EMPLOYMENT TRIBUNALS

Claimant: Mrs N Khan

Respondent: Bradford Metropolitan District Council

Heard at: Leeds (by CVP video) **On:** 15 September 2021

Before: Employment Judge Parkin

Representation
Claimant: In person
Respondent: Mr S Gallagher, Solicitor

JUDGMENT

The Judgment of the Tribunal is that

1) The claimant was employed by the respondent under a contract of employment;

2) The claimant was unfairly dismissed by the respondent;

3) The claimant was wrongfully dismissed by the respondent in breach of contract and is entitled to damages for the loss of her notice period;

4) A Polkey deduction from compensation for unfair dismissal of 50% is appropriate;

5) The claimant contributed towards her own dismissal to the extent of 60%; and

6) Determination of remedy for unfair dismissal and wrongful dismissal is postponed to Thursday 9 December 2021 at 10am. The hearing is reserved to Employment Judge Parkin and will be held by CVP video.

REASONS

1. The claim

By her claim presented on 12 February 2021 the claimant claimed that she had been unfairly dismissed and claimed notice pay for wrongful dismissal in breach of contract from her position as a Clerk to the Governors with the respondent's Governors Clerking Service on 9 October 2020. She stated: "(The respondent) claims that I am a casual worker and therefore employment rights to not apply, however this contradicts my contract of employment… I was informed via telephone on 9 October 2020 that I was "being let go". No reason was given but after probing Jo Garbett (line manager) about this she stated that I was a risk to the Council." She stated the respondent had again maintained she was a casual worker but she contended her contract of employment made clear she had statutory employment rights, setting out that she had been paid statutory maternity pay during maternity leave. When she had pressed for the reasons for her dismissal, the respondent had said that she had been in conflict of interest by entering an agreement with a number of schools depriving it of the opportunity to continue to provide services to them. She disputed that this was so, since the Trust in question was never going to renew using the services of the School Governor Service in any event.

2. The response

In the grounds of resistance presented with the response, the respondent defended her claims, contending that she was a casual worker and not an employee. Alternatively, it stated that it had dismissed her for gross misconduct namely a serious conflict of interest and breach of the implied duty of fidelity in her contract by her agreeing to provide clerking services directly for schools she had been clerking for under her engagement with the respondent. In the event of a finding of procedural unfair dismissal, it claimed the claimant would have been dismissed in any event and a Polkey reduction should be made and also claimed that there should be a reduction of any compensation for her contributory conduct.

3. The hearing and case management

The hearing was held remotely by CVP video hearing. There was an agreed Bundle (1-190), provided electronically with some copy documents added and included late. The Tribunal heard oral evidence from the claimant and from the respondent's Lead Officer for Governor Clerking, Ms Jo Garbett, based upon their witness statements. Both witnesses gave their evidence straightforwardly but on occasions the passage of time and hindsight meant that both put forward a version closer to what they wished had happened than what they had actually thought and done; contemporaneous documents were particularly helpful. Since the oral evidence on liability (together with contributory conduct and Polkey issues), was only concluded by the late afternoon, it was agreed that the parties would provide submissions in writing with the Judge reserving judgment. A remedy hearing was provisionally fixed.

4. The application to present additional evidence

At about the same time as written submissions were received from the legal representatives, there was an application made direct by the claimant to adduce additional evidence including a full witness statement from JBn. The respondent objected to this new evidence being produced but contended in the alternative

that, without oral evidence, it could have little evidential value. The Tribunal refused the application. The claimant had been diligent in preparing her case and was aware of the need to disclose documents and exchange witness statements ahead of the hearing. Moreover, she knew that the liability hearing was only not concluded because there was no time for oral submissions; no new evidence was anticipated and there was no suggestion by her or on her behalf that further evidence may be provided afterwards. Fuller detail about JBn, in support of the claimant's argument of inconsistency of approach in terms of unfair dismissal and inappropriate categorisation as gross misconduct, could have been put before the Tribunal within the ordinary exchange of witness statements or when the claimant provided an additional statement shortly before the hearing. The alleged inconsistency was already included in her ET1 claim form and initial witness statement, with a letter from the same colleague in the Bundle and relied upon. Whilst there was fuller exploration in oral evidence of the comparative position in respect of the two other clerks, the claimant had a full opportunity to instruct her counsel before cross-examination was concluded. There needs to be finality in the presentation of evidence before decision-making and the Judge concluded that it was not in accordance with the overriding objective to permit the new evidence to be introduced at this late stage.

