EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107603/2021 (V)
Held by means of the Cloud Video Platform on 18, 19 and 20 August 2021
Employment Judge W A Metklejohn

Mr W Ross	**Claimant** **Represented by:** **Mr G Bathgate - Solicitor**
Doosan Babcock Ltd	**Respondent** **Represented by:** **Ms L Miller – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimants complaint of unfair dismissal is not time-barred but does not succeed and is dismissed.

REASONS

1 . This case came before me for a final hearing, conducted remotely by means of the Cloud Video Platform, on both liability and remedy. Mr Bathgate represented the claimant and Ms Miller represented the respondent.

Procedural history

2. The claimant initiated ACAS early conciliation ("EC") on 5 December 2020. The EC certificate was issued on 14 January 2021 . The claimant's ET1 claim form was submitted on 10 February 2021, intimating a claim of unfair dismissal. The respondent's ET3 response form was lodged on 1 5 March 2021 , resisting that claim and asserting that (a) the claimants employment had ended by reason of his resignation on 16 September 2019 and so the claim was out of time and (b) if there had been a dismissal, it was a fair dismissal by reason of some other substantial reason or, in the alternative, redundancy.

3. A Preliminary Hearing took place on 21 May 2020 (before Employment Judge Shepherd). Various case management orders were made and the present hearing dates were fixed. It was decided that the time bar point taken by the

respondent should be decided at the final hearing and not at a separate Preliminary Hearing. The parties were required to provide a chronological statement of agreed facts - this was done (34).

4. The issues to be determined at the final hearing were identified and I set these out in the next paragraph. References to "ERA" are to the Employment Rights Act 1996.

List of issues

5. These were recorded by EJ Shepherd as follows -
(i) V\fas the claimant dismissed or did the claimants employment terminate as a result of the claimant's resignation?
(ii) What was the effective date of termination?
(iii) Has the claim been brought within the relevant time limit (section 1 1 1 ERA)? If not, was it reasonably practicable for the claim to be brought in time? If it was not reasonably practicable, was it brought within such further period as the Tribunal considers reasonable?
(iv) If the claimant was dismissed, what was the reason for the claimants dismissal? The respondent asserts that any dismissal was for some other substantial reason, namely the impact of the pandemic, the fact that the claimant's role was not available at the relevant time and the need to realign workload necessitating a reorganisation. In the alternative it was by reason of redundancy.
(v) If the claimant was dismissed, was the claimants dismissal fair (section 98 ERA)?
(vi) If the claimant was unfairly dismissed, what is the appropriate remedy? The claimant seeks reinstatement or re-engagement

6. Mr Bathgate intimated at the start of the hearing that the claimant no longer sought reinstatement or re-engagement and his preferred remedy was now compensation.

Evidence

7. I heard evidence from the claimant. For the respondent I heard evidence from Mr I McFarlane, Director of General Engineering and Mr D Taylor, HR Director. I had a joint bundle of documents extending to 128 pages to which I refer above and below by page number.

Findings in fact

8. The claimant commenced employment with the respondent on 21 August 1978. He was employed continuously until 16 September 2019, latterly as Lead Engineer, CAE Systems, and Smartplant Administrator. Unfortunately, his employment did not end happily. He described matters in a letter dated 19 September 2019 (76) to Mr A Colquhoun, the respondent's CEO, in these terms -
"/ do feel aggrieved that working in the process group has seriously affected my wellbeing and this is the main reason for me leaving. There are a number of individuals in that group that I can't trust and in my opinion have effectively manoeuvred things to eliminate my role within Doosan Babcock as SmartPlant Administrator. . .."

9. The respondent operates across a number of areas in the power industry

including thermal, nuclear, oil and gas and petrochemical. It is a subsidiary of Doosan Group, based in South Korea. The claimant was employed at the respondent's operational headquarters in Renfrew.

Claimant resigns

10. From May 2019 until his departure on 16 September 2019 the claimant was absent from work by reason of stress and depression. In early June 201 9 he exchanged emails (51-54) with Mr A Rodger, Head of Sector - Engineering at West Coast College ("WCS'), and arranged to meet with Mr Rodger. The claimant described himself to Mr Rodger as "fed *up with life at Doosan Babcock"* and was interested in lecturing and/or workplace assessment for apprentices.

