EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110483/2021

Held in Glasgow on 20 June 2022

Employment Judge P O'Donnell

Mr G Rush	**Claimant** **Represented by:** **Ms Apicella -** **Representative**
J Mark Gibson	**Respondent** **Represented by:** **Mr Profitt -** **Counsel [Instructed by DAC Beachcroft]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant did not have two years' continuous service at his effective date of termination. The Tribunal does not, therefore, have jurisdiction to hear the claim of unfair dismissal and it is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought a complaint of unfair dismissal against the Respondent. This is resisted by the Respondent who raises two, interlinked preliminary issues which go to the jurisdiction of the Tribunal to hear the unfair dismissal claim.

2. This hearing was listed to determine these issues which have previously been framed as follows:-

a. Whether for the whole of the two year period prior to the effective date of termination, the Claimant worked for the Respondent under a contract of employment (this will be referred to below as "the contract issue").

b. If so, whether a period in June 2019 when the Claimant did no work for the Respondent breaks the Claimant's continuous service (this will be referred to below as "the service issue").

3. The Claimant has also brought claims for payments he says he is due on the termination of his employment which are not affected by these issues.

Evidence

4. The Tribunal heard evidence from the following witnesses:-

a. The Claimant.

b. The Respondent.

5. There was an agreed bundle of documents prepared by the parties and a reference to page numbers below is a reference to pages in that bundle. The Claimant's representative produced some additional documents on the morning of the hearing. The Respondent did not object to these being added and was given time to review those before the hearing commenced. In the event, those documents did not particularly feature in the hearing.

6. The passage of time since the relevant events had clearly had an impact on the recollection of both parties as would be expected. As a result, the quality of the evidence led by both of them in relation to the detail of what discussions were had about the Claimant coming back to work for the Respondent during school holidays. They both had a broad recollection of their respective understanding but there was no detail of the exact words used by them in setting out this would work.

7. Further, the Tribunal appreciates that neither of them would, at the time, have anticipated being involved in the present dispute and so considers that it is

unlikely that they would have expressed themselves in formal or legalistic terms.

Findings in fact

8. The Tribunal made the following relevant findings in fact.

9. The Respondent owns and operates the Craigengillan Estate ("the Estate"). The Estate includes ancient woodland and a farm. It employs about 10 people.

10. The Claimant's first involvement with the Respondent was in November 2017 when he came to the Estate to do work experience. At the time, he was in the S4 class at Doon Academy and the placement was part of the week's work experience down by all students in S4. This was unpaid work.

11. One of the courses which the Claimant was doing required a certain number of hours of work in addition to classroom based learning. The Claimant identified the Estate as a possible placement and an approach was made to the Respondent for the Claimant to do his placement at the Estate. The Respondent agreed. The placement took place over four weeks from the start of May 2018.

12. The Respondent paid the Claimant for the work done on this placement. There was no obligation on the Respondent to do so but he chose to do so because he felt that it was appropriate where the Estate was getting a benefit from the Claimant's work. He paid the Claimant at the National Minimum Wage and continued to do so whenever the Claimant returned to work for him.

13. The Respondent was pleased with the work done by the Claimant and the Claimant enjoyed working at the Estate. It was agreed that the Claimant could return to work at the Estate during the school holidays to gain further experience.

14. The Claimant's bank statements at pp68 and 70 show that the Claimant received payments from the Respondent during the following holidays and it

was common ground that these represented the periods when the Claimant worked for the Respondent:-

a. Summer holiday in July and August 2018.

b. Half-term holiday in October 2018.

c. Half-term holiday in February 2019.

d. Easter holiday in April 2019.

15. The Claimant also received payments in May 2019 and it was common ground that he was working for the Respondent at this time up to 31 May 2019. This was not during a school holiday but, rather, when the Claimant was on study leave ahead of his final exams.

16. The Claimant took his final exams in June 2019 and did not work for the Respondent during this time. He began working for the Respondent again in the week ending 12 July 2019 and his bank statements show payments from the Respondent each week from thereon.

17. At this point, the Respondent was looking to employ the Claimant on a permanent basis and went through a process to obtain funding from the European Social Fund to pay for the Claimant to obtain a chainsaw “ticket”. The Claimant signed a contract of employment (pp75-78) on 16 September 2019 which records that his employment with the Respondent started on 19 August 2019.