4 The Issues

4.1 Employee status: it was for the claimant to prove that she was she was an employee subject to a contract of service for both her unfair dismissal and wrongful dismissal claims, with 2 years' continuity of service necessary for the unfair dismissal claim.

4.2 If she was employed as an employee, the respondent admitted that it dismissed her and moreover for the potentially fair reason relating to her conduct but conceded that the dismissal was procedurally unfair. It relied upon her gross misconduct, contending she was in breach of the implied term of trust and confidence by competing with her employer and perhaps making a secret profit. Accordingly, it sought to contend that the extent of her contributory conduct causing or contributing towards her own dismissal was very high and also to argue for a Polkey deduction from any compensation award.

4.3 Wrongful dismissal (breach of contract). For her notice pay claim if she was an employee, it was agreed that the claimant would have been entitled to 12 weeks' statutory minimum notice unless she was herself in repudiatory breach of contract i.e. guilty of gross misconduct disentitling her to notice or pay in lieu.

5. Findings of fact

From the oral and documentary evidence the Tribunal made the following findings of key fact. The Tribunal has initialised the names of individuals, schools and trusts which do not need to be expressly identified for the parties to follow these reasons.

5.1 With effect from 18 May 2007, the claimant was engaged to work as a Clerk to school governing bodies by Serco Ltd (which then traded as Education Bradford (EB) and was an outsourced provider of services to the respondent local authority). She had a letter of appointment and Statement of Main

Particulars issued in accordance with the Employment Rights Act 1996 (35-37), including the following details:

> "Work location and address: (Home based)
>
> Hours of work: The nature of the work covered by this contract is casual and intermittent and will vary from week to week term time only. Actual working hours will be agreed according to the needs of the service and will be determined by the manager in consultation with staff.
>
> Period of continuous service: your period of continuous service for statutory employment rights dates from 18 May 2007.
>
> If you have previous continuous service with an organisation covered by the redundancy payments (local government) (modification) Orders… this will be used in calculating your entitlement to redundancy payment, sickness allowance, maternity leave, annual leave and a notice period…
>
> Termination of Employment: your employment with EB may be terminated:-
>
> 1) By Education Bradford without notice or payment in lieu of notice if you are guilty of gross misconduct.
>
> 2) By EB with or without notice in writing if you are guilty of misconduct in accordance with EB's disciplinary procedures and/or serious or persistent negligence…
>
> 3) By EB with notice in writing if you are incompetent and/or incapable of performing your duties under the terms of your contract.
>
> 4) By either party upon giving the other not less than 4 weeks notice in writing."

5.2 There was automatic membership of a pension scheme with the right to opt out, provision for maternity rights and an attached appendix gave details about conditions of service, including notice, grievance and disciplinary procedures, sickness and sick pay arrangements and a number of other matters.

5.3 At no time was the claimant asked to sign the respondent's standard letter of "Appointment to the Casual Register of Casual Clerk to School Governors" which set out expressly that the individual was not an employee and that the respondent had no obligation to provide work or pay and that the individual was under no obligation to accept work, with the individual being able to leave the casual register at any time. As to discipline and capability, the standard contract merely stated that "These matters will be dealt with by your line manager and may result in your removal from the Casual Register" (38-42).

5.3 Initially she served as clerk at two schools, working on average 7 to 10 hours a week. From the outset, once assigned by the respondent as clerk her pattern of working was set: she made her own arrangements with the school managers to attend the Governors' meetings and carry out their administrative work such as preparation for meetings and writing up Minutes at times which suited both the governing bodies (who often met in the evenings) and herself.

She thus worked closely with the managers and governors and organised her own time to enable her to service each school allocated to her. If she was unable to attend a school meeting such as because of domestic emergency, the claimant could not arrange her own substitute but would notify the respondent's line manager who would put a cover clerk in. The claimant never or almost never needed this cover.

5.4 Having early on had a learning support assistant role with the respondent local authority alongside her role as clerk, she gave this up as her clerking role grew. She was good at the role and respected by the governing bodies and progressively the number of schools she was allocated to increased to as many as 7, eventually working 27 hours a week in term time with occasional additional hours for instance to clerk at disciplinary hearings. Although there was an increase in the number of schools and thus the hours she worked, the pattern of working to an agreed schedule around governors' meetings with breaks at holiday times was wholly established, including provisional dates set in advance for the next academic year due to start in September.

5.5 Being a Clerk to the Governors was a skilled and responsible position, with a need to keep abreast of legislation and developments. The individual clerk would necessarily hear discussion of confidential information (including, more recently, governors' highly sensitive discussions about the possibility of ceasing to be a maintained school and joining Academy Trusts) and would develop a rapport with the governors and school managers. The respondent provided training for Clerks before the academic year started and at times during the year. Dates for the academic year commencing in September would generally be set before the end of the preceding summer term but were often set a year in advance.

