EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104569/2018

Held in Glasgow on 18 October 2018

Employment Judge: Mr A Kemp

Ms A McCulloch	**Claimant** **In Person**
Nercon Ltd	**Respondent** **Represented by:** **Mr W Lane - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal has jurisdiction to consider the Claim, and it shall proceed to a Full Hearing.

REASONS

Introduction

1. The Claimant made a Claim of unfair dismissal. The Respondents deny that there was a dismissal or that it was unfair, but they also allege that the Claimant did not have the service necessary to pursue the Claim as her service had been broken.

2. A Preliminary Hearing was fixed to address that issue of whether the Claimant had sufficient continuous service. The Claimant appeared for herself, and Mr Lane, Solicitor, appeared for the Respondents. At the commencement of the hearing I explained to the Claimant, who did not have experience of such

hearings, what the issues were, and the process of giving evidence and submissions. Mr Lane was, without objection from the Claimant, permitted to correct a typographical error in the Response Form as to the date of termination, so that it read 7th February 2018. The Claimant's position was that it had terminated on 1 February 2018. After the evidence was concluded she asked for fifteen minutes to consider her submission but shortly after that I was informed that she spoke to the clerk, informed her that she did not wish to make a submission and left the Tribunal building. A submission was then given for the Respondents, who had earlier provided both to the Claimant and the Tribunal a written outline submission and authorities.

The issues

3. The issues for the Tribunal were:

(i) When did the Claimant's continuous employment with the Respondents start?
(ii) What was the effective date of termination?
(iii) Did any week or weeks break continuity?
(iv) If so, was there any arrangement by which she is regarded as continuing in the employment of the Respondents for any purpose?

The evidence

4. The Tribunal heard from the Claimant, and from Mr Kevin Harvey, the Company Secretary of the Respondents. Documents had been produced in a bundle by the Respondents, and they were supplemented by wage slips that the Claimant produced.

The facts

5. The Tribunal found the following facts to have been established:
6. The Claimant commenced employment with the Respondents on 22 June 2015. She worked in an administration role, and was paid according to the hours that she worked.

7. Shortly before she started the employment she explained to the Director of the Respondents, Ms Moyra Paterson, that she was shortly to commence a period working as a nanny abroad. The Respondents accepted that, and that she would have a period of unpaid leave when doing so. The parties agreed that she would remain an employee of the Respondents during that period of work as a nanny.

8. The Claimant was sent at or around the time she started the employment with the Respondents a Statement of Terms and Conditions of Employment by the Respondents. That included confirmation that her date of continuous employment was with effect from 22 June 2015. It had a provision for notice to be given by either party. The Claimant signed and returned it to the Respondents, but only an unsigned version was produced in evidence.

9. The Claimant was paid an hourly rate for the work she did for the Respondents. She did not receive pay from them during the period when she worked as a nanny, and was regarded as being on unpaid leave. That period of unpaid leave commenced on 10 July 2015.

10. The Claimant returned to work for the Respondents after that unpaid leave on 27 August 2015.

11. The Claimant continued to work for the Respondents for the period to 30 June 2016. In about May 2016 the Claimant spoke to Ms Paterson to ask if she could work as a nanny abroad as she had the previous year. Ms Paterson agreed that she could allow her the time off, but said that she could not guarantee that the job would be held open for her.

12. The Claimant commenced the work abroad as a nanny from 30 June 2016. From that date, until her return, she was not paid by the Respondents. The Respondents did not write to the Claimant to record any termination of employment. The Respondents did not complete Form P45 from Her Majesty's Customs and Revenue to record the termination of employment.

13. The Claimant did return to work for the Respondents on 19 August 2016. She resumed working for them, and continued to be paid for the work that she did. She did not receive any new statement of terms and conditions of employment thereafter.

14. In about May 2017 the Claimant spoke to Ms Paterson to ask if she could work as a nanny abroad as she had in the previous two years. Ms Paterson agreed that she could allow her the time off, but said again that she could not guarantee that the job would be held open for her.

