gaps in the evidence, but that was not the Tribunal's fault. The Claimant had not addressed this issue in his witness statement at all, but only in oral evidence. The onus of proof had been on him. All that the Tribunal could be expected to do was make findings, and draw conclusions, as best it could, on the evidence that it had. That was what it had done.

Discussion and Conclusions

35. By the close of oral submissions a certain amount of common ground as to the general framework of law was established. I therefore do not need to refer to the authorities that were cited to me on some of these points, and I will set the points out briefly.

36. Continuity of employment, and when it starts and ends, for the purposes of an unfair dismissal claim (and other statutory purposes), is a statutory construct. The question of when it starts must be decided by a Tribunal properly applying the words of Section 211(1)(a) of the **1996 Act**, guided by the authorities, to the facts properly found. 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 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 contract of employment, may come about orally, in writing, by conduct, or some mixture thereof. But, one way or another, there must be agreement as to the essential terms.

37. Whilst respective counsel disagreed about whether this Tribunal had made a finding about whether the Claimant was, at some point, provided with the Statement of Main Terms and Conditions, it was agreed that the Tribunal had certainly found that it was not provided to him before 6 November 2015. Mrs Fraser Butlin accepted that it could not be said that, for *that* reason the Claimant was not working under a contract of employment with the Respondent in the week of 26 October 2015. Mr Milsom, for his part, accepted that, on a fair reading of the Tribunal's decision, the Tribunal did not question that this document had been genuinely created contemporaneously; and its contents were relevant evidence. What he took issue with was the particular significance or weight that (he said) the Tribunal attached to it.

38. I agree with Mrs Fraser Butlin that Section 210(5) of the **1996 Act** has no bearing in this case. It is concerned with cases in which it is accepted (or found) that employment began on a certain date, and ended on a later date, but it is asserted that there was a break in continuity for some period falling in between those dates. Where the employee asserts that continuous employment started on an earlier date than the employer concedes, the onus is on the employee to make good his case. I also agree with her that there is no tension between Section 211 and Section 212. They are concerned with different things (see further Section 210(3)) and Section 212 has no bearing on the issue raised by this appeal.

39. Cases in which there is a dispute about when, for the purposes of Section 211, the employee started work under a contract of employment with the employer against which he brings his claim, may come in many and various guises. The EAT (and higher Courts) can give guidance in relation to particular scenarios which may commonly occur, but not every case will necessarily or exactly fit a particular scenario. The watchword that the starting point is the words of the statute is never wrong; and the authorities need to be approached with this in mind.

40. **Dewsbury** was a case in which there was undisputed evidence that the parties had agreed a certain start date, but the employer asserted that, in the relevant sense, work only in fact started on a later date. The present case is not of that type.

41. **Koenig**, as its opening paragraph states, concerned a case in which activities were undertaken at the request, but not the requirement, of the employer prior to the date on which it had been agreed by the parties that work under the contract of employment would begin. As the EAT states at several points, the underlying question remains whether those activities amounted to work done under a contract of employment with the employer.

42. The discussion in **Koenig** draws a distinction between work done under such a contract, and work that is merely collateral to it. I think it is clear, reading the case as a whole, that 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, as the opening words of paragraph 21 put it, be "outside of a contract of employment, though it might have some relationship to it".

A 43. When he directed a full hearing of this appeal Lavender J observed that, on the facts of this case there is perhaps a tension between the fourth sentence in paragraph 21 of **Koenig**, and the fifth sentence in that paragraph. However, on examination I do not think that there is.

B 44. It is trite to say, but worth a reminder, that the application of a legal test of this type in a given case will depend on an evaluation of all the relevant facts and circumstances of that case. If the Tribunal misunderstands the law it will err. But if it correctly directs itself as to the law, it C will not err unless its evaluation of the facts is, in the legal sense, perverse, or demonstrates that, despite stating the law correctly, it has not applied it correctly. Where what the law requires the Tribunal to do is to weigh up and evaluate a range of relevant circumstances, the EAT (and higher D Courts) can sometimes offer guidance on particular features that may, in the given case, be regarded as potentially relevant, or even that ought, if present, to be so regarded; but such lists can be neither universally applicable nor exhaustive; and the weighing up and evaluative exercise E is one that falls to be carried out by the Tribunal, not the EAT.