5.6 In January 2011, Serco/EB lost its contract to provide the services for the respondent and there was a classic transfer of undertaking (a TUPE transfer) back to the respondent. The documentation (37a-h) expressly referred to the transfer of groups of employees, including the EB group. In respect of employees, it was made clear that the respondent's own Grievance and Disciplinary Procedures would apply. Following the transfer, the claimant was never provided with an updated Statement of Particulars.

5.7 However, she was provided by the respondent with a laptop and IT support. She was in the Local Government Pension Scheme and was paid Statutory Maternity Pay during a period of maternity leave. She was paid for holidays/annual leave within her pay to cover the school holidays. Although limited during the line management of Ms Garbett, there were regular performance reviews or appraisals, including setting of targets to ensure the clerk managed time and worked effectively getting out completed work after meetings and keeping positive relationships with their schools.

5.8 After June/July 2018, the respondent's School Governor Services were provided to schools commercially through service level agreements (SLAs) whereby the schools generally contracted for a year's supply of clerking services and education advice, support and guidance, although it was also possible for payment to be made on a "pay as you go" basis for services supplied. This was

part of the respondent's commercial provision of "traded services" and it was obviously important to the respondent to retain as many schools under SLAs and using its services as possible. SLAs generally covered the financial year April to March, but if the school had hours credited to them still to be used those could be worked after the end of the SLA and likewise extra work done beyond the school's agreement with the respondent would be charged to and paid for separately by the school.

5.9 In September 2018, Jo Garbett was appointed as the respondent's Lead Officer for Governor Clerking. She was the claimant's line manager in turn reporting to Adele Rowley, Trading Services Manager. However, a combination of maternity leave and sickness absence meant that there were many months when she was away from active supervision of the claimant's work. During her tenure, the claimant was not required to participate in performance appraisal reviews on an annual basis although there were reviews from each school sent back to Ms Garbett about the claimant.

5.10 In about summer 2019, the claimant introduced FT to the respondent in circumstances whereby this Trust, which ran the school her child attended, sought her services as its Clerk to the Governors. On this occasion, the claimant specifically indicated to the Trust that it should engage her as clerk through the respondent's School Governor Services, which did happen.

5.11 In August 2020 Ms Garbett provided conflict of interest advice to the various Clerks in connection with the School Governor's role (110-111, 113-114). Although solely provided to the Clerks so they could advise governors how the governors should make their own declarations, this showed that clerks were familiar with principles of conflict of interest.

5.12 In about the third week of August 2020, the Chief Executive Officer (CEO) of CAT contacted the claimant personally to indicate that CB School, which was now within an expanded Trust, CAT, would not be retaining the respondent's School Governor Services. He offered her the opportunity to become clerk personally for CB and the 3 other new CAT schools which she already clerked for through the respondent. He explained the reason as dissatisfaction with the respondent's services (which obviously did not include dissatisfaction with her clerking). He wished her to become Clerk with effect from 1 September 2020 for all 4 schools. The claimant did not immediately agree but asked him to notify the respondent of this.

5.13 During the academic year 2019/20, CB School and the other schools forming the expanded CAT had given no indication to the respondent that they were dissatisfied with the services provided by the respondent and were not intending to renew their SLAs. Nor did they do so at the start of the new academic year 2020/21 in September 2020.

5.14 In early September 2020, as the new term was about to begin, the CEO contacted the claimant again to ask her to be clerk. When she enquired whether he had spoken with the respondent, he told her it was on his "to do" list and he would be doing so (i.e. that he had not done so yet).

5.15 So the claimant agreed to work directly for the 4 schools as their Clerk to the Governors. At that time in early September, she made no notification to Jo Garbett about this, apparently feeling she was doing nothing wrong because she expected the CEO to inform the respondent of the changed position that CAT was no longer going to use the respondent's School Governor Service (and was engaging her services as clerk direct).

5.16 On 21 September 2020, Ms Garbett emailed the claimant enquiring about dates of meetings at TPS (one of the new schools in the CAT) with no knowledge that the respondent was no longer responsible for clerking services. The claimant replied:

> "With regard to your email concerning meeting dates … the CAT has decided to clerk all their schools as a Trust rather than via the (respondent) with effect from September 2020. They still want me to clerk the schools but not via School Governor Services. This applies to (all 4 schools). The CEO said that he would contact the service to inform you" (115).

