EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110268/2021

Case heard on 26 and 27 October 2021 by CVP

Employment Judge Campbell

Ms M Bell	**Claimant** **Represented by:** **Herself**
24-7 Recruitment Services Limited	**Respondent** **Represented by:** **Mr S Povey,** **Company Secretary**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1. The claimant was not continuously employed by the respondent for a period of two years or more;

2. The claimant is not entitled to bring a claim of unfair dismissal;

3. The claimant is not entitled to a statutory redundancy payment;

4. The respondent is not entitled to compensation in respect of annual leave she would have accrued had she served her contractual notice period rather than being paid in lieu of notice; and

5. Her claims are dismissed.

REASONS

Introduction

1. This claim arose out of the claimant's employment with the respondent. The claimant was dismissed on 21 June 2021 on grounds of redundancy.

2. There was a dispute over whether the claimant had an unbroken a period of continuous service beginning in April 2017, as dealt with below. The outcome of that question would determine whether she was entitled to pursue a claim of unfair dismissal and be entitled to a statutory redundancy payment.

3. Separately the claimant alleged that she had a right to serve her notice period after the respondent decided to dismiss her, rather than be paid in lieu of that notice. She argued that she was denied the opportunity to accrue annual leave during her notice period, and should be compensated for that.

4. Evidence was heard from the claimant and also a Mr Garred Gardner, her former line manager on her behalf. For the respondent Mr Simon Povey and Ms Deborah Young gave evidence. Written statements had been prepared for the respondent's witnesses. These were read out under oath by each as part of their evidence in chief and then supplemented by further oral evidence as necessary.

5. Although there was a degree of dispute over a small number of details of the evidence, the witnesses were all found generally to be credible and reliable.

6. The respondent prepared a bundle of documents which contained the majority of the documents the parties required to refer to. The claimant supplied a small number of additional documents. Page references below are references to those pages in the respondent's bundle. The claimant also provided a statement of her losses.

7. Closing submissions were delivered orally and noted by the tribunal in reaching its decision.

Issues

The issues to be determined in the claim were as follows:

1. Was the claimant continuously employed by the respondent between 8 April 2017 and 21 June 2021, or did the period 16 August to 8 October 2019 in which she was not an employee break her period of continuous service?;

2. If the claimant was continuously employed as above, was her dismissal on 21 June 2021 fair in terms of sections 98(1), (2) and (4) of the Employment Rights Act 1996 ('ERA')?:

3. If not, what remedy is appropriate?;

4. If the claimant was continuously employed as in 1 above and dismissed by reason of redundancy under section 98(2)(c) ERA, what redundancy payment was she entitled to?

5. Was the claimant entitled to serve her notice period or was the respondent entitled to pay her in lieu of that notice?;

6. If she was entitled to serve her notice period, was she entitled to compensation for holidays she would have accrued during that period?;

7. If so, what compensation is appropriate?

Relevant law

8. Employees are protected against being unfairly dismissed under various pieces of legislation, the principal one being ERA. Chapter I of that Act is devoted to provisions establishing the right.

9. In summary, an employee may only be fairly dismissed if their employer has a fair reason for doing so, which must be at least one of the types mentioned in section 98(1) or (2), such as their conduct, redundancy, capability or 'some other substantial reason'. It is for the employer to prove that the reason for dismissal was fair if challenged by way of a claim to an employment tribunal.

10. If the employer can establish a fair reason for dismissal the tribunal must examine whether the employer acted reasonably in carrying out the dismissal. The test of reasonableness is set out in section 98(4) ERA and involves reviewing the nature of the process followed (if any), the employer's size and resources, as well as *'equity and the substantial merits of the case'*. That test is deliberately wide-ranging so that it may be applied to a variety of situations, although the underlying principles are the same.

11. In addition to the section 98(4) test, certain other principles of fairness have been established over time for particular types of dismissal by way of external guidance, such as ACAS Codes of Practice, and the decisions of higher tribunals and courts which act as precedents.

12. Unless an employee's dismissal is for a reason which ERA states is automatically unfair, such as for making protected disclosures or undertaking duties as a trade union representative by way of example, the employer may only make a claim to an employment tribunal if they have been employed for a continuous period of at least two years. Employment tribunals do not have jurisdiction to decide claims of employees whose continuous service was less than two years.

13. An employee who had completed at least two years of service and who is dismissed by reason of redundancy is entitled to a statutory redundancy payment under section 135 and subsequent sections of ERA.

14. Every employee is entitled to a minimum period of notice of termination of their employment. That will be the greater of the entitlement set out in section 86 ERA and any contractual notice their employer has agreed to. If an employer wishes to bring an employee's contract to an end without having the employee serve that notice period, that must be agreed. The employer does not automatically have the right to do so.