18. During the periods when the Claimant was at school and not working for the Respondent he had no contact with the Respondent. When the holiday was approaching, the Claimant would contact the Respondent to let him know the dates when he could come to work for him and the Respondent would confirm that the Claimant could come to work on those dates. The Tribunal finds that there was no obligation on the Claimant to return to work with the Respondent during any school holiday and there was no obligation on the Respondent to allow him to return.

19. The payments made to the Claimant in 2018 and early 2019 vary by a considerable degree. The Respondent explained this as the Claimant working additional hours and being paid for these whereas the Claimant explained this as the days when he was free to do work. The Tribunal finds that the variation in payment arose from a combination of these factors as neither of them alone could explain why some payments were as low as £46 a week and others were as much as £230 a week with a number of different payments between these two amounts.

20. From week ending 6 September 2019, the payments made to the Claimant became more consistent and he was paid £152.25 a week rising to £186.71 from April 2020 (which would coincide with a rise in the National Minimum Wage). At this point, the Claimant began working the same hours (8am to 4pm on Monday to Friday) as other employees at the Estate.

Respondent's submissions

21. The Respondent's counsel made the following submissions.

22. He started by identifying the two issues which the hearing was listed to address as set out above.

23. Reference was made to the agreed fact that there was a contract of employment from, at least, July 2019 until 5 May 2021.

24. It was submitted that the claim had been pursued under a misapprehension; the fact that the Claimant previously did work experience or casual work did not help him because the break in June 2019 was a proper break under s212 ERA.

25. The Claimant has the burden of showing that he worked under a contract of employment and he cannot show mutuality of obligation. The outset of the relationship is a voluntary relationship with the primary purpose being learning. This was a training contract with no obligation on the Respondent to offer work nor on the Claimant to do the work.

26. The fact that the Respondent chose to pay the Claimant is neither here nor there. If he had not paid then this would not have fundamentally altered the relationship; pay is not part of the test for employment.

27. Reference was made to *GE Caledonia Ltd v McCandliss* (UKEATS/0069/10) as authority that the Tribunal should look at the purpose of the relationship.

28. Before July 2019, there was a mix of work experience and casual holiday work; there was no ongoing mutuality. It was the Claimant's evidence that he would call up each holiday and say when he was free. It was submitted that this shows no obligation and was no more than a wish on the part of the Claimant and the Respondent for the Claimant to come back. If the Claimant did not contact the Respondent then nothing would have been said of it; it was entirely in the gift of the Claimant if he wanted to return and entirely in the gift of the Respondent if he wanted him back.

29. It was submitted that the Claimant was trying to look retrospectively to infer that there was the necessary relationship. He needs to show that there was a prior agreement; this does not need to be in writing; the nature of school people is that there is the hope of employment but that does not create an ongoing employment relationship; if something had changed then there was no obligation on the Respondent to offer work.

30. There should be caution about whether there was an agreement in advance given there was no umbrella contract. Reference was made to *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459. It was submitted that someone can work regularly over many years but, without an umbrella contract, there is no continuity.

31. The Claimant needs to establish an agreement before the break in June and July 2019. This is a five week break and there is a clear difference in circumstances in the mechanics of the relationship before and after this break. The turning point in the intention of the parties is when the Claimant leaves school and there is then regularity in pay and hours. It was submitted that parties were approaching this with fresh minds and had the Claimant decided to do something other than work for the Respondent (for example, travel) then

there was nothing the Respondent could have done. The fact that the Claimant did come to work for the Respondent did not mean that there was a prior agreement.

Claimant's submissions

32. The Claimant's representative made the following submissions.

33. The Claimant started on a verbal contract in May 2018; the bank statements are proof of that. The agreement was that the Claimant would return after the school holidays.

34. Any breaks in the Claimant's service were not applicable because of this prior arrangement. No P45s were ever issued and the Claimant returned to work after any break.

35. The Claimant is not counting the periods when he did work experience when he was not paid.

36. There was not no obligation and there was a verbal agreement.

Relevant Law

37. In order for the Tribunal to hear claims under the Employment Rights Act 1996 (ERA), the person bringing the claim must fall into the definition of "employee" or "worker". The status of "employee" is required for a greater number of statutory rights and, in this case, it is the status required for the claim of unfair dismissal.