This notification came as a complete shock and disappointment to Ms Garbett, who thereafter took advice from senior management on the situation.

5.17 On 24 September 2020 Amanda Clegg, the respondent's Admin Assistant, forwarded a copy of the claimant's Serco contract to Jo Garbett (34a). Whilst Ms Garbett and those who advised her could have carefully considered its contents (along with the 2011 TUPE documentation) and contrasted these with the standard Casual Worker Clerk contract, the Tribunal inferred from the respondent's reliance upon the standard contract until a late stage in the proceedings that they failed to do so and did not distinguish the claimant from those who were engaged pursuant to the Bradford standard "casual" contract. Ms Garbett continued to view the claimant as a casual worker only and therefore not entitled to formal disciplinary procedure or indeed reasons for her dismissal.

5.18 On 6 October, Ms Garbett pressed the claimant as to when she started charging the CAT for her clerking services i.e. when she started as clerk directly for the Trust. The claimant responded that she had started working for the Trust on 1 September 2020 (122-3).

5.19 On 9 October 2020 by a telephone call, Ms Garbett informed the claimant that she was "being let go" i.e. her appointment was being terminated. The claimant sought more information about the termination and Ms Garbett said it was because she was seen as a risk to the respondent council and that the decision had come from the Deputy Director of Childrens' Services. The claimant asked for a letter confirming the decision.

5.20 On 9 October 2020 Jo Garbett sent the claimant a brief letter confirming the termination of her appointment:

> "… I am writing to confirm that the School Governor Service are ending your engagement to work for us with immediate effect (bar finishing off writing minutes for the TS meeting this week and their FGB (Full Governing Body))…" (123a).

The respondent thus anticipated the claimant concluding her work writing up minutes of meetings notwithstanding the termination of the appointment. This was not a decision taken alone by Ms Garbett but under consultation with senior management. However, there had only been a limited investigation by Ms Garbett, with no disciplinary hearing or opportunity for the claimant to put forward her version whatsoever and no form of appeal offered.

5.21 But for the termination of her engagement, the claimant would still have had three schools to clerk for through the respondent, involving about 15 hours per week (thereby carrying on almost 50% of her previous working hours).

5.22 On 15 October 2020, the claimant sought a formal dismissal letter with reasons (124).

5.23 Despite her understanding that the claimant was only a casual worker, Ms Garbett provided reasons for termination dismissal as requested by the claimant (126). Her detailed letter set out these reasons:

> "You were working in a traded service arm of the Council, in a role that gave you direct access to the management teams of the client schools. You represented the Council when providing services to these schools. Privately and without notice to the Council, you entered into an agreement with a number of schools which had the effect of depriving the Council of the opportunity to continue to provide services. You were in place by virtue of your association with the Council and acted in a manner which brought you into direct conflict with the interests of your principal and by your actions you made a private profit from your position.
>
> Your willingness to do this and to do it without reference back to the Council represented a serious conflict of interest and clearly damaged the Council's interests.
>
> This having happened once and given the circumstances in which this happened, continuing to place you in engagements with other schools represents a clear business risk to the service and not one we are willing to take. Further these events and the circumstances in which they occurred represents a breach of trust and confidence. Consequently we have decided to bring arrangements to an end."

5.24 The claimant vigorously sought to appeal her dismissal. However, her letters of appeal were completely ignored by the respondent and Ms Garbett was unaware that she had sought to appeal.

5.25 Only when pressed repeatedly by the respondent did the CEO of CAT confirm to Ms Garbett on 22 October 2020 that the Trust was dissatisfied with the respondent's Clerking Services and not renewing for the 2020/21 academic year (139). The letter referred to the high cost of the service and the poor quality of service offered, stating that if they had not contracted the services of the claimant they would not have retained the respondent but would have used another provider instead.

5.26 Other clerks/colleagues: 1) JBn – she had clerked in the past for BPS much earlier, on behalf of the respondent; however, when relations with the

respondent broke down, that school had then taken over its own clerking. JBn had also always worked independently as a clerk for other schools and told Ms Garbett that she had been asked and had agreed to take on the clerking at BPS personally. The timing of this change was very similar to the time of the claimant's dismissal, but there had been a gap of several years since JBn had been the clerk assigned by the respondent's School Governor Service.

2) JBa: For the academic year 2021/2022, JBa took up the role personally to serve as clerk for SSS, where she had been the mentor of the previous clerk which included her attending Governors' meetings. The respondent became aware of this long after the claimant's dismissal and, when it did, she resigned her position with the respondent.