15. An employee will normally accrue annual leave while they serve their notice period. If agreed that the employer may terminate the contract without the full notice period being served and by making payment in lieu, it can be agreed that holidays will not be deemed to accrue in respect of the notice period.

Findings in fact

1. The following findings in fact were made as they are relevant to the issues.

2. The claimant was employed by the respondent as an Operations Manager. The respondent operates as a recruitment agency and supplies staff to a number of organisations who require the flexibility of engaging temporary workers.

3. The claimant latterly worked 24 hours per week and thus part-time. Her pay was calculated at a daily rate proportionate to an equivalent annual salary for a full time Operations Manager. She was predominantly home-based.

4. The claimant undertook a period of employment with the respondent between 8 April 2017 and 16 August 2019. She resigned with effect from the latter date to take up a new role with a different employer unconnected to the respondent. Her manager with the respondent was Mr Garred Gardener. She left on good terms and Mr Gardener said he would be happy to have her back.

5. The claimant did not enjoy the new role as she had anticipated. It was a full time role and she preferred to work part-time. She had kept in touch with Mr Gardener who asked her to consider coming back to work for the respondent.

6. The claimant spoke to Mr Gardner by telephone about the possibility of re-joining the respondent. Mr Gardner obtained approval from one of the respondent's directors to make an offer of employment to the claimant. He was not a director of the respondent himself and that was the process he had to follow.

7. He discussed with the claimant the terms on which she could return. He said she could return on the same terms as before. As part of that conversation he said that the claimant would be treated as working continuously for the respondent, in that her period of service would be deemed to date back to 8 April 2017 rather than start again on the date she re-joined.

8. Mr Gardner sent a letter to the claimant dated 7 October 2019 confirming the terms of the respondent's offer to re-hire her [27]. The letter confirmed the role, location, salary, probation period and start date, which would be 8 October 2019. It stated that:

> *'All other standard Company terms will be detailed within your Contract of Employment once issued.'*

9. The letter did not mention continuous service.

10. The claimant agreed to re-join the respondent and did so on 8 October 2019.

11. The respondent provided a 'Contract of Employment – Management & Salaried Roles' to the claimant shortly after she returned [28-32]. This document stated that her *'Commencement date of role'* was 8 October 2019, and that her *'Commencement date of continuous employment with the Company'* was the same date.

12. The claimant effectively returned to her old role. Her clients, work and colleagues were the same as before she left.

13. The respondent lost the account to supply temporary staff to Sainsbury's supermarkets based at Langlands. That was an account which the claimant serviced. The respondent decided that it no longer required to have an Operations Manager if the contract was to come to an end. It planned to reduce the size of the claimant's team from three to two, retaining a Site Co-ordinator and a Contract Manager.

14. Mr Povey, Ms Young and a Ms Julie Hopkin from Human Resources held a conversation with the claimant and two of her colleagues on 11 May 2021 to confirm that the respondent proposed to restructure that team and the three individuals' roles would be affected.

15. Ms Young sent a letter dated 12 May 2021 confirming that the claimant was being put at risk of redundancy, and asking her to attend a consultation meeting the next day [73].

16. The claimant attended the meeting and a note was made, by way of a pro-forma template filled in by the manager holding the meeting, Balasz Kis [74-75].

17. The note recorded that the claimant asked about a particular vacancy for an HR Advisor. She wished to know whether the role could be carried out remotely, or whether any other remote vacancies existed.

18. The claimant could not undertake either of the two roles being retained, as both were full time. They were both significantly lower paid than an Operations Manager position, and were not eligible for a bonus or payment of travel expenses, both of which were available to her as an Operations Manager.

19. The claimant was generally made aware of relevant vacancies within the respondent's business. However, each of those was for a full-time role and the claimant's circumstances did not allow her to work full time. She therefore could not apply for any of them.

20. The claimant attended a second individual consultation meeting on 8 June 2021. There was further discussion of vacant roles but it was clear that all of them were full time positions and therefore not suitable for the claimant.

21. The claimant began a period of illness-related absence on or around 11 June 2021. She submitted a fit note from her GP. The reason given was stress. She did not wish to take part in any further redundancy consultation meetings while she was absent.

22. During her period of absence the claimant raised a number of requests and complaints about how she had been treated. She asserted that her continuous period of service with the respondent should be treated as *'over 4 years'* as she had only agreed to return to the respondent in 2019 on the condition that her earlier period of service would be credited to her [93].

23. Ms Young replied to state that the respondent's position on her length of service was that it began on 8 October 2019 [94].

24. On 17 June 2021 Ms Young wrote a letter to the claimant saying that the redundancy consultation process could not be delayed any longer, and inviting the claimant to a final redundancy meeting on 21 June 2021.

25. The letter went on to say that all vacant roles previously offered to the claimant had been considered unsuitable by her, and there were no further vacancies to make her aware of.

26. The claimant did not attend the proposed meeting as she considered herself too unwell. She was still covered by her fit note.

