



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4104887/2022**

**Preliminary Hearing held on the CVP/Kinly Platform on the 22 November  
2022 at 10am**

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**Employment Judge Porter**

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**Jane Brannan**

**Claimant  
Represented by:  
Mr Brannan,  
lay representative**

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**Greater Glasgow Health Board**

**Respondent  
Represented by:  
Leighton Craig,  
solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

It is the judgment of the Employment Tribunal that the claimant does not have  
35 qualifying service to bring a claim of unfair dismissal in terms of s108 of the  
Employment Rights Act 1996. The claimant's claim of unfair dismissal is  
dismissed.

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ETZ4(WR)

**Introduction**

1. The claimant was employed by the respondents as a midwife between the 20 September 2021 and the 24 May 2022. In these proceedings she brings claims of unfair dismissal, discrimination on the grounds of religion or belief and breach of contract, being unpaid wages. The claimant's claims are resisted and there was a Preliminary Hearing ("PH") in the case on the 26 October 2022 before Employment Judge Mannion. At that PH the case was listed for a PH on the issue of whether the claimant has sufficient service under s108 of the Employment Rights Act 1996 to bring a claim of unfair dismissal. On the 17 November 2022 EJ McManus determined that the issue of time bar should also be covered at the PH.  
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2. The PH took place on the 23 November 2022 via the CVP/Kinly platform. At the PH the claimant was represented by her husband, Mr Brannon and the respondents were represented by Mr Reeve, solicitor. The PH took place on the CVP/Kinly platform.  
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3. At the outset of the PH Mr Brannon made an application to postpone the hearing on the preliminary issue of time bar. To this end he submitted that the claimant had not had sufficient time to prepare this case, notice having been given on the 17 November 2022, and that the claimant wished to intimate Further and Better Particulars of the claim which would include additional acts of discrimination on the part of the respondents. For his part, Mr Reeve did not oppose the application. After hearing from parties and after consideration of the overriding objective and in particular the need to ensure parties are on an equal footing, the EJ postponed the PH insofar as the issue of time bar was concerned. The PH proceeded on the sole issue of whether the claimant has sufficient service under s108 of the ERA 1996 to bring a claim of unfair dismissal.  
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4. In response to Orders made by EJ Mannion the claimant provided details of her employment. The details provided demonstrated that she had been employed by 'A Bevan' between the 7 April 2019 and the 9 September 2019; 'Southmead' between the 16 September 2019 to the 28 June 2021;  
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Lanarkshire Health Board between the 5 July 2021 and the 20 September 2021; and Greater Glasgow Health Board between the 20 September 2021 and the 24 May 2022. For the purpose of these proceedings, these dates were agreed by the respondents.

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5. The PH proceeded by submissions alone, and no evidence was heard. Parties referred to a Joint Bundle of Documentation numbered 1-560.

## 6. Submissions

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**The undernoted consists of a summary of each parties' submissions, provided by them and in their own words.**

## 7. The claimant

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Our position is simply we posit that the NHS is in fact one employer, and if the respondent argues that this is not the case then it must at least be considered as a group of clearly related employers per Section 218(6) of the Act. We propose that the respondent does in fact meet the required criteria in the act in so far that they are a company and that the companies are under the de facto control of the same organisation namely the NHS.

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Is a trust a company? All NHS boards or trusts are classified as Non-Profit Benefit Corporation, benefit corporations are charitable incorporated entities. Note that as outlined above NHS NPBC were deemed as not being charities and therefore liable to pay business tax. They are registered for VAT. It is clear from the above the despite the view held by the respondent, that they are in fact to be considered a company per the definition in the Act.

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We can demonstrate de facto control by the fact that the NHS exercises considerable control over many areas of how each Trust or Board delivers its services. For instance, how each body is incorporated, how it is funded, the use of the NHS corporate logo and branding, registration and certification of staff, centralised procurement, centralised and standardised HR policy and other areas where individual trusts have no say over how certain activities are undertaken.

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For "The NHS" to be stating on its GOV.UK website that it is the UK and Europe's largest employer and to claim it is "One NHS" on its recruitment ads, and to operate a centralised core of shared services including Procurement, Legal, Finance, HR and a range of others while at the same time arguing in this litigation  
5 that it is merely an affiliate of individual registered trusts, contributes to the air of contrivance and artificiality which pervades the NHS's case by its hiding behind the umbrella of "settled law".

Regardless of previous precedent we ask respectfully that the Judge finds that the Trusts and the NHS meet the test outlined in the act and that they overturn  
10 prior precedent and find in the Claimants favour that her employment is continuous based on the grounds outlined above.

## **8. The respondents**

15 The Claimant was employed by the Respondent as a Registered Midwife from 20 September 2021 to 24 May 2022.

In order for a claim for unfair dismissal to be brought, a Claimant requires to have been in continuous employment with a single employer for a period of not less than  
20 two years ending with the effective date of termination (section 108(1) ERA 1996).

Continuous employment is a statutory concept provided for in ERA 1996. The period of continuous employment begins on the day on which the employee commences a period of employment with an employer. For the purposes of  
25 bringing a claim for unfair dismissal, the period of continuous employment ends on the effective date of termination.