1 1 . The claimant also approached Ayrshire College and Glasgow Clyde College ("GCC"). He was offered a temporary (one year) contract in a SVQ Assessor/Coordinator role with GCC. He then submitted a letter of resignation dated 19 August 2019 to his line manager, Mr J Fulton (55). Mr Fulton contacted the claimant and they arranged to meet with MrColquhoun. The outcome of this meeting was that the respondent would look for an alternative role for the claimant.

Dialogue with Mr McFarlane

12. This led to a dialogue between the claimant and Mr McFarlane, who was Mr Fulton's line manager. Mr McFarlane knew about the claimant's job opportunity at GCC. Mr McFarlane liaised with Ms M Henderson and Ms C Mclackland who worked in the respondent's HR department and with Mr P Carruthers, Training Coordinator, who was based at the respondent's Tipton office. They exchanged emails between 4 and 10 September 2019 (56-57).

13. According to Mr McFarlane, Ms Henderson raised the possibility of the claimant taking a sabbatical, only for the respondent's HR department to advise that this would not be possible. The claimant and Mr McFarlane spoke on or around 10 September 2019. Mr McFarlane told the claimant that he had not been able to find an alternative role for the claimant. He mentioned a sabbatical which the claimant rejected. The claimant had looked at the respondent's sabbatical policy (47-48) and was aware that this could entail losing his accrued holiday entitlement There was also consideration of seconding the claimant to GCC. However, the claimant indicated to Mr McFarlane that he was not interested in this and it was not pursued.

14. On 1 2 September 201 9 the respondent sent what appeared to be a standard exit letter to the claimant (62-63). This confirmed the claimants accrued holiday entitlement which was duly paid with his September 2019 pay. The claimant was issued with a P45 (71-73). The respondent dealt with the claimants leaving in line with their normal process which involved completion of a leaver's checklist (64). Part of the process entailed sending a manager's checklist which should have resulted in the claimants Doosan email account being closed down but this did not happen. Mr Taylor described this as an oversight but I accepted the claimants evidence that this was the result of a telephone conversation he had with Mr Fulton on or around 23 September 2019.

Claimant meets with Mr Colquhoun

15. On 19 September 2019 the claimant visited the respondents premises in Renfrew to collect his personal belongings. The claimant had written a note to Mr Colquhoun (76) and met with Mr Colquhoun while on the premises. That note included the following (after the passage quoted at paragraph 8 above) "As *a result of this, I was hoping that as a gesture of goodwill you would consider making me redundant. If this means taking up the offer of a sabbatical until such time that there is a redundancy I would be more than happy to do this.*
If it is to[o] late in the day to do this, then I wish Doosan Babcock under your leadership every success for the future.. .."

16. This was in contrast with what the claimant stated in his exit questionnaire (65-70). He responded "no" to the question asking whether he would return to the company one day. Having spent his entire working life with the respondent to that point, it was apparent the claimant was leaving with mixed emotions. He concluded the questionnaire by saying -
"On the whole I enjoyed my time working at Doosan Babcock. It is very sad that I have felt I have had to leave under the current circumstances. "
Mr Taylor becomes involved

17. Following his meeting with the claimant, Mr Colquhoun spoke to Mr Taylor. Mr Taylor's account of this was that Mr Colquhoun told him that he had had a discussion with the claimant, that he had not been able to persuade him to stay and that it was a shame after 41 years. Mr Colquhoun asked Mr Taylor is *"if there was anything else we could do".* Mr Colquhoun mentioned GCC but not the claimant's reference to redundancy nor a sabbatical.

18. This led to a phonecall between Mr Taylor and the claimant on Friday 20 September 2019. Mr Taylor's evidence about this was that they discussed the claimant's GCC job. He (Mr Taylor) was aware that this was a one year contract. Mr Taylor told the claimant that if the respondent had a suitable opportunity, they could consider re-employing him but there was no guarantee. Mr Taylor said that there was no possibility of a sabbatical to which the claimant responded "OK" Mr Taylor asked the claimant to think over the weekend and they would speak the following week. If the claimant was interested, he (Mr Taylor) would put something in writing.