38. Section 230 ERA defines "employee" as follows:-

(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

39. There is no further definition of contract of service in the Act and it has been left to the courts to develop the tests to be used in establishing "employee" status.

40. Different tests have been developed over time and the current approach is to apply a "multiple" test where no one feature of the working relationship is wholly determinative of the question (*Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497).

41. However, there is an irreducible minimum that must exist for there to be a contract of service (*Carmichael and anor v National Power plc* 1999 ICR 1226, HL). The following factors are considered to be essential to an employment relationship:-

    a. There must be the relevant mutual obligations on the parties in the sense that the employer must be obliged to provide work, the employee obliged to do that work and the employer obliged to pay for it.

    b. There must be some degree of control by the employer over the employee.

    c. There must be an obligation on the employee to personally perform the work.

42. If the irreducible minimum does exist then this is not the end of the matter and it does not create a presumption that the contract is a contract of employment (*Kickabout Productions Ltd v Revenue and Customs Commissioners* 2022 EWCA Civ 502). A Tribunal must look at all the other relevant factors to determine whether, overall, the contract is one of employment.

43. Although a written contract is a useful starting point in identifying the nature of the relationship, it is only part of the circumstances of the case and the Tribunal has to consider, given the relative bargaining power of the parties, whether it is a true reflection of the working relationship (*Autoclenz Ltd v Belcher and ors* 2011 ICR 1157).

44. Certain statutory employment rights under the ERA, such as unfair dismissal. require an employee to have a minimum period of continuous service.

45. The rules for calculating continuous service begin at s210 ERA:-

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

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

(a) a month means a calendar month, and

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

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

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

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

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

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

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

46. Section 212 ERA sets out what weeks count for the purposes of calculating a period of continuous service:-

(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, or

(d) …

counts in computing the employee's period of employment.

47. It is important to note that s212(3) only applies where there is no subsisting contract of employment. If the absence is covered by the terms of a contract then these provisions do not apply.

48. In relation to s212(3)(c) ERA, there must be some evidence from which the Tribunal can conclude that there was a discussion or agreement between the parties that the employment relationship is continuing despite the termination of the relationship (*Mark Insulations Ltd v Bunker* EAT 0331/05).

Decision

49. The Tribunal will address the service issue first. The reason for this is that if the Respondent is correct and the period in June 2019 when the Claimant did no work for him breaks the Claimant's continuous service then it renders the contract issue academic. In other words, it would not matter what type of contract the Claimant had with the Respondent prior to June 2019 as he would

not have the two years' continuous service necessary for the Tribunal to hear the unfair dismissal claim because of the break in June 2019.

50. The Respondent accepts that the Claimant was employed under a contract of employment from 19 August 2019. It is also not in dispute that the Claimant was working for the Respondent and being paid from week ending 12 July 2019 up to 19 August 2019. It is, therefore, arguable that his continuous service began on 8 July 2019. However, this does not assist the Claimant as the earlier date still does not give him two years' service at the effective date of termination on 5 May 2021.

51. On the other hand, the Claimant does not argue that any contract he had with the Respondent subsisted during those periods when he was not working for them. Indeed, he can only rely on s212(3)(c) ERA if there is no contract during such periods.

52. There is no dispute between the parties that the Claimant did not work for the Respondent from week ending 31 May 2019 to 8 July 2019. This period is long enough for there to be more than a whole week's gap and so, absent the application of any of the provisions which bridge any gaps in service, this would mean that the Claimant did not have two years' continuous service at the effective date of termination.

53. The case is, therefore, focussed on whether there is any basis on which the gap in June 2019 can be bridged. The Claimant relies on s212(3)(c) ERA and argues that there was a custom or arrangement that his employment would continue during any breaks in service. This is based on his assertion that there was an agreement that he would work for the Respondent during school holidays but not during school term.

54. Although the June 2019 gap is pivotal in the question of whether the Claimant has the necessary continuous service, the Tribunal has not focussed its attention solely what that gap and has looked at the whole factual matrix in assessing whether s213(3)(c) ERA applies.

55. The question for the Tribunal in addressing s212(3)(c) is not whether there is an agreement that the Claimant would return to work for the Respondent at some later date (that is, the next school holiday) but, rather, whether there was an agreement that the employment is continuing for any purpose (emphasis added).