5.27 The respondent's Department of Human Resources provides a formal and comprehensive Fairness at Work - Disciplinary Procedure (50a). As well as containing specific procedures for informal and formal disciplinary cases, investigation, disciplinary hearings and appeal hearings, which are routinely followed where allegations of misconduct are made against the respondent's employees it incorporates a Code of Conduct (50m) and General Principles of Conduct as laid down in the Council's Constitution (50aa). The Code contains explicit reference to conflicts of interest: "An employee must not take on private work from other organisations or individuals where there is or may potentially be a conflict of interest. any contact which may compromise the Council's interest should be reported to line management…" (50q) and the General Principles refer to personal interests: "Employees must not allow their personal interests to conflict with the Council's interests nor make use of their employment to further their private interests. (50aa)"

6. The respondent's submissions

6.1 The respondent contended that the claimant was a section 230(3) worker, relying upon the statements that the nature of the work was casual and intermittent, varied week to week and operated term-time with hours to be agreed according to the needs of the service and upon the freedom of action the individual worker had in performing the responsible role as a Clerk. There was a light touch management which it was contended was much more advice and support than orders and directions. The Serco Statement of Terms was preserved by the TUPE Regulations 2006 but these were conferring rights broader than just to employees, as seen in the instructive ET decision in Dewhurst v Revisecatch Ltd t/a Ecourier (ET 2201909/2018).

6.2 The claimant's engagement was brought to an end utilising powers in the contract to terminate for conduct issues (as at page 36). She was in a trusted position when providing services to the schools and expected to act with integrity; she should have understood the risk to the respondent when she took advantage of her privileged position as clerk at CBS where the respondent had had an SLA in place. She would understand about conflicts of interests, but kept silent despite knowing of the intentions of the school and the impact this might have.

6.3 If she was an employee, the respondent acknowledged that the decision to dismiss without access to its disciplinary policy would make the dismissal

unfair. A proportionate procedure with an investigation followed by a disciplinary hearing and an appeal, if needed, would normally require between 8 and 12 weeks. However, the management had genuine concerns as to her conduct in conflict of interest and promoting her personal interests at a time the Trust's contract was due for renewal, acting in competition with it and only disclosing her actions when pressed by her manager for dates of meetings; it considered this gross misconduct and fundamental breach of contract justifying dismissal even summary dismissal. The respondent relied upon the implied term that the employee will serve the employee with good faith and fidelity, consistent with the employee's particular contractual obligations. It contended she had contributed substantially towards her own dismissal such that a reduction of compensation by 50-60% should be applied. Furthermore, it admitted procedural unfairness but relied upon Polkey and contended the claimant would have been dismissed fairly in any event, probably summarily but if with notice there should be a substantial reduction, again in the order of 60%.

6.4 Likewise, the claimant's actions undermined trust and confidence and constituted a fundamental breach of contract meriting summary dismissal without pay; alternatively, If the breach was not fundamental and this should have been dismissal on notice, there should have been a payment equivalent to 12 weeks' pay.

7. The claimant's submissions

7.1 The claimant attacked the respondent's credibility about her contractual arrangements, pointing to the vagueness of the ET3 response about the contract under which the claimant worked what stated that she was employed "under similar terms to casual employees"; she had needed to apply for disclosure relating to her TUPE transfer. Despite admitting that the specimen contract did not apply to the claimant, the respondent consistently referred to it since it excluded employment rights. She criticised the respondent's approach in relation to similar conduct by other clerks, especially JBn who acted in a similar way to her but was not dismissed.

7.2 On employee status within section 230(1) and (2) ERA 1996, there was a line of case law showing the tribunal could conclude that the express terms of the contract did not reflect the reality of the employment relationship, such as Autoclenz v Belcher [2011] UKSC 41. However, the contract here gave employment rights expressly, plainly set out in the 2007 contract and transferred across under TUPE. Even the respondent in cross-examination appeared to concede the documents showed an intention that the claimant would be an employee. The reality of the situation reflected the contract and reinforced this intention: the claimant was given continuous work for 13 years; assigned schools which she would clerk for as long as that school stayed with the respondent's service; she was given regular training and equipment and had a line manager; timetables were set a year in advance; the client was expected to attend meetings but, if she could not attend, her line manager would arrange cover and she would need to catch up.

7.3 The respondent admitted a procedurally unfair dismissal. Whilst misconduct was a potentially fair reason, this was also substantively unfair since

dismissal in the claimant's circumstances was not within the range of reasonable responses applying section 98(4) ERA, in accordance with British Home Stores v Burchell and having regard to the ACAS Code of Practice.