1 9. During this conversation Mr Taylor made a handwritten note in his work book. This was as follows -
Willie Ross/DT 20/9/19
WR -No- leaving - taking up new job
- may think about returning
- DT - can't give a sabbatical
WR-OK
- If we have a opening/skills need could consider bringing back- but cannot promise as Willie resigned - OK
- Agree -DT write with conditions
Act- Lynne draft up"

20. The claimant's evidence was that Mr Taylor had asked him to reconsider the offer of a sabbatical. The claimant mentioned that he had holidays which he would lose and Mr Taylor said that the respondent would honour these. They discussed that the claimant was doing things which were not allowed under the sabbatical policy, ie his job with GCC and also that he hoped to work as a bank lecturer with Ayrshire College and to do smartplant admin work with

GSK. Mr Taylor confirmed that there were no conflicts of interest. The claimant asked for time to *"think about their offer".*

21. The claimants concerns reflected the following provisions within the respondent's sabbatical policy -
"Any accrued but unused holiday entitlement for the current holiday year must be taken prior to the start of the employee's sabbatical leave. "
"During the period of the employee's sabbatical, the employee remains an employee of the Company on the normal terms and conditions of employment. Therefore, the employee will not be permitted to take up employment or provide any consultancy services to any third party and all provisions as to confidential information will continue to apply."

22. The claimant emailed Mr Taylor on Sunday 22 September 2019 as follows -
"Thanks for reaching out to me on Friday, it really is appreciated. I would like to accept your kind offer of a sabbatical for the next 12 months.
It is also appreciated that you will honour my holidays and reimburse me for the ones I haven't used to date."
The claimant's email went on to raise questions about his pension, healthcare benefits and purchasing his work chair. He referred to being employed by GCC and his proposed Ayrshire College/GSK work. He indicated that he would call Mr Taylor on Monday 23 September 2019.

23. The claimant and Mr Taylor spoke again on Monday 23 September 2019. According to the claimant Mr Taylor was *"quite pleased I'd decided to take up his offer** and said that he would put something in writing. Mr Taylor struggled to recall this conversation and was uncertain if he had read the claimant's email of 22 September 2019 before it took place. He thought the claimant had mentioned his healthcare. Mr Taylor said that the conversation had been around his putting in place an arrangement for the claimant's re-employment in 12 months' time.

What was agreed?

24. It was not possible to reconcile the conflicting accounts given by the claimant and Mr Taylor of their conversation on 20 September 2019. For a number of reasons, I preferred Mr Taylor's evidence -
(a) Mr Taylor's version was supported by his contemporaneous note, in particular the references to *"can't give a sabbatical"* and ∪*OK".*
(b) There was some force in Mr Taylor's assertion that the arrangements recorded in his subsequent letter to the claimant on 7 October 2019 (81-82) would have been unnecessary if the claimant was taking sabbatical leave, as his entitlement to his existing levels of employer pension contribution and life cover would have been preserved anyway.
(c) I accepted Mr Taylor's evidence that he was the custodian of the respondents sabbatical policy and did not have authority to *"bend the rules".* I believed that if there had been an arrangement which granted sabbatical leave outwith the respondents policy, that would have been suitably documented.
(d) The issuing of his P45 was not consistent with the claimant being on sabbatical leave, under which his employment would have continued.

25. That said, the claimant clearly believed that what he had been offered and

had accepted was sabbatical leave. He used the word *"sabbatical"* no fewer than four times in his email to Mr Taylor of 22 September 2019. He also referred to his *"sabbatical"* in his subsequent email of 1 1 October 2019 (80). When he applied for voluntary redundancy on 8 January 2020 (94) he referred to being *"on a one year sabbatical"* and when he emailed Mr Taylor on 24 July 2020 (99-100) about coming back he referred to *"my 12 month sabbatical".*

26. I believed that, on the balance of probability, Mr Taylor had not read the claimants email of 22 September 2019 when he spoke with the claimant on 23 September 2019. However, I believed that he had read it before his letter to the claimant of 7 October 2019 was sent Mr Taylor described the claimants email of 22 September 2019 as a *"blatant misrepresentation".* He explained not putting the claimant right (about not being on sabbatical leave) as acting *"on a balanced compassionate basis".* It would have been better if Mr Taylor had been straight with the claimant when documenting the outcome of their discussions, ie telling him in unequivocal terms that he was not on sabbatical leave.

