EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4106505/2017

Preliminary Hearing held at Glasgow on 17 April 2018

Employment Judge: Paul McMahon

Dr D Neilson — **Claimant**
Represented by:-
Mr A Thomas - Solicitor

Greater Glasgow Health Board — **Respondent**
Represented by:-
Mr D Hay - Counsel

JUDGMENT FOLLOWING PRELIMINARY HEARING

The Judgment of the Tribunal is that:-

1. The claimant has sufficient qualifying service in terms of section 108(1) of the Employment Rights Act 1996, and therefore the claim for unfair dismissal will proceed.

REASONS

Introduction

2. The claimant has presented a claim of unfair dismissal relating to the termination of his employment under the Fixed Term Contract (defined below). At a preliminary hearing held on 6 April 2018 it was agreed that the final hearing set down for seven days from 17 April 2018 would be converted to a preliminary hearing which was listed for 17 and 18 April 2018. The claimant was represented by Mr A Thomas, solicitor. The respondent was represented by Mr D Hay, counsel. The representatives had agreed in advance that the respondent would present their case first. For the respondent, evidence was led from Mrs Beth Culshaw who works for the respondent as Chief Officer of West Dunbartonshire Health and Social Care Partnership. No evidence was led for the claimant. The parties lodged a joint set of documents and Mr Hay and Mr Thomas made closing submissions.

The issue

3. The issue to be determined by the Tribunal is:

(i) whether the claimant has sufficient qualifying service in terms of section 108(1) of the Employment Rights Act 1996.

Findings in fact

4. The Tribunal considered the following relevant facts to admitted or proved:

(i) The claimant commenced a period of employment with the respondent on 28 September 2004 providing clinical provision to the out of hours care service within the Lomond Centre at Vale of Leven Hospital under a contract of employment (the "Out Of Hours Contract"). A copy of this contract of employment was produced at pages 28 to 30

of the joint set of documents. This employment was ongoing as at the date of the preliminary hearing.

(ii) The claimant was engaged in a partnership with Dr McGonigle in a GP practice from in or around April 2005. The GP practice was based at Dumbarton Health Centre. This came to an end with effect from 23 March 201 7 or thereabouts.

(iii) The claimant commenced a period of employment with the respondent on 12 December 2012 providing clinical provision to the integrated care service at Vale of Leven Hospital under a contract of employment (the "ICS Contract"). A copy of this contract of employment was produced at pages 32 to 34 of the joint set of documents. This employment was ongoing as at the date of the preliminary hearing.

(iv) The claimant commenced a period of employment with the respondent on 4 April 201 7 as a general practitioner based at Dumbarton Health Centre under a fixed term contract of employment (the "Fixed Term Contract"). A copy of this contract was produced at pages 95 to 101 of the joint set of documents.

(v) The Fixed Term Contract was extended to 31 July 2017 by letter dated 14 June 201 7, a copy of which letter was produced at page 102 of the joint set of documents.

(vi) The claimant's employment under the Fixed Term Contract terminated on 31 July 2017.

(vii) As at 31 July 2017 the claimant was employed by the respondent under three contracts of employment; the Fixed Term Contract, the Out Of Hours Contract and the ICS Contract.

(viii) The Fixed Term Contract was separate and distinct from both the Out Of Hours Contract and the ICS Contract. Whilst one required to be a qualified doctor to provide the services and all three contracts related to provision of medical care, there were differences in reporting lines, the

nature of oversight and accountability, the time and place of performance, the way in which services users accessed services and the level of continuation of the doctor-patient relationship.

(ix) The Fixed Term Contract did not, together with the Out Of Hours Contract and the ICS Contract, form part of one single overarching or umbrella contract of employment between the claimant and the respondent.

Observations on the evidence

5. There was little or no dispute about the relevant facts in the case, many of which were the subject of agreement.

6. For the claimant, Mr Thomas conceded that the Fixed Term Contract did not, together with the Out Of Hours Contract and the ICS Contract, form part of one single overarching or umbrella contract of employment between the claimant and the respondent.

7. The Tribunal found Beth Culshaw to be a credible and reliable witness. Her evidence was not subject to any significant dispute or challenge in cross examination. In particular, her evidence relating to the extent to which the Fixed Term Contract was separate and distinct from both the Out Of Hours Contract and the ICS Contract, which made up the bulk of her evidence, was not challenged to any significant extent. Mrs Culshaw was asked by Mr Thomas if she accepted that the employer in respect of all three contracts was the respondent, which she did accept.

Relevant law

8. Section 94 of the Employment Rights Act 1996 (the "ERA") provides that the right of an employee not to be unfairly dismissed by their employer is subject to the provisions of section 108(1) of the ERA.