7.4 As to the implied duty of trust and confidence in conduct cases, the claimant relied upon McFarlane v Relate Avon Ltd 2010 ICR 507, where the Employment Appeal Tribunal stated that it was more helpful to focus on the specific conduct than resort to general language of loss and trust and confidence.

7.5 The claimant accepted that the implied duty of fidelity operated to prevent an employee setting up in competition with the employer or going to work for a rival concern as long as the employment subsisted but submitted that tribunals can take a very broad view of the relevant circumstances when determining the extent of contributory fault. Here the claimant did not realise she had done anything wrong by her course of action and in general such behaviour was not treated as misconduct by the respondent. Accordingly, it was never within the range of reasonable responses to dismiss the claimant in these circumstances: she did not realise she was doing wrong, her behaviour was never expressly forbidden by respondent which had never treated her as an employee or provided her with its disciplinary procedure or trained clerks about conflicts of interest within their own role. The respondent did not hold out such behaviour to be gross misconduct.

7.6 Likewise, in terms of wrongful dismissal, any breach of contract by the claimant was not repudiatory going to the heart of the contract when she had such a level of freedom and flexibility to work with other organisations and in the absence of any express provision.

8. **The Law**

8.1 The main statutory provisions are at Sections 86, 98, 211-212 and 230 of the Employment Rights Act 1996.

8.2 The definition of employee for the purpose of the unfair dismissal provisions is at section 230(1) and (2):

> "(1) In this Act "Employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under closed parenthesis a contract of employment.
>
> (2) In this Act "Contract of employment" means a contract of service or apprenticeship, whether express or implied, and open parenthesis if it is express) whether oral or in writing."

The very same definitions are to be found at section 42(1) of the Employment Tribunals Act 1996 in respect of contract claims under the powers made under section 3 of that Act In the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, Articles 3 to 5.

The wider definition of "worker" including also an individual working under a contract to perform personally work or services for an employer who is other than a client or customer of the individual's professional business is contained in section 230(3) ERA.

8.2 The essence of a contract of employment is the provision of work by the individual with some degree of supervision or control by the employer and with mutuality of obligation, the "irreducible minimum" of obligation on each party. There has been extensive authority over the years including Carmichael v National Power plc [1999] ICR 1226 (HL) and Autoclenz Ltd v Belcher [2011] ICR 1157 (SC) guiding courts and tribunals in determining whether a contract of employment was in place. The starting point is to consider the contractual documents when the contract began to seek to ascertain the parties' intentions, then to look at other contractual documents and any further evidence as to the way the relationship operated.

8.3 Whilst by no means conclusive of whether a contract of employment was in place, the statutory requirement to provide the statement of particulars of the main terms and conditions of employment was only extended to workers falling within the wider definition at Section 230(3) with effect from 6 April 2020. Until then, the employer was only required to comply with the Statement of Particulars requirements of sections 1 to 4 ERA for employees. A further significant though not conclusive feature is the impact of the Transfer of Undertakings (Continuity of Employment) Regulations 2006. The recent non-binding but persuasive first instance decision in Dewhurst, Marchant & McQuaid v City Sprint (UK) Ltd & Revisecatch Ltd (ET Case No 2201909/2018 & others) gives a purposive interpretation that workers as well as employees are covered by the Regulations; if correctly decided, this was probably not the conventional employment law approach in 2011 at the time of the TUPE transfer under consideration here.

8.4 Continuity of employment is provided for in part XIV of the 1996 Act. Section 211 sets out

> "(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, [F2or]
>
> (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."

8.5 For both claims, the burden is on the claimant to establish that she was an employee, With sufficient continuity of service for her unfair dismissal claim. If she does so, every contract of employment contains implied terms of trust and confidence binding both parties including on the employee's side a duty of fidelity and good faith such that the employee will not act contrary to the interests of the employer or compete directly with the employer during the course of employment; the full extent of this implied duty will depend upon the employee's

contractual obligations including their job description, see Customer Systems plc v Ranson [2012] EWCA Civ 841.

8.6 Unfair Dismissal. By section 94(1) ERA:

> "An employee has the right not to be unfairly dismissed by his employer."

By sub-section 98(1) ERA:

> "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show -
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Then by sub-section (2):

> "A reason falls within this sub-section if it -...
>
> (b) relates to the conduct of the employee..."