27. On 7 October 2019 Ms L McConnachie, Compensation and Benefits Manager, emailed the claimant (80-81) with the letter from Mr Taylor (which she had drafted on his instructions). This set out the arrangements which would apply if the claimant returned to the respondent after his one year contract with GCC. It made clear that there was no guarantee that the claimant would be able to return. If he did, then *"on an exceptional basis"* his employer pension contributions and life cover would continue at their current levels (as opposed to the less generous terms offered to a new start) and his 41 years' service would be recognised for *"Long Service etc"* purposes.

28. The claimant responded to Mr Taylor on 1 1 October 2019 (80). He did not pick up on the feet that Mr Taylor made no reference to his *"sabbatical"* but he did ask, if there was no job for him to return to or there was a restructuring, whether he would be able to apply to be made redundant.

Voluntary redundancy application

29. On 7 January 2020 the claimant received an email from his trade union (93) advising that the respondent had announced redundancies at Renfrew and Crawley and that applications for voluntary redundancy would be considered. Mr Taylor explained that the planned redundancies primarily affected a group of R&D staff who had transferred to the respondent following an internal reorganisation.

30. The claimant sent an email to the respondent's HR Shared Services email address on 8 January 2020 (94) asking to be considered for voluntary redundancy. He received a reply from Mr D Comforth, MRO Managing Director, dated 16 January 2020 (95) rejecting his application and telling him *"....the Company very much wants to retain your services and that is why we are unable to accept your application for voluntary redundancy. "*

31 . Not surprisingly, the claimant regarded this as confirming that he remained in the respondent's employment, consistent with being on sabbatical leave. Mr Taylor's explanation was that the respondent reviewed all of the voluntary redundancy applications and issued a standard rejection letter to all of those who were not accepted. This would not have been signed by Mr Comforth personally. I accepted Mr Taylor's explanation, although not without

considerable sympathy for the claimant. In his case, the letter was simply wrong (about *"retain your services")* and misleading.

Claimant seeks to return

32. On 28 July 2020 the claimant emailed Mr Taylor (99-100) intimating his intention to return to the respondent on 23 September 2020. Mr Taylor acknowledged this immediately (99) indicating that he was about to take annual leave but would *"review the arrangements asap".* Mr Taylor initiated some enquiries about the possibility of a role being available for the claimant

33. Having not heard further the claimant emailed Mr Taylor again on 24 August 2020 (99). Mr Taylor responded on 1 September 2020 (98) stating that a review had been undertaken and that there were no similar roles for the claimant to undertake. The respondent was therefore unable to offer the claimant *"a position of similar status to that you were carrying out prior to your decision to leave the business on 16th September 2019".*

34. The claimant replied on 8 September 2020 (97-98) expressing his disappointment and seeking *"confirmation on next steps regarding redundancy process".* The claimant sent a follow up email on 16 September 2020 (97).

35. Mr Taylor replied by email on 21 September 2020 (103, also 106). Quoting the sentence in the respondent's sabbatical policy prohibiting employment/consultancy, Mr Taylor told the claimant -
"As *you were leaving to take up paid employment from another employer, as discussed with you at the time, it was deemed that a sabbatical was outwith our policy and therefore not applicable in your case. As a result, you confirmed your decision to* ***resign*** *from the business and Doosan Babcock accepted your resignation that was submitted on 19th August 2019 in the letter of 12th September 2019..."*

36. This reads as if the claimant had confirmed that he was resigning after his conversations with Mr Taylor on 20 and 23 September 2019, which was incorrect. The claimant's position then and now was that his resignation had taken effect on 16 September 2019. The claimant contended that the outcome of his dialogue with Mr Taylor in September 2019 was that his employment had been renewed, albeit on sabbatical leave.

37. Mr Taylor's email advised the claimant that there would be no *'at risk process".* The claimant responded on 24 September 2020 (105) expressing his dismay. He quoted from Mr Taylor's email of 7 October 2019 - *"The Company would recognise your previous service of 41 years for purposes of Long Service etc".* He also quoted from the respondent's letter of 16 January 2020 (see paragraph 30 above). Mr Taylor did not respond.

Mitigation

38. The claimants one year contract with GCC was extended to 30 June 2021 . It was then extended again to 1 7 September 2021 . The claimant understood it would not be further extended. The claimant had accepted an offer of temporary employment with WCS, the start date of which had still to be confirmed. The claimant understood that this would pay around £31000 per year which was slightly less than he earned at GCC.