15. The Claimant carried out the role of nanny from 6 June 2017. Before she did so, the Claimant wrote in Ms Paterson's diary for 6 June 2017 "Ashleigh last day", and for the entry for 28 June 2018 the Claimant wrote "Ashleigh's return if needed". The Respondents did not write to the Claimant to record any termination of her employment on or about 6 June 2017. No P45 was sent to her. Whilst she worked as a nanny, the Claimant did not receive any pay from the Respondents.

16. The Claimant returned to work for the Respondents on 28 June 2017. She did not receive any new statement of terms and conditions of employment thereafter.

17. The Claimant continued to work for the Respondents until 1 February 2018, when she had a discussion with Ms Paterson in which Ms Paterson made a comment regarding, amongst other matters, a new member of staff after which she went home, feeling very upset. The Claimant texted Ms Paterson to state that she did not feel able to return to work on 7 February 2018. The Claimant was paid for one day in February 2018.

The law

18. In order to be able to claim unfair dismissal an employee must have two years' continuous employment by the effective date of termination (section 108 of the Employment Rights Act 1996 "the Act").

19. Section 210 of the Act states:

"**210 Introductory**

(1) 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.

(2) In any provision of this Act which refers to a period of continuous employment expressed in months or years—

(a) a month means a calendar month, and

(b) a year means a year of twelve calendar months.

(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—

(a) whether the employee's employment is of a kind counting towards a period of continuous employment, or

(b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,

shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous."

20. Section 212 of the Act states:

"**212 Weeks counting in computing period**

(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.

(2) . . .

(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, . . .

(d) . . .

counts in computing the employee's period of employment."

Submissions

21. For the reasons given above there was no specific submission from the Claimant. Her position in evidence was that her understanding was that Ms Paterson had agreed to allow her time off to work as a nanny.

22. Mr Lane for the Respondents had helpfully produced a written outline submission, which he had given to the Claimant prior to the Hearing commencing. He supplemented that orally. The following is a summary of the submission. He founded strongly on the case of ***Curr v Marks and Spencer plc*** and the message from it that the law was quite strict, and that it did not matter if the employee did not appreciate that continuity would not be preserved. He also referred to ***Welton v Deluxe Retail Ltd***. His submission also covered the issue of temporary cessation of work, but that was not a matter that could be advanced by the Claimant. He argued that there were breaks in the employment when the role as a nanny was carried out. There had not been a meeting of minds over that. It was not certain that she would return, and there had been no guarantee given by Ms Paterson. Mr Harvey had heard that comment, and the diary entry from 2017 confirmed it. The Claimant in her own evidence had only stated that she had not been told of the consequences as to continuity. There had therefore been breaks in employment, and the Tribunal did not have jurisdiction.

Discussion

23. The employment commenced initially on 22 June 2015. It appeared to me that the termination can only have taken place on 7 February 2018, as the Claimant did not argue an “actual” dismissal but a constructive one, and her acceptance of any repudiation took place on 7 February 2018.

24. Whilst there is a presumption of continuity, the evidence was clear, and not disputed, that there were periods of absence in the time of working for the Respondents when the Claimant went abroad to work as a nanny on three separate occasions, being 10 July 2015 to 27 August 2015, 30 June 2016 to

19 August 2016 and 7 to 28 June 2017. Those periods had not been taken as annual leave.

25. Those periods of absence break continuity unless the Claimant is able to establish that there had been an arrangement within section 212(3) of the Act. That is, I consider the only basis that might be relevant, as there was no evidence as to a temporary cessation of work.