9. Section 95(1) of the ERA provides that:

"...an employee is dismissed by his employer if....-

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

10. Section 108(1) of the ERA provides that the right not to be unfairly dismissed does not apply to the dismissal of an employee unless they have been continuously employed for a period of not less than two years ending with the effective date of termination.

11. Section 21 0(5) of the ERA provides:

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

12. Section 21 1(1) of the ERA provides:

"An employee's period of continuous employment for the purposes of any provision of this Act —

(a) ...begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision."

13. Section 21 2(1) of the ERA provides:

"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"

Respondent's submissions

14. Mr Hay made oral submissions on behalf of the respondent. In summary his submissions were as follows:

15. The relevant statutory provision is section 108(1) of the ERA and makes the general provision that section 94 of the ERA does not apply to the dismissal of an employee unless they have two years' service at the effective date of termination, which in this case was 31 July 2017.

16. What constitutes a dismissal is set out at section 95 of the ERA and the definition of dismissal at section 95(1)(a) of the ERA, "the contract under which he is employed is terminated by the employer (whether with or without notice)", applied in this case. The use of word "the" before the word "contract" in that provision rather than the word "any" was highlighted.

17. Detailed submissions were made in relation to differences between the Fixed Term Contract and the Out Of Hours Contract and the ICS Contract with reference to the evidence from Beth Culshaw and the Tribunal was invited to find that the contracts were separate and distinct. There is no need to rehearse those details here for the purposes of this judgment.

18. The unfair dismissal claim relates to the termination of the Fixed Term Contract and, in the circumstances that there is no attempt to argue that an umbrella contract existed, clearly the Fixed Term Contract does not provide the length of service requirements for the purposes of section 108(1) of the ERA.

19. In the circumstances adduced in the evidence of Beth Culshaw, the claimant's length of service under the Fixed Term Contract should be looked at on its own.

20. Reference was made to *Surrey County Council v Lewis 1987 ICR. 982, H.L.* Reference was made to the facts of the case and extracts from the speeches of Lord Hailsham of Marylebone (in particular at pp 986C to 987E) and Lord Ackner (in particular at pp 989B to 990C). At pp 986H to 987B, the extract makes clear that one cannot add the hours of work or the periods of work done under one contract to the hours of work or periods of work done under the other if the contracts are separate and distinct. We are dealing with the later of those two circumstances here, i.e. adding periods of work. At p 987D the Tribunal's attention was drawn to the following passage, "...and there is no room therefore for importing into paragraph 4 of Schedule 13 any such phrase as would give the meaning "a contract *or contracts* of employment which normally, *whether singly or collectively* involve employment for 16 hours" Where there are distinct and separate concurrent contracts of employment one cannot tot up the totality of service to provide sufficient service under one of them for the purposes of an unfair dismissal claim when, if one looked at that contract alone, there would be insufficient qualifying service.

21. Reference was also made to *Bradford Metropolitan District Council v Dawson 1999 ICR 312, EAT.* This decision is more nuanced than it may first appear. The distinction of *Lewis* is more limited than the rubric suggests. Reference was made to the speeches in *Lewis* which were detailed above. An important concession was made at p 316G in *Dawson* "...had there been successive contracts and one could say that the intention of the parties was that one employment should succeed the other, then the total period of employment could be taken into account. Reference was made to p 318 and the Tribunal's attention was drawn to the fact that only one contract of employment was in existence at the date of termination in *Dawson* and the EAT were making this clear in its decision. It was also highlighted that, by contrast, in the present case there was not only one contract of employment in existence at the date of termination but three contracts of employment in existence at the date of termination.

22. Accordingly, if the contracts of employment are separate and distinct contracts then the position in *Lewis* set out earlier remains binding. The claimant in the present case cannot get past the starting point in *Dawson* as both the Out Of Hours Contract and the ICS Contract were still extant at the date of termination of the Fixed Term Contract.

23. There is no suggestion that the circumstances in this case involved the separation of contracts by the employer for the purposes of deliberately depriving the employee of his statutory rights. This case is far from that category of loop-hole that concerned Lord Ackner in *Lewis.* The Out Of Hours Contract and the ICS Contract are two separate and distinct supplementary contracts to the Fixed Term Contract for the delivery of GP services. The Fixed Term Contract lasted a total of three months, where prior to that the GP services were delivered via the partnership the claimant was a partner in.

24. The consequence of this is that for the purposes of an unfair dismissal claim, the claimant does not have the necessary qualifying service and the claim should be dismissed for want of jurisdiction.