45. It seems to me that in the fifth sentence of [21], the EAT in **Koenig** was doing no more than pointing to factors that *may* be particularly relevant when applying Section 211(1)(a) to a F case which concerns a certain type of factual scenario. But that falls within the context of a paragraph that recognises that the task of deciding which side of the line the case falls is that of the Employment Tribunal; so that if it properly directs itself it is unlikely to be wrong (because, G I would add, it would then only go wrong if it reached a perverse decision, or otherwise patently did not follow its own direction). The fifth sentence highlights certain features, which *may* be thought easily to point to the answer in "*most*" cases of the type with which the EAT was there concerned. But it is then noted that it all depends on the evaluation of the activity, that there may H be many different such activities, and that it is a matter of fact and degree.

A

46. It seems to me that in the present case the Judge properly directed himself by reference to **Koenig**. Although he did not specifically set out paragraph 21 of that authority, he fairly captured the essence of the guidance that it gave. The Tribunal rightly cited the words of Section 211(1)(a) and the distinction postulated in **Koenig** between work done under, and work done collateral to, the contract, and the wise words that common sense should be applied to the drawing of that distinction. It is that distinction which the Judge, in terms, applied, when coming to his conclusions on this issue at [36] and [37]. The fact that the Judge did not cite paragraph [21] of **Koenig** does not show that he misunderstood, or failed to apply, the law.

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47. I turn to the aspects of the Tribunal's findings and conclusions with which Mr Milsom took particular issue.

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48. First, he challenged the significance attached by the Tribunal to the 2 November 2015 date, in particular, given that the Tribunal found that the Claimant certainly did not see, still less sign, the Statement of Terms document at the relevant time, and the Tribunal heard no evidence about, for example, a specific conversation in which the date of 2 November was discussed.

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49. However, the Tribunal was entitled to attach *some* weight, as part of the overall picture, to the fact that a document *had* been drawn up which gave that start date. Further, the Tribunal had evidence (and Mr Milsom did not dispute that these facts were properly found) that the Claimant had been put on payroll with effect from the week beginning 2 November and had completed work sheets with effect from that week, both of which were consistent with the Statement, and neither of which happened in respect of the week beginning 26 October.

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50. I have pondered whether the Tribunal went too far in relying on the Claimant's reference in the 14 May 2018 letter to "the start date of 2nd November 2015 proposed by the Respondent". I think it is capable of meaning what the Tribunal took it to mean. But in any event I am not sure how far that, as such, took things, in the absence of any other specific evidence about how, or when, or on what basis, that date was "proposed".

51. But, ultimately, the Tribunal relied on a constellation of material, when considering the significance of the 2 November date, including the Statement of Terms, and the date of inception of payroll arrangements and completion of work sheets. Further, the Claimant would obviously have known that he was only completing work sheets from 2 November, only being paid through payroll with effect from 2 November, and indeed only being paid at the rate of £12 per hour with effect from that date; and there was no evidence before the Tribunal that he expressed any concern about any of that not having applied in respect of the week of 26 October. Given all of that, I do not think it was too much of a stretch for the Tribunal to describe 2 November as an agreed start date for the purposes of what it had to decide.

52. Further, the Tribunal accepted the evidence of the Claimant that he had, in fact, done work on the Derby site in the week beginning 26 October 2015, with Mr Duffy, that this had been possible because he had the necessary certificate as of 22 October; and the Tribunal accepted that this happened notwithstanding Ms Wood's assertion in her statement that he simply would not have been allowed on site if he was not listed on the weekly labour sheet.

53. Given all of that, and the contrast between the facts as to the working and payment arrangements in respect of the week of 26 October and then in the period from 2 November, I do not think the Tribunal made the error of attaching excessive weight to the 2 November date.

54. Mr Milsom submitted, next, that the Tribunal attached too much weight to the failure of the Claimant to claim wages from the Respondent in respect of the week beginning 26 October. Had the Tribunal solely relied on the absence of an Employment Tribunal claim I would have agreed that it had gone too far. But it also referred to the absence of any complaint or escalation of the matter by the Claimant at all; and it was entitled to rely on its appraisal of him and the evidence relating to his conduct generally, in considering what it made of that. Given, also, the stark difference between the amount of £100 that he received for the week of 26 October, and the £12 hourly rate, again I do not think that the Tribunal overstepped the mark in the weight that it attached to this aspect.

55. Conversely, said Mr Milsom, the Tribunal attached insufficient weight to the fact that the Claimant worked at the Respondent's Derby site in the week of 26 October, doing what was on any view significant work, supervised by the Respondent's site manager, wearing its uniform, which work benefited the Respondent and for which he received some payment, albeit in the manner described. In **Koenig** paragraph [21] terms, he submitted, this was, at least, significant work to the benefit of the employer by someone who, even if the date of 2 November *had* been set as his originally planned start date, anticipated being in the Respondent's employment from that date, and indeed working at the same site.