26. Both the Claimant and Mr Harvey gave evidence honestly. The Respondents accepted that for the break in 2015 the Claimant remained an employee, on unpaid leave. The Claimant accepted that she did not remember the precise terms of the agreement she reached with Ms Paterson. Mr Harvey had overheard the discussion in 2016. He stated that he had not heard any conversation between the Claimant and Ms Paterson in 2017. I accepted his evidence as to what Ms Paterson had said at that meeting in 2016. He had also referred to the diary entry for 27 June 2017 which the Claimant accepted had been written by her which included the words “if needed” qualifying her return. The evidence appeared to me to be consistent that the agreement reached in both 2016 and 2017 between the Claimant and Ms Paterson was that the Claimant would be retained as an employee, and in fact return to work, if she was needed. The fact that Ms Paterson did not give evidence, and the fact that I found the Claimant to be credible, coupled with the fact that the Claimant spoke to having various conversations with Ms Paterson on the issue of her working as a nanny, led me to conclude that there was an arrangement, but that in 2016 and 2017 it changed from that in 2015 only in the respect that in those later two years Ms Paterson could not guarantee employment at the point of return, at the time when the discussion before absence was held, although as it turned out the Claimant was needed and did remain an employee on that return each year.

27. The next issue is whether such a conditional arrangement is an arrangement within the statutory provision. I consider that it is. There are a number of reasons for that finding:

(i) There had been a specific agreement in 2015 that the Claimant would remain an employee, and Mr Harvey had accepted that that was the case in his evidence

(ii) The only written statement of terms and conditions of employment produced in evidence had reference to a date of continuous service from 22 June 2015

(iii) The Claimant met the condition, in that she was needed in each of the years 2016 and 2017 when she returned after working as a nanny.

(iv) The Respondents had not sent any written confirmation of termination of employment at or about the times that the Claimant started the role as nanny in 2016 and 2017.

(v) In 2016 when the period of absence was well over one month, no P45 was sent, when if there had been a termination of employment that would be expected as confirmation of that fact. No P45 was sent in June 2017 although a return took place in the same month.

(vi) Whilst Mr Harvey said that that had been an oversight, he was not the person who had had the discussion with the Claimant. Ms Paterson had. She remains a Director, and it would have been possible for her to attend to give evidence, even if it was more convenient for the Respondents that Mr Harvey did. I did not consider how it was an oversight.

(vii) In his evidence, Mr Harvey said that he overheard the conversation in 2016, and that had referred to the “babysitting job”, as he described it but meaning the role of nanny, “carried out abroad, that she had done in the previous year”. That reference to the previous year was to the year 2015 when the Respondents accepted that employment continued, and the record Mr Harvey had prepared for the purposes of the hearing had stated for that period as a nanny “unpaid leave”. It appeared to me likely that the basic arrangement for 2016 and 2017 was a continuation of that, but with a qualification that she would return “if needed”.

(viii) In his evidence, he said that Ms Paterson had said that she "could allow [the Claimant] the time off." That reference to time off appeared to me to be consistent with the continuation of employment at that point.

(ix) There had been no written termination of employment which was also consistent with the continuation of employment.

(x) The qualification was that there was no guarantee that the job would be held open, consistent with the diary entry of a return "if needed". The Claimant did prove to be needed however, and she did in fact return.

(xi) When the Claimant did so, no new statement of terms and conditions was sent, which would have been required had that break in service not been regarded as an arrangement falling within section 212 while Mr Harvey indicated that he had not known that it is a statutory requirement and Ms Paterson had not given evidence.

28. It appeared to me that there was an arrangement between the parties, which was that the Claimant would remain an employee during the absence from work to carry out the role as a nanny, with no certainty of being able to return but that if she was at point of return needed, her employment would then continue. It appeared to me that from that arrangement the employment must have continued at the point of the starting of the nannying role, as the condition could only be considered at point of return. When she did return, the need was there. The employment continued.

29. It also appeared to me that such an arrangement, including that condition which was later fulfilled, remained an arrangement within the terms of the statute. It did not cease to be an arrangement because it had such a condition.