39. For the sake of completeness I record that the claimant provided a revised schedule of loss on 20 August 2021 , to which I would have had regard had I found in the claimants favour.

Comments on evidence

40. It is not the function of the Tribunal to record every item of evidence presented to it and I have not attempted to do so. I have sought to focus on those parts of the evidence which had the closest bearing on the issues I had to decide.

41 . All of the witnesses were credible, in the sense that their evidence reflected their recollection of events. Where there were differences in recollection, particularly with regard to the conversation of 20 September 2019, 1based my view of credibility on the availability of other evidence (such as Mr Taylor's notes) and the balance of probability.

Submissions

42. I heard oral submissions from Mr Bathgate. Ms Miller provided a written submission which she supplemented orally.

43. Mr Bathgate invited me to make various findings in fact and I have done so broadly as suggested by him, with the significant exception of the conversation between the claimant and Mr Taylor on 20 September 2019.

44. Mr Bathgate said that the claimant's position was that (a) he had resigned on 16 September 2019, (b) he had been re-engaged following the discussions with Mr Taylor on 20/23 September 2019 and (c) his employment had io continued until 21 September 2020 when there was effectively communication of dismissal. Mr Bathgate referred to there being a gap of less than a week in terms of section 210 ERA - although I believed his argument was actually founded on section 212(1) ERA (see below).

45. Mr Bathgate pointed to aspects of the evidence which supported his argument that the claimant had remained employed until 21 September 2020. His email account had deliberately been left live. The response to his voluntary redundancy application, of which Mr Taylor had been aware, confirmed his status as an employee. It had been agreed that he would keep in contact with Mr Fulton.

46. Mr Bathgate stressed the number of opportunities Mr Taylor had to *"put the claimant straight"* that he was no longer employed by the respondent. He referred to (a) in response to the claimant's email of 22 September 2019, (b) in response to the claimant's email of 1 1 October 2019, (c) in response to the claimants voluntary redundancy application and (d) in response to the claimants email of 28 July 2020. The evidence, Mr Bathgate submitted, supported the claimants position that he was re-employed from the weekend of 22 September 2019 until 21 September 2020.

47. Referring to the assertion by Mr Taylor that the claimant had been trying to engineer that he would receive a redundancy payment, Mr Bathgate argued that Mr Taylor's position that he had not sought to correct the claimant (about being on sabbatical leave) through compassion lacked credence. Mr Bathgate submitted that, given his role as HR Director, Mr Taylor had been able to offer the claimant a sabbatical and the claimant had accepted that

offer.

48. Mr Bathgate acknowledged that if I did not accept his argument that the claimant had been on sabbatical leave, the claim had to fail. If I did accept his argument, it would be for the respondent to show the reason for dismissal and that they acted reasonably. I should find that (a) the respondent had not shown a fair reason for dismissal or (b) if they had, they had not shown that it was a sufficient reason to dismiss the claimant.

49. I invited Mr Bathgate to consider whether section 212(3)(c) ERA might be relevant. He very fairly responded that it would be disingenuous to say that it had been in his and the claimants mind (but left the door open for me to address the point if I considered it appropriate to do so).

50. Ms Miller began her written submission by addressing the burden of proof. She accepted that, in terms of section 210(5) ERA, it was for the respondent to show that the claimant was not continuously employed. She invited me to find that the claimant resigned as at 16 September 2019 and was not at any time thereafter re-employed.

51 . In terms of credibility, Ms Miller argued that I should prefer the evidence of Mr Taylor on the issue of whether sabbatical leave had been offered and accepted. She referred to Mr Taylor's notes of 20 September 2019 and the absence of any reference to *ttsabbaticai"* or *"bending the rules"* in Mr Taylor's letter of 7 October 2019. Ms Miller submitted that the claimant had been motivated by seeking a redundancy payment whereas there was no motivation for Mr Taylor to be untruthful.

52. There had, Ms Miller argued, been a clear and unambiguous resignation in terms of the claimant's letter of 19 August 2019. This had been accepted by the respondent's letter of 12 September 2019. Various activities were carried out which were consistent with the claimant leaving the respondent's employment - a P45 was issued, an exit questionnaire was returned, accrued holiday entitlement was paid and a leaver checklist was completed.

