



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr N. Nur**

**v**

**Reading Buses Ltd**

**Heard at:** Reading

**On:** 5 July 2022

**Before:** Employment Judge Matthews

## **Appearances**

**For the Claimant:** Mr M Abubakar (Consultant)

**For the Respondent:** Ms L Hannath (Solicitor)

## **JUDGMENT**

1. The claimant's claim for further payment in respect of redundancy pay and notice pay does not succeed.

## **REASONS**

### **The claim and issues**

1. The claimant was made redundant on 30 June 2021 from his employment as a driver for Reading Buses Ltd, the respondent. The redundancy payment was calculated based on continuous service from 3 January 2017. The claimant submitted that his continuous service should run from 5 February 2003. If continuous service from 2003 had been used in the calculation the claimant would have been entitled to redundancy pay for continuous service of eighteen years instead of the four years he received and to notice pay of twelve weeks. The respondent submitted that there was a break in continuity of employment from 30 September 2016 to 3 January 2017.
2. The issue for the Tribunal to decide today is whether employment did indeed stop on 30 September 2016 and recommence on 3 January 2017, meaning that 3 January 2017 was the relevant date for calculating continuity of service.

3. The claimant commenced work as a driver with National Express on 5 February 2003. There was a TUPE transfer to the current respondent on 17 September 2018. The intervening chronology which is not in dispute is that the claimant had an accident on 3 September 2008 and then returned to work as a shunter instead of a driver on 19 August 2009. At that time continuity of employment was preserved.
4. The issue which is in dispute is whether there was a break in continuity of employment with National Express between 30 September 2016 and 3 January 2017. The claimant submitted that he was employed by National Express throughout that time. He became a driver again on 3 January 2017 and in the intervening period after his accident he worked as a shunter. The respondent relied on the records of National Express which are in the bundle (referred to in further detail below). The respondent could not explain the reason for the alleged break in service.

#### **Procedure, Documents and Evidence Heard**

5. I heard oral evidence from the claimant and a witness on his behalf, Mr Sawby (a work colleague). On behalf of the respondent I heard from Ms Anscombe, the HR director. Their statements were accepted as evidence in chief. There was no witness evidence from National Express. I had a bundle of documents in front of me of 167 pages. Limited records concerning the claimant's employment were available following the TUPE transfer. It is regrettable but perhaps understandable that National Express has not retained detailed records. Similarly, the claimant had tried to obtain bank statements to demonstrate a history of wage payments but as the account had been closed he had been unable to do so. I accept his evidence that he had tried to obtain statements by visiting his former branch.

#### **Findings of fact**

6. The bundle contains a contract from National Express sent on 5 December 2016 (33-39) which states that the claimant's employment commenced on 3 January 2017. This is in contrast to a previously dated letter of 18 August 2009 (48-50) which arises out of the claimant's accident in 2008 when there could potentially have been a break in service. In this document the date of continuity of employment is specified as 5 February 2003.
7. There are screenshots from National Express's HR system (125-128). These show a leaving date of 30 September 2016 and give the reason as TUPE. I find that significant. They record that the claimant's continuity of service was broken on 30 September 2016 and provide an explanation of the reason; a TUPE transfer.

8. There is a letter from the claimant dated 31 August 2016 (52) asking for a transfer to National Express stating that he did not want to work for another 'employee' (I think he means 'employer'). This was dated one month before the date that the respondent asserts his employment with National Express was terminated.
9. Mr Sawby gave evidence of a TUPE transfer around that time affecting the claimant's workplace, although he could not remember the date of the transfer. He recalled that National Express decided to outsource shunting to 'another company'. I find on a balance of probabilities that the claimant was transferred. That broke continuity. Mr Sawby was not a close friend of the claimant or his manager but he did see him at the depot at the beginning and end of the day. It is clear that the claimant was continuing to work there during this period but this is not inconsistent with a TUPE transfer occurring on 30 September 2016 and breaking his continuity of employment.
10. Mr Sawby referred to discrepancies in the records and disputes about who was transferred over but balancing this against the screenshot (125), and the lack of any documentary evidence to the contrary, I am satisfied on the balance of probabilities that the claimant did transfer and that is the explanation for his break in service. This is consistent with the claimant applying for the driver job. He said in evidence that he did this on his days off as he worked four days off and four days on. The interview for the driver job was on 16 November 2016 (53-92). This was after the probable transfer. By the time the various checks including the medical check were completed it was 28 November 2016 (97) and he was sent a job offer on 5 December 2016.
11. I accept that the claimant would have had to have checks even if he had still been working for National Express as he was taking on a new role but all the documents support this being a new employer for the purposes of the continuity issue.
12. The claimant said in evidence that he carried on as a shunter during the period between writing the letter (52) and the start of the new contract on 3 January 2017. Although he stayed in the same job I find his employer had changed.
13. The claimant stated in evidence that he did not see the contract sent on 5 December 2016 (33-39). He gave evidence that he did continue working through the period and there was no suggestion that he resigned in response to the transfer or formally objected to it. He said in evidence that if he was not successful in obtaining the driver job he would have remained shunting. Mr Sawby said that many employees were not happy about the transfer but on the balance of probabilities I find that a TUPE transfer of the claimant's employment did take place on 30 September 2016.

## The law

14. Section 163 of the Employment Rights Act 1996 enables the claimant to bring a claim to the Tribunal when there is a dispute about the amount of a redundancy payment. Redundancy is calculated based on years of 'continuous service' under s.162 of the Employment Rights Act. 'Continuous service' is a statutory concept.
15. Section 210(5) of the Employment Rights Act stipulates that a person's employment during any period will, unless the contrary is shown, be presumed to have been continuous. Where the evidence is lacking or so finely balanced that the Tribunal cannot determine the matter even on the balance of probabilities, it should give the employee the benefit of the doubt and apply the presumption in the employee's favour. That is not to say that a Tribunal should resort to the presumption in a case where there is good evidence of a particular alleged break in continuity (Mark Installations Ltd v Bunker [2005] EAT 0031/05). The Tribunal's primary task is to find the facts on the balance of probabilities.
16. Minimum statutory notice is also calculated based on continuous service under s. 86 of the Employment Rights Act 1996. It provides for one week's notice for each year of continuous employment if the period of continuous employment is two years or more up to a maximum of twelve weeks' notice if the period of continuous employment is twelve years or more.

## Conclusion

17. Taking into account the documentary evidence in the bundle and the oral evidence I have heard today, while bearing in mind the presumption of continuity, I consider the documentary evidence overwhelmingly supports a break in service and I found that the oral evidence of the claimant and his witness did not outweigh this.
18. I accept that there is only limited information about the transfer in 2016. However, National Express' records provide clear evidence of a break in continuity and the claimant has not produced evidence to rebut them. His oral evidence that he carried on working as a shunter after the date of the transfer supports a break in continuity. I find that on the basis of the documents, the claimant's evidence and Mr Sawby's evidence the continuity of service was broken.
19. It is unfortunate for the claimant. I find that a break in his employment did occur and that means that he is not entitled to redundancy pay calculated on the basis of continuous service going back to 2003 and therefore his claim does not succeed.
20. With regard to notice pay I find that the claimant was not entitled to additional notice pay under s.86 of the Employment Rights Act 1996 as his continuous service was four years and not over twelve years.

---

Employment Judge Matthews

Date: 27 July 2022.....

Sent to the parties on: 31 July 2022

T Cadman.....  
For the Tribunal Office