56. This is subtle but important distinction; it is not enough for there simply to be an understanding that the Claimant could come back to work for the Respondent during the next holiday and, rather, there needs to be evidence from which the Tribunal could conclude that, during those periods when the Claimant was back at school and not doing any work for the Respondent, he was still considered to be employed by the Respondent for some purpose.

57. There was no evidence before the Tribunal that the Claimant was considered to remain in the Respondent's employment during school terms for any purpose at all. There was certainly no evidence that the Respondent ever expressly said that the employment relationship continued or words to that effect.

58. Neither was there anything in the actions of the parties which provides evidence from which the Tribunal could draw an inference that the employment was continuing for some purpose. For example, the Claimant was not entitled to any benefits or payments from the Respondent during any gaps. Similarly, this is not a case where the Claimant was taking a period of unpaid leave or similar absence with the understanding that his job would remain open for him.

59. There was also no contact between the Claimant and Respondent during those periods when the Claimant was not doing any work; the evidence from both parties was that the Claimant would only contact the Respondent shortly before any holiday to let him know the dates and it would then be agreed when the Claimant would come to work for the Respondent.

60. The Tribunal contrasts this with the scenario where an employer is releasing an employee to attend school, college or some similar education course related to their job where the employment relationship continues. The

present case is almost the exact opposite; someone doing a qualification at school who is working during the holidays to get experience in the same field as the qualification.

61. There was some reliance by the Claimant on the fact that he was not issued a P45 at the end of each period of employment. However, the Tribunal does not consider that this, on its own, is sufficient to establish that the Claimant's employment was continuing during any gaps.

62. The Tribunal noted that the Claimant accepted in cross-examination that he could have chosen not to return to work for the Respondent at any time. The corollary of this is that the Respondent must have been entitled to say that they did not want him to return during any particular holiday; the Claimant accepted in cross-examination that if the Respondent had not needed him then he would not hold this against the Respondent. The fact that neither ever exercised such a choice does not lead to the inevitable conclusion that there was a prior agreement that the Claimant's employment was continuing.

63. The Tribunal does agree with the submission from Mr Profitt that it would be wrong to retrospectively infer an agreement from the fact that the Claimant always chose to work during the holidays and the Respondent chose to employ him.

64. The Tribunal does consider that it is within its industrial or judicial knowledge that many people in education undertake work during holidays to gain experience and with the hope that they could secure a permanent job with that employer when they leave education but this does not mean that there is an agreement that their employment is continuing during any period when they do not work for that employer. Rather, these tend to be separate periods of employment in which neither party is obliged to continue the relationship.

65. The Tribunal also takes account of the fact that there was a distinct change in the relationship when the Claimant started working permanently for the Respondent; he was paid a regular wage; he worked regular days and hours; he was issued with a contract. The Tribunal is cautious about placing too much weight on these matters given the relative bargaining power of the

parties and the fact that these matters were almost wholly in the control of the Respondent.

66. However, this is a relevant factor that must be weighed in the balance with the other matters led in evidence. There was no suggestion that the change in the mechanics of the relationship in August/September 2019 was a deliberate ploy by the Respondent to break continuity and so the Tribunal does consider that it is evidence of a change in the relationship.

67. In these circumstances, the Tribunal does not consider that, when the factual matrix is looked at as a whole, there is any evidential basis on which it could conclude that there was a custom or arrangement that the Claimant was considered to be continuing in employment for some purpose during those periods when he was not working for the Respondent.

68. This means that s212(3)(c) ERA does not apply to bridge any of the gaps when the Claimant did not work for the Respondent. In particular, it does not bridge the pivotal gap in June 2019 and, as a result, the Claimant did not have two years' continuous service at his effective date of termination.

69. The Tribunal does not, therefore, have jurisdiction to hear the claim of unfair dismissal and it is hereby dismissed.

70. As noted above, the Tribunal's conclusion on the service issues renders the contract issue academic and so it has not come to any conclusion on whether the Claimant worked under a contract of employment during the earlier periods when he did work for the Respondent.

71. For the avoidance of doubt, this does not affect the other claims raised by the Claimant and further directions for those claims to be heard will be issued under separate cover.

Employment Judge: **P O'Donnell**
Date of Judgment: **22 June 2022**
Entered in register: **23 June 2022**
and copied to parties