53. Referring to events post-resignation, Ms Miller submitted that what Mr Taylor had agreed with the claimant was arrangements that would apply **if a** suitable position was available and the claimant returned to the respondent after his one year contract with GCC. Nothing in Mr Taylor's letter of 7 October 201 9 suggested that a sabbatical had been discussed or agreed, and there was no reference to continuity of service other than in the three areas mentioned (pension contributions, life cover and long service).

54. Ms Miller frankly accepted that the respondent did not *"cover itself in glory"* in the response to the claimants voluntary redundancy application but that did not alter the position that the claimant resigned, no offer of a sabbatical was made and the claimant was not re-employed. The same could be said of the correspondence in July/September 2020. The respondent did (as they said they would) consider whether they could re-employ the claimant but were unable to do so.

55. Referring to section 212(3)(c) ERA , Ms Miller argued with reference to ***Welton v Deluxe Retail Ltd [201]3 ICR 428*** that an "arrangement" could not be entered into retrospectively. Also, for there to be an ***"arrangement",***there had to be a ***"meeting of minds" - Curr v Marks and Spencer pic [2002]***

EWCA Civ 1852.

Applicable law

56. Section 111 ERA, so far as relevant, provides as follows -
u(1) A complaint may be presented to an employment tribunal by any person that he was unfairly dismissed by the employer.
(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal -
(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months...."

57. Section 210 ERA provides, so far as relevant, as follows -
" (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. . ..
(4) Subject to sections 2 15 to 2 17, a week which does not count in computing the length of a period of continuous employment breaks the continuity of employment
(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous."

58. Section 212 ERA provides, so far as relevant, as follows -
"(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 ....
counts in computing the employee's period of employment...."

Discussion

59. I approached this by looking at the list of issues set out at paragraph 5 above.
Was *the claimant dismissed or did the claimant's employment terminate as a result of the claimant's resignation?*

60. The claimant's letter of 1 9 August 201 9 (55) was clear and unambiguous. The claimant asked that it be accepted as formal notification of his resignation, and specified that his last day with the respondent would be 16 September 2019. There was no suggestion on the claimant's side that this had been a

constructive dismissal. The claimant resigned. This served to rebut the presumption of continuity of employment under section 210(5) ERA.

61 . However, that was not necessarily the end of the story. I had to consider whether, as argued by Mr Bathgate, the claimant had been re-employed. If he had been re-employed, was his continuity of employment preserved?

62. The answer to this turned on the key area of factual dispute. This related to the events of 20/23 September 2019. Did the claimant accept an offer of a one year sabbatical, or did the arrangement agreed with Mr Taylor apply only to the terms upon which the claimant would be re-employed by the respondent if a position of similar status was available?

63. My findings set out at paragraph 24 above were determinative of this issue. By preferring the evidence of Mr Taylor, I was in effect deciding that the claimant did not commence a one year period of sabbatical leave on or around 22/23 September 2019. He was not re-employed.

64. I next considered whether, even although the claimant was not re-employed, it might be argued that his continuity of employment was preserved beyond 16 September 2019. This engaged section 212(3)(c) ERA. Could the terms offered by Mr Taylor in respect of pension, life cover and long service amount to an *"arrangement"* for the purpose of that provision?

65. I identified some difficulties with this. Firstly, while I could see an argument that retaining the right to be treated as if on sabbatical leave in respect of pension, life cover and long service meant continuing in employment *"for any purpose 0,* I was not persuaded that this was correct. When I say *"as if on sabbatical leave"* I mean something akin to, but not the same as, employment continuing because of sabbatical leave.

66. It seemed to me that the true position here was not that these were entitlements which subsisted from and after 22/23 September 201 9, but rather they were things that would revive if the claimant were to be re-employed. The effect was that if, and only if, he was re-employed, he would be treated more favourably than a new start in respect of pension, life cover and long service.

67. Secondly, Ms Miller was correct in saying that ***Welton*** was authority for the argument that an arrangement could not be entered into retrospectively. I believed however that there was a caveat to this, based on section 210(3) ERA. The effect of that provision is that a period of continuous employment is computed week by week. Section 212(1) ERA states that a week counts if *"during the whole or part"* of it there is a contract of employment governing the employer/employee relationship.