56. Were this a case where the only possible scenario was one in which any contract under which the Claimant did work in the week beginning 26 October 2015 was with the Respondent, then I would have agreed that these features ought to have carried the day for the Claimant. But it is, in principle, possible for an individual to do significant work which benefits a company, on

their work site, wearing their uniform and working with their site manager, but under a contract with someone else, for example as a sub-contractor or agency worker.

57. Such a possible factual scenario did not arise for consideration in **Koenig**, and cannot be supposed to have been in mind when the EAT made its observations at [21]. But, if that alternative scenario applied in the present case, the guidance given at [21] of **Koenig** would not avail the Claimant, as Section 218(1) of the **1996 Act** provides that (subject as provided in the remainder of that Section), the provisions of the **1996 Act** concerned with continuous employment relate "only to employment with the one employer."

58. It seems to me that this is in effect what the Tribunal found was the case here, when it concluded (at [37]) that the Claimant's "status was as a sub-contractor/extra pair of hands helping out on site for which he was paid cash in hand by one of the other workers for his help." Mr Milsom submitted that this was, itself, an impermissible conclusion, because it was not supported by the evidence or the facts. The natural inference, he said, was that in the week of 26 October the Claimant was employed by the Respondent. There was no sufficient basis to conclude otherwise, nor had the Tribunal identified who the other employer actually was.

59. However, I do not agree that this was an impermissible or an inadequately reasoned conclusion. The Tribunal had evidence that the Claimant was not put on the payroll for the week of 26 October, did not fill out work sheets, was not paid at the £12 hourly rate, and was paid in cash; and that the Respondent's client was not charged for his work that week. It had evidence that the Respondent put the Claimant on payroll, required him to fill out work sheets and applied that rate to him from 2 November. All of that tended, in itself, to militate against, rather than support, a scenario in which the reason why the Claimant came to be working on site in the week

of 26 October, was because that had been requested or agreed as his start date (or revised start date) by someone who was doing so on behalf of the Respondent.

60. The witness statement of Ms Wood, the PA to the Contract Director, said that it was John Kelly, then a Director and owner of the Respondent company, who had originally agreed to give the Claimant a job; and that thereafter, once his health and safety certificate and other paperwork was finalised, he started work on 2 November. Notwithstanding directions that had been given, the Claimant's witness statement contained no evidence on the start date issue. But the Tribunal had the Claimant's own oral evidence, as summarised in Judge Self's note, regarding the week of 26 October, that Mr Duffy was "running the site and it was Jack Duffy's job and … he was taken down in Jack Duffy's car." Although Mr Duffy was employed by the Respondent as site manager, I cannot say that the Tribunal ought to have inferred from that evidence that he was, in respect of the week of 26 October, acting on the Respondent's behalf.

61. Having regard to the features of the evidence that I have described, the Tribunal was fully entitled to reach the conclusion that it did, that the Claimant's work that week was "unofficial" work which was *not* done under a contract with the Respondent. I do not think that conclusion was vitiated by a lack of adequate findings on the other aspects referred to by Mr Milsom. The Tribunal did not need to find more about the nature of the agreement reached on 22 October 2015 than it did. Its findings reflected the evidence it had about that: that acquiring the health and safety certificate on that date meant that the Claimant *could* potentially now start work on site on any date that might be agreed. Its conclusions about the significance of 2 November were not dependent on it making more findings about 22 October.

62. The Tribunal may not have had the full picture in evidence of how it came about that the Claimant was asked, or agreed, specifically to do some work on the Derby site in the week of 26 October; but the evidence it did have supported the findings and conclusions that it reached about that work. It also made a sufficient finding about the nature and manner of performance of that work, accepting in essence what the Claimant had written in his 14 May 2018 letter, and told and shown the Tribunal (by way of photographs) about that. The Tribunal did not purport to find that the Claimant's work that week was not significant, or not of a nature that *could* have been performed under his contract with the Respondent. That was not why his case failed.

63. Reading the Tribunal's decision as a whole, as I have described, it sets out all of the findings of fact necessary to support the conclusions to which it came at [36] and [37]. It understood the law correctly, and applied it correctly in reaching those conclusions. It adequately explained its decision, and why it concluded that the work done by the Claimant in the week of 26 October 2015 was not done under a contract with the Respondent, which was the reason why he lost.

Outcome

64. For all these reasons I conclude that the Tribunal did not err in concluding that the work done by the Claimant in the week of 26 October 2015 was not done under a contract with the Respondent, and therefore did not count for the purposes of determining his start date in accordance with Section 211(1)(a). It made necessary and proper findings to support its conclusion; and its decision was adequately reasoned.

65. Both Grounds of Appeal therefore fail, and the appeal is dismissed.