30. The Respondents founded strongly on the case of ***Curr v Marks and Spencer plc [2003] IRLR 74***. It was heard in the Court of Appeal. Its facts were different, in that the Claimant had a four year period on a child break scheme for mothers of young children, during which no contract of employment was in existence, and as part of the documentation for which she

resigned after the end of her maternity leave. She also received a P45. It was held to break continuity. At paragraph 30 the Court said this:

"The clear purpose of s.212(3) was to extend what was meant by continuous employment under a contract of employment to include certain periods where there was no employment under a contract of employment if the specified conditions were satisfied. Thus, if an employee during a week not within s.212(1) is incapable of work in consequence of sickness or injury or is absent from work on account of a temporary of cessation of work, that week is nevertheless to count in computing the employee's period of employment (s.212(3)(a) and (b)). Similarly, a week in which the conditions of para. (c) are satisfied will so count. But the ex-employee (who is included in the definition of 'employee') must, by arrangement (which can, but need not, be a contract) or custom, be regarded by both the employer and the ex-employee as continuing in the employment of the employer for any purpose in that week. The parties might, for example, agree that for pension purposes the ex-employee is to be treated during the child break as continuing in the employment of the employer. But there must be a mutual recognition by the arrangement that the ex-employee, though absent from work, nevertheless continues in the employment of the employer. Without there being a meeting of minds by the arrangement that both parties regard the ex-employee as continuing in that employment for some purpose, s.212(3)(c) will not be satisfied. Further, unless in every week of the child break the ex-employee is so regarded there will be a break in the continuity of employment."

31. At paragraphs 33 and 34 the following is added:

"The question whether Mrs Curr was regarded as continuing in the employment of M&S for any purpose falls to be answered by a consideration of all the circumstances, and in particular the terms of the two letters of 16 November 1990 and what she was told by Miss Johnstone before agreeing to accept the child break. I, of course, accept that s.212(3) proceeds on the basis that there is no contract of employment for any week in question, but that does

not remove the force of the clear emphasis on the bringing to an end of the previous employment. Mrs Curr was required to resign and that carried all the financial consequences of such cesser of employment. She was given her P45. She even had to repay her house purchase loan forthwith. Whilst para. 11 of the second letter refers to the personnel manager discussing the effect the child break would have on her staff benefits, we know from the ET's findings that she was told that she would lose all staff benefits during the child break, and we know that her pension was frozen."

32. I consider that that test is met in the circumstances that I have set out above. There was a meeting of minds. The Claimant was regarded as continuing in employment when she went to work as a nanny. Her employment was not terminated when she left to start that role (in contrast to the case of Curr, where it was). As she was needed, it continued when she returned. Had the Claimant not been needed, then and only then would there have been a termination, that termination being at the end of the nannying period of work. Such a termination never took place.

33. Taking all the circumstances into account, there was an arrangement for the purposes of the statute, which refers to being regarded as continuing in the employment "for any purpose". Those words are reasonably wide. I consider that they are apt to include the type of arrangement that existed in this case.

34. The Respondents also referred to ***Welton v Deluxe Retail Ltd t/a Madhouse (in Administration) [2013] IRLR 166.*** The employee had been employed at the respondent's Sheffield store until that store closed down. He was then re-employed by the same employer, at its Blackpool store, but there was a clear week between the end of the first employment and the start of the second. The employment tribunal held that this broke continuity, rejecting an argument that there was an 'arrangement' that his employment would be treated as continuous, made when he was re-employed, such that the arrangement had not been made at point of termination, but at the point of being employed for a second occasion. The then President of the EAT reviewed the authorities

and noted that the words of s 212(3)(c) use of the present tense which pointed to a requirement that the arrangement be in place at the time of the commencement of the absence, as was the established position for a custom. A decision to the contrary in the case of Kirkpatrick should not be followed in future.

35. What that case means, in summary, is that any arrangement requires to be made at or before the time of the absence, and cannot be made retrospectively after it has ended and remain within the statutory provision. But that issue does not arise in the present case as the arrangement was made before the Claimant's absence. That a condition of that arrangement was not fulfilled until later does not I consider detract from the fact that the arrangement preceded the absence. There may have been no certainty of a return to employment, but certainty is not I consider required by the statutory provision. What it requires is an arrangement where the Claimant is regarded as continuing in the employment of the Respondent. The Claimant was so regarded.

36. Despite the careful submission made by Mr Lane, I consider that the Claimant does have continuous service under the statute, and that the Claim should proceed to a Full Hearing.

Employment Judge: A Kemp
Date of Judgement: 23 October 2018

Entered in Register,
Copied to Parties: 24 October 2018