68. It followed that the week commencing Monday 1 6 September 201 9 counted, even though the claimant's employment ended on that date. If I had preferred the claimant's version of the events of 20/23 September 2019, 1would have found that the week commencing Monday 23 September 2019 (and those that followed) also counted. I believe this can be reconciled with ***Welton*** by reference to paragraph 58 of the Employment Appeal Tribunals judgment in that case.

69. While the EAT refer to the use of the present tense in section 212(3)(c) *("is*

regarded as continuing....") as indicating that the *"arrangement"* requires to subsist during the period which would otherwise break continuity (see paragraph 53), they say this at paragraph 58 -
"...."arrangements" within the meaning of section 212 will not have effect to bridge the gap in the continuity of employment unless the arrangement is in existence before, or arises contemporaneously with, the relevant weeks of absence from work during which there is no contract of employment governing relations. "

70. I believe that leaves the door open for there to be an arrangement entered into shortly after employment has ended, so that the week in which it ends and the week in which it revives both count under section 212(1) ERA and, provided these weeks are consecutive, continuity is preserved. However, that does not help the claimant here because he was not re-employed.

What was the effective date of termination?

71 . It follows from my conclusions above that the effective date of termination was 16 September 2019.
Has the claim been brought within the relevant time limit (section 111 ERA)? If not, was it reasonably practicable for the claim to be brought in time, If it was not reasonably practicable, was it brought within such further period as the Tribunal considers reasonable?

72. I found some useful guidance in the EATs decision in ***Cambridge and Peterborough Foundation NHS Trust v Crouchman [2009] ICR 1306.***
There, the EAT set out a number of considerations which seemed to me to be relevant to the present case -
• Ignorance of a fact which is *"crucial"* or *"fundamental"* to a claim will in principle be a circumstance rendering it impracticable for a claimant to present that claim.
• A fact will be *"crucial"* or *"fundamental"* in the relevant sense if it is such that, when the claimant learns of it, his state of mind genuinely and reasonably changes from one where he does not believe that he has grounds for the claim to one where he believes that he does have such grounds.
• But ignorance of the fact in question will not render it *"not reasonably practicable"* to present the claim unless (a) the ignorance is reasonable and (b) the change of belief in the light of the new knowledge is also reasonable.
• Whether the belatedly-learned crucial fact is true is not as such relevant: what matters is whether the late-acquired information about it has genuinely and reasonably produced the change of belief.

73. The crucial fact of which the claimant was ignorant in the present case was that he had not been placed on sabbatical leave. The consequence of that was that he believed he remained in the respondents employment, having resigned and then been re-employed, until 21 September 2020.

74. I considered that the claimants misapprehension about his employment status was reasonable. The point made by Mr Bathgate, as summarised at paragraph 46 above, was relevant here. The respondent had ample opportunity to correct the claimants understanding that he was on sabbatical leave, but did not do so.

75. The claimant genuinely believed that his employment with the respondent ended only when he received Mr Taylor's email of 21 September 2020. That remained his belief when he presented his ET1 claim form and indeed throughout these proceedings. The fact of that genuinely held belief made it not reasonably practicable for the claimant for the claimant to present his claim of unfair dismissal within three months of 16 September 2019.

76. Given that the claimant's position was that he understood that his employment ended on 21 September 2020, it was reasonable for him to present his ET1 within the statutory time limit calculated from that date, as extended by the period of EC, and he did so.

77. Accordingly, I found that (a) it had not been reasonably practicable for the claimant's unfair dismissal claim to be brought in time and (b) it had been brought within such further period as I considered, in the somewhat unusual circumstances of this case, to be reasonable. The claim was not time-barred.
If the claimant was dismissed, what was the reason for the claimant's dismissal?....
If the claimant was dismissed, was the claimant's dismissal fair (section 98 ERA)?
If the claimant was unfairly dismissed, what is the appropriate remedy?....

78. In light of my conclusions on the preceding issues, all of these became academic and so I have not addressed them.

Disposal

79. My decision is therefore that the claimant's claim of unfair dismissal is not time barred, but does not succeed because (a) his employment ended when he resigned on 16 September 2019 and (b) he was not thereafter re-employed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 26 August 2021
Entered in register: 02 September 2021
and copied to parties