Claimant's submissions

25. Mr Thomas made oral submissions on behalf of the claimant. In summary his submissions were as follows:

26. The only point to be highlighted from the evidence was that the witness accepted that the claimant had been employed by the respondent since 2004.

27. The *Lewis* case and this present case deal with two completely separate points. In this case the question is, did the claimant have two years' service? In *Lewis* the question was, could Ms Lewis aggregate contracts of less than 8 hours per week?

28. The relevant statutory provisions to look at in this case are sections 210, 21 1 and 212 of the ERA.

29. Section 210(3) of the ERA makes reference to an employee's continuous service being determined by weeks, months and years but does not make any reference to what contract the weeks, months or years relate to.

30. Section 21 0(5) of the ERA contains a presumption of continuity provision.

31. Section 21 1 of the ERA provides that a period of continuous employment begins with the day on which the employee starts work, which in this case was 28 September 2004. There was no equivalent to this provision in the 1978 Act *Lewis* was dealing with.

32. Section 21 2 of the ERA provides that weeks which count are "any weeks. .."

33. Following the legislation, one should look to when the contract terminated (in this case it was 31 July 2017) and look to when employment started (in this case it was 28 September 2004). If that is greater than two years, the requirements of section 108 of the ERA are satisfied and the claim should proceed.

34. Reference was made to *Lewis.* The respondent founds on *Lewis* and its references to aggregation. However, when one looks at the Oxford English Dictionary definition of "aggregate" it defines it as "gathered in to one whole". We are not seeking to do that here.

35. We should differentiate *Lewis* because, as Lord Ackner made plain, it dealt with two questions. Firstly, could you aggregate the hours worked under more than one contract in a given week to say that the total hours worked in that week met the requirement to work a specified number of hours under the old legislation? The second question related to gaps in employment. *Lewis* is only relevant to its own circumstances. The question in this case is different, when did employment start and when did it stop?

36. Reference was made to *Dawson.* It would be a complete nonsense that *Dawson* could look at the whole employment when one contract existed but

the claimant, who had three contracts could not. That cannot be right. On a careful analysis of *Dawson* at pp 317H to 318C, it doesn't support *Lewis,* it avoids *Lewis.* The reference to it not being possible to allow service or hours on one contract to feed the other is a reference to totting up hours per week and weeks per term under different contracts running concurrently.

37. Reference was made to *Wood v York City Council 1978 IRLR 228* at paragraph 6, "as long as he is with the same employer all the way through, then it is continuous employment". It was highlighted that in this case the employee moved from working in an arts festival to working in the treasury department which were separate and distinct jobs.

38. Reference was made to *Vernon v Event Management Catering Limited EAT 0161/07* at paragraph 19, "It seems to us that in every week where the Claimant worked as an employee, for however long, that week must count under s 212(1). His relationship is then governed by a contract of employment. The subsection could not be clearer".

39. If *Dawson* is right, the proper outcome is that the claimant should be advised that he should be able to proceed with his claim.

Discussion and decision

40. The Tribunal has to decide whether the claimant has the sufficient qualifying service in terms of section 108(1) of the Employment Rights Act 1996 to claim unfair dismissal.

41. The relevant statutory provisions are set out under the "Relevant law" section above.

42. To meet the test set out in section 108(1) of the ERA the claimant must have been continuously employed for a period of not less than two years ending with the effective date of termination, which in this case was 31 July 2017.

43. In the claimant's unfair dismissal claim, he seeks relief in respect of the termination of the Fixed Term Contract. The Fixed Term Contract lasted a total period of not quite four months.

44. Accordingly, the claimant cannot meet the test set out in section 108(1) of the ERA unless he can look back over the total employment relationship with the respondent, including the time when he was employed under the Out Of Hours Contract and/or the ICS Contract, for the purposes of calculating his period of continuous employment.

45. In *Surrey County Council v Lewis 1987 ICR. 982, H.L.* the House of Lords said that "The respondent's difficulty resides in the fact that she can only establish the requisite periods of continuous employment whether for deciding that "the whole or part of the employee's relations with the employer was governed by a contract of employment which normally involved employment for 16 hours or more weekly" (Schedule 13, paragraph 4) or for the purpose of considering whether "the periods" (consecutive or otherwise) are to be treated as forming a single period of continuous employment if she is permitted to add both the hours and periods of work actually done under one engagement respectively to the hours and periods of work actually performed under one or more of the others. In my opinion neither computation will avail the respondent if it is once established that the engagements are quite separate and distinct from one another, and do not, in one way or another, form a part of a single composite whole — entitling the employee to add one to the other for both purposes."