Then by sub-section (4):

> "... where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertakings) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

8.7 In considering this alleged misconduct case, the Tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98(4). The Tribunal reminded itself that its role in respect of Section 98(4) was not to substitute its own decision had it been the employer for that which the employer had taken. In many cases there is a range of reasonable responses open to a reasonable employer in respect of the investigation, procedure and substantive aspects of the decision to dismiss but each case turns on its own facts as to the nature of the investigation and extent of the procedure which is appropriate in all the circumstances having regard in particular to Section

98(4)(b). In terms of the respondent's consistency of approach to dealing with similar situations with colleagues and the claimant's case on disparity, the Tribunal reminded itself of the warning in the EAT authority of Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 that the previous situation must be truly or sufficiently similar before inconsistency can be considered. The Tribunal also had regard to the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015).

8.8 Contributory fault and Polkey reduction, if unfair dismissal

By section 122(2) ERA:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

And by section 123(6):

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

For a reduction of the compensatory award under 123(6), the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. For the basic award, section 122(2) lays down a slightly different test: whether any of the Claimant's conduct prior to his dismissal makes it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

8.9 The Tribunal also needed to determine whether any percentage reduction should be applied to the compensatory award to reflect the chance that this respondent may have dismissed the claimant fairly in any event, if it had not dismissed her unfairly, following the House of Lords judgment in Polkey v AE Dayton Services Ltd [1987] 3 All ER 974.

8.10 Notice Pay claim: Wrongful dismissal/breach of contract: As set out above, the applicable law is at Section 3(2) of the ETA 1996 and Articles 3 and 4 of the 1994 Order. The claimant' says she was wrongfully dismissed in breach of contract in being summarily dismissed. To justify a summary dismissal, the employer has to show on the balance of probabilities that the employee was guilty of gross misconduct or some other repudiatory breach of contract entitling it to dismiss without notice. The Tribunal therefore determined on the claimant's actions: was she guilty of gross misconduct or some other repudiatory breach of contract? By section 86 ERA, the statutory minimum notice requirement if she was employed for 13 years and not herself in repudiatory breach would have been 12 weeks. Strictly the contractual claim is parallel with rather than overlapping the unfair dismissal claim and may require separate fact-finding. However, here there is significant overlap particularly because of the need to decide on contributory conduct and Polkey alongside determination of liability.

Conclusion

9.1 Employee status

The term casual could hardly be less apt for the relationship between the claimant and the respondent. Year after year, she was engaged as clerk for an increasing number of schools through the involvement of the respondent's School Governor Services team, originally through its predecessor EB and most recently through its commercial "traded services" arm. Although the claimant organised her own time, the respondent provided training and equipment and appraised her, normally loosely supervising her work through the line manager at the time. Starting with the contractual documentation before considering how the relationship actually operated, only the inclusion of the terms "casual" and intermittent" support the respondent's case that this was not a contract of employment; every other feature, not least "your period of continuous service for statutory employment rights" strongly suggests a contract of employment. Despite the wording of casual and intermittent, there was no suggestion of a "zero hours contract" such that the employer could provide no work or that the claimant could refuse at any stage to carry out the work assigned to her. This was very different from the framework for a series of successive ad hoc contracts which the parties might subsequently made with no obligation to provide or accept work, as identified by the House of Lords in the Carmichael case. Standing back and viewing the nature of the claimant's appointment and engagement holistically and objectively, the Tribunal had no hesitation in concluding the claimant proved she was an employee with continuous service with the respondent back to 2007. The breaks between terms were typical of many contracts in education and schools and covered by Section 212(3) ERA. Beginning with the very fact of provision by EB of a Statement of Particulars in 2007 (not then a statutory requirement for a worker), considering the TUPE transfer documentation, aspects such as maternity leave and maternity pay, the training and supervision by line management, and the whole of the role and responsibility of the Clerk to the Governors (based around the terms of each school's academic year and continuing from year to year, with the schools themselves tied to the respondent through SLAs or "pay as you go arrangements" for clerking services which the respondent then paid the claimant to provide, the Tribunal was satisfied that the respondent and the claimant here were under considerably more than a minimal obligation towards each other.