27. Ms Young wrote a letter dated 21 June 2011 to the claimant which confirmed her employment was being terminated on grounds of redundancy [109-110]. It stated that the contents were what would have been discussed at the meeting that day had it gone ahead.

28. The letter stated that the respondent did not require the claimant to work during her one-month notice period and that the respondent would pay her in lieu. Her employment was therefore being terminated on 21 June 2021 and she would be paid for the annual leave she had accrued up to that date.

29. Also featured in the letter was discussion of whether the claimant was entitled to a statutory redundancy payment. As she was considered to have begun her period of continuous service on 8 October 2019 the respondent calculated that she had not completed two years of service and so was not entitled to a payment.

30. The claimant exchanged emails with Ms Young after receipt of her dismissal letter. She queried whether she should have been paid for holidays she would have accrued by working her notice period, which she confirmed she would have been prepared to do. No further payment was made.

31. The claimant's contract of employment as issued to her in October 2019 was the most recent written statement of her key terms and conditions of employment. It did not contain a provision permitting the respondent to terminate the claimant's employment and pay her in lieu of any notice not

served, as an alternative to the full notice period running and the contract ending upon that happening.

Discussion and conclusions

Continuous service

32. It is necessary first to consider whether the claimant was employed continuously for two years or more. If she was, her claims of unfair dismissal and for a redundancy payment could be decided on their merits. If she was not, the tribunal had no power to determine them.

33. The provisions for treatment of service are contained in Chapter I of Part XIV of ERA – sections 210 to 219.

34. Essentially, if an employee's period of working for a given employer is interrupted by at least a clear week, starting on a Sunday and ending the following Saturday, in which they are not an employee, then their continuous service period will be broken.

35. As such, there is a presumption that continuity ceases if the above occurs. However, there are specific exceptions where a longer period without being an employee will not interrupt the running of continuous service. Those can include a 'temporary cessation' of work or an 'arrangement or custom' to the effect that gaps between contracts will not break continuity.

36. It has been clarified by higher authorities that continuity of service has to be assessed by applying the relevant statutory rules and cannot be contractually agreed between an employer and an employee – see for example ***Carrington v Harwich Dock Co Ltd [1998] IRLR 567***.

37. Given that is so, Mr Gardner was unable to change how the claimant's period of continuous service should be assessed by anything he said to her around the time she re-joined the respondent in October 2019.

38. In any event it is found that he had no power to bind the respondent by any promise made to the claimant to the effect that her period of service up to August 2019 would count towards her service acquired from October 2019

onwards. He was not senior enough himself, and there was no evidence that he had obtained such approval from the board of directors of the respondent. Additionally, the formal written documentation issued to the claimant at that time, namely the offer letter and contract of employment, omitted any such terms.

39. Having considered the requirements for service to be preserved by either a temporary cessation of work or an arrangement or custom, it is found that the claimant's circumstances did not qualify as either.

40. There was no evidence of even a temporary cessation of her work, which continued after her resignation and was then resumed by her when she returned. She did not leave because her work ceased – she resigned to take up another job elsewhere.

41. Nor was there any arrangement or custom for her earlier period of service, or the gap in between, to be treated as part of the second period. Such an arrangement has to exist before the first period of working comes to an end and cannot be created or agreed upon retrospectively - ***Welton v Deluxe Retail Ltd (t/a Madhouse) [2013] IRLR 166***. No such discussion took place with the claimant until she had left the respondent's service in August 2019.

42. Therefore it is found that the claimant had not acquired two years or more of continuous employment by the time of her dismissal on 21 June 2021, according to the relevant statutory tests and other principles established by case law.

43. It follows that the tribunal cannot determine her claims of unfair dismissal and for a statutory redundancy payment, and those claims must be refused.

Accrued holidays for notice period

44. The claimant's final complaint was that she was entitled to compensation for holidays which would have accrued during her notice period had she served it.

45. It is notable that her contract of employment did not allow the respondent to terminate her employment earlier than the expiry of her one month notice period and make payment in lieu of notice. Therefore, the respondent was in breach of contract by taking that step.

46. The question of whether the claimant is entitled to a remedy is related but separate. She was paid in respect of her salary for her notice period, and so did not sustain a loss in that way. Nor in fairness is she making a claim to that effect.

47. Whilst the claimant is correct to argue that she was contractually entitled to serve her notice period, it does not follow that she has sustained a loss through being denied the opportunity to accrue holidays during that period. This is because the respondent would have been entitled by virtue of Regulation 15 of the Working Time Regulations 1998 to require her to use part of her notice period as paid annual leave, resulting in no accrued holidays remaining by her termination date.

48. Therefore the claim in respect of accrued holidays relating to the claimant's notice period must also be refused.

Employment Judge: Brian Campbell
Date of Judgment: 16 November 2021
Entered in register: 17 November 2021
and copied to parties