46. The facts and circumstances in *Lewis* were different to those which exist in the present case. In *Lewis* the House of Lords was dealing with a series of fixed-term and part-time contracts of employment at educational

establishments running by the term or course which were intermitted, amongst other things, by the usual holiday periods.

47. *Lewis* established that an employee couldn't amalgamate the hours or periods they worked under those concurrently running contracts in order to meet the minimum hours per week requirement, which was in force at the relevant time, for the purposes of calculating continuous employment and that an employee couldn't add the periods of employment together for the purposes of meeting the requirements of the special provisions relating to the temporary cessation of work to overcome the gaps in the separate contracts.

48. The Tribunal does not understand *Lewis* to be establishing a general rule that, where there are distinct and separate contracts of employment which for a period of time overlap and run concurrently, the overall period of employment cannot be taken into account for the purposes of calculating the employee's period of continuous employment (so long as the separate periods during which the contracts of employment run concurrently are not added together). To accept such an analysis would mean that the Employment Appeal Tribunal had erred in its interpretation of *Lewis* in the later case of *Bradford Metropolitan District Council v Dawson 1999 ICR 312, EAT.*

49. In *Dawson* the Employment Appeal Tribunal gave clear guidance to Tribunals in interpreting the provisions of section 212(1) of the ERA: "Section 212(1) of the Employment Rights Act 1996 provides:

"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 the employment."

The use of the indefinite article shows that, for the purpose of continuity, the tribunal should look at the whole employment relationship during which there was any contract of employment in existence. We do not understand the decision in *Surrey County Council v Lewis 1987 ICR. 982* to be saying anything different."

50. The Tribunal noted that the respondent in submissions had made reference to a different statutory provision where the definite article had been used with reference to contract of employment and that was section 95(1)(a) of the ERA. However, that provision relates to the definition of dismissal rather than, as is the case with section 212(1) of the ERA, the calculation of continuous employment.

51. In the same passage in *Dawson* the EAT concluded "But section 212 and the presumption in favour of continuity in section 210(5) operate so as to enable a one contract employee to look back over the whole employment relationship, including the time when he enjoyed two employments with the same employer."

52. The EAT in *Dawson* also said that "Where there are two contracts running along side by side, it is not possible to allow the service or hours under one to feed the other, where the contracts are separate and distinct." And "It would not be possible to count the weeks under each contract when they are running concurrently and aggregate them for the purposes of ascertaining continuity.". The Tribunal concluded that those passages relate only to aggregating or adding together hours of work or periods of work

done under separate contracts during the same time period for the purposes of calculating an employee's period of continuous employment.

53. The Tribunal noted, as was highlighted by the respondent in submissions, that in *Dawson* the EAT were dealing with a situation in which there was only one contract of employment in existence as at the relevant date and the EAT made clear reference to that fact in its decision. However, the Tribunal saw nothing in the EAT's analysis and interpretation of the relevant statutory language for the purposes of calculating an employee's period of continuous employment in *Dawson* which would suggest that the same analysis and interpretation of the relevant statutory language for the purposes of calculating an employee's period of continuous employment should not apply equally to a situation, as we have in the present case, where three contracts of employment were in existence as at the relevant date.

54. Whilst the Fixed Term Contract was separate and distinct from both the Out Of Hours Contract and the ICS Contract, the separate and distinct nature of contracts prevented the amalgamation of hours and periods of employment in the *Lewis* type situation described above. It did not prevent the employee from being able to look back at the whole employment relationship during which there was any contract of employment in existence in the *Dawson* type situation. In *Dawson* there was very little similarity between the two contracts of employment at all; one being a contract of employment where the employee was employed principally as a theatre usherette and the other being a contract of employment where the employee was employed in a care home. The Tribunal concluded that the fact that the Fixed Term Contract was separate and distinct from both the Out Of Hours Contract and the ICS Contract in the present case did not prevent the claimant from being able to look back at the whole employment relationship during which there was any contract of employment in existence.

55. For the reasons stated above the Tribunal concluded that the provisions of section 212(1) of the ERA and the presumption in favour of continuity in section 210(5) operate so as to allow the claimant to look back over the

whole employment relationship with the respondent including the time when he had more than one employment with the respondent for the purposes of calculating continuous employment.

56. Accordingly, in the circumstances that the claimant began employment with the respondent on 28 September 2004 and the effective date of termination was 31 July 2017, the claimant has established the necessary continuity of employment and the claimant has sufficient qualifying service in terms of section 108(1) of the Employment Rights Act 1996, therefore the claim for unfair dismissal will proceed.

Employment Judge: P McMahon
Date of Judgment: 14 May 2018
Entered in register: 17 May 2018
and copied to parties