9.2 Unfair Dismissal

Obviously, the respondent's concession that this was a procedurally unfair dismissal was significant, but the Tribunal concluded that although the respondent proved the potentially fair reason for its dismissal related to the claimant's conduct, the unfairness of the dismissal went well beyond mere procedural defects. This was an unfair conduct dismissal whereby the respondent entirely failed to offer the claimant the opportunity to present her version of events and explanation. Remarkably, when she sought to appeal the dismissal spelling out that she was an employee by reference to her Serco contract, the respondent failed even to acknowledge her appeal or give her the opportunity to pursue it. Putting it another way, the respondent's actions lay right outside the range of reasonable responses open to a reasonable employer in

circumstances where it had found out that its Clerk had taken on direct engagement with a school or schools she had immediately previously clerked for through its School Governor Service. As to disparity or inconsistency of approach to dealing with colleagues, the Tribunal found no assistance in the case of JBa which arose long after the claimant's dismissal. It concluded the situation of JBn was not truly or sufficiently similar in circumstances where she had ceased to be the clerk at BPS assigned through the respondent several years before and had only after the passage of years accepted an invitation to clerk once again for the Governors at that school under a direct engagement. It does not matter whether Ms Garbett found out about the engagement first or JBn approached her first since the situation is not truly or sufficiently similar.

9.3 Claimant's conduct

The claimant came to know that CAT was dissatisfied with the respondent's services and not going to renew its SLA entirely through her position as Clerk for CB School and her rapport with the CEO of the Trust. In the event, this was two months before the Trust formally confirmed its intention not to renew to the respondent. By her failure to notify the Trust's changed position and offer she had received to clerk directly for it promptly to the respondent, she certainly deprived it of the opportunity of seeking to persuade the Trust to continue to use its services, however vain such an attempt may have been. She effectively put herself into direct competition with her employer. The Tribunal concluded that the claimant could not have felt there was nothing to notify the respondent about or she would not have pressed the CEO himself to notify the respondent, as was her evidence; notwithstanding any formal contact by the CEO as the client receiving services from the respondent in respect of an SLA or future services, she was the employee who owed a duty of fidelity to the respondent. She had acted entirely in accordance with that duty of fidelity the previous year when approached to become Clerk to FT on a direct basis; that time she had referred the matter to Jo Garbett or put FT in touch with Ms Garbett and became the Clerk through the respondent's School Governor Service.

9.4 Ironically, the Tribunal found a great contradiction in the actions of both parties in their approach towards both employee status and the obligations of the individual. Whilst the claimant was rightly persistent about her status as an employee under a contract of employment, she sought to play down the duty of fidelity which attaches to such a contract, viewing the competition to which she had subjected her employer when dealing with the CEO without notifying her own employer as immaterial because she understood the Trust was not going to renew with the respondent. For its part, whilst denying the claimant was ever anything more than a casual worker, the respondent acted decisively upon its expectation of a very high level of trust, fidelity and responsibility from the claimant such that it dismissed her peremptorily on 9 October 2020.

9.5 The Tribunal concluded that the claimant was certainly in breach of her contract of employment towards the respondent in acting as she did. She only belatedly explained to the respondent that she was now clerking for the Trust direct when questioned about meeting dates some weeks later in late September 2020, although this was a situation which would soon have become clear to the respondent that term. In circumstances where the respondent had never stressed the importance of non-competition by clerks and never explained the principles of

conflicts of interest and not serving their personal interests to them in respect of their personal appointment, because it never regarded them as subject to a contract of employment and the implied terms central to such a contract, the Tribunal concluded this was a serious act of misconduct rather than a repudiatory breach or gross misconduct within the context of this employment.

9.6 Wrongful Dismissal

Accordingly, in terms of the notice pay claim, the claimant was wrongfully dismissed in breach of contract since she was not given notice or pay in lieu of notice. An award of damages representing 12 weeks' pay will thus follow.

9.7 Contributory conduct and Polkey

As to unfair dismissal, the Tribunal proposes to make a deduction of 50% from compensation to reflect the chance that the claimant would have been fairly dismissed in any event had the respondent acted differently – the Polkey deduction. A proper investigation followed by a disciplinary hearing at which the claimant could have put her case (and mitigated her position), then perhaps followed by an appeal hearing would not have altered the essential facts that she agreed to and did take on the position of Clerk to four schools in the Autumn term 2020 which she had so recently clerked through the respondent; she failed to tell her employer that CAT may not be renewing and that she had been offered the role directly. In these circumstances, whilst the claimant was denied the opportunity of explaining her position she may well still have been dismissed fairly had a proper procedure been followed and a 50% deduction is appropriate. Furthermore, and in the circumstances set out at 9.3-9.5 above, the claimant substantially contributed towards her own dismissal to the extent of 60%.

9.8 Remedy

At a remedy hearing, a percentage increase for failure by the respondent to comply with the ACAS Code of Practice in respect of disciplinary procedures is likely to be made. Final consideration of the amount and order of adjustments, including any ACAS uplift and the particular impact of the Polkey and contributory conduct deductions will be made at the Remedy hearing.

Employment Judge Parkin

Date: 7 October 2021