It is accepted that section 21 8(6)(b) of the ERA 1996 provides that a change in a person's employment from one associated employer to another associated  
30 employer does not break the continuity of the period of employment. For the purposes of the ERA 1996, two employers are to be treated as associated employers if:-

- a. one is a company of which the other (directly or indirectly) has control (section 231(a) ERA 1996); or
- b. both are companies of which a third person (directly or indirectly) has control (section 231(b) ERA 1996).

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Health service providers are not “associated employers” for the purposes of section 218(6) of the ERA 1996. This point was addressed by the EAT in **Argyll & Clyde Health Board v Foulds & Others**, in which it was made clear at paragraph 47 that the Appellant Health Board was not a company and, as such, section 231 ERA 1996 had no application to it. The finding of the ET at first instance, that the Appellant Health Board was part of the same establishment or service as the second Respondent Health Board, was held by the EAT in **Argyll** in to be “plainly wrong”.

15 This position is clarified within legal commentary (**IDS Employment Law Handbooks, Volume 2, Chapter 4 at paragraph 4.39**).

In relation to section 218(8) of ERA 1996, it is submitted that the Claimant’s role as a Registered Midwife is not “relevant employment”. On this point, I would invite the Tribunal to follow the EAT judgement in **Winchester and Eastleigh Healthcare NHS Trust v Walker UKEAT/0048/11/LA**. Consequently, the Claimant’s employment with successive health authorities cannot be treated as forming one period of continuous employment.

25 Scottish Health Boards are not charitable trusts, they are established by statute under s2 of the National Health Services (Scotland) Act 1978, which followed The National Health Service (Constitution of Health Boards) (Scotland) Order 1974.

All the territorial boards were set up by order and have their functions defined by a separate order called The Functions of Health Boards (Scotland) Order 1991. There are no Scottish NHS Trusts anymore.

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Confirmation that Health Boards are public bodies are provided by the Scottish Government notification document: National public bodies: directory - gov.scot (www.gov.scot)

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## The Law

9. S108(1) of the Employment Rights Act 1996 ("the ERA") provides:

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*"Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years, ending with the effective date of termination. "*

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10. Scottish Health Boards are constituted by the National Health Service (Constitution of Health Boards) (Scotland) Order 1974.

11. S21 8 of the ERA provides clarification on the issue of change of employer. To this end, s218(6) provides:

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*"If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer-*

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*(a) The employee's period of employment at that time counts as a period of employment with the second employer, and  
(b) The change does not break the continuity of the period of employment. "*

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12. S231 of the Employment Rights Act 1996 defines "associated employer" thus:

*"For the purposes of this Act any two employers shall be treated as associated if-*

(a) one is a company which the other (directly or indirectly) has control; or

(b) both are companies of which a third person (directly or indirectly) has control;

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and “associated employer” shall be construed accordingly. ”

13. S218(8) and (9) provides certain provisions for continuity of employment in cases of ‘relevant employment’ insofar as health service employees are concerned.

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14. In **Argyll & Clyde Health Board v Foulds & Others UK EATS/0009/06/RN** Lady Smith provided clarity on the status of Health Boards in conjunction with the issue of change of employer. At paragraphs 46 and 47 she stated: “I turn briefly to one other matter. In paragraph 14, the Tribunal found that the respondents were part of the same establishment or service and were thus associates of the second respondents in terms of s231. That is plainly wrong.... The respondents are not a company and s231 has no application to them. ”

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15. The facts of **Winchester and Eastleigh Healthcare NHS Trust v Mrs J M Walker UKEAT/0048/11/LA** were that the claimant had worked for the NHS since 1983 but for the respondents only since 2006. The Tribunal awarded the claimant a basic award dating back to 1983. However, this was overturned by the EAT who held that continuity of service in separate NHS Trusts does not arise unless s218, or TUPE applies.

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### Discussion and Decision

30 16. In determining this case the Tribunal had regard to the full submissions made by each party orally, of which a careful note was made. All authorities were considered; however, reference is made in this judgement only to those authorities which are relevant to the question of continuity of service.

17. In reaching a determination, the Tribunal had regard firstly to the submission made by Mr Brannan that the Tribunal should not be bound by authority (or ■precedent'). The Tribunal considered this to be an interesting submission. However, it is the role of the Tribunal to apply the law to the facts; and insofar  
5 as the law is concerned, the Tribunal is bound by statute and authority from superior courts.
18. The Tribunal commenced their deliberations with the proposition by Mr Brannan that the Health Boards should be considered as associated  
10 companies under s 218(6) and s231 of the Employment Rights Act 1996.
19. In considering this matter, the Tribunal had regard firstly to the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 which established Health Boards in Scotland, including the Greater Glasgow Health  
15 Board. The Tribunal noted firstly that Health Boards are entirely separate statutory bodies from NHS Trusts. On this ground alone the argument of Mr Brannan must fail. Secondly, the Tribunal noted that in terms of the Order Health Boards are their own statutory entities; and it cannot be said that they are partnerships, or companies, or indeed charities. To this end the Tribunal  
20 had regard to the words of Lady Smith in the EAT in paragraphs 46 and 47 of **Argyll and Clyde Health Board** and considered themselves bound by this authority.
20. Secondly, the Tribunal considered the authority of **Winchester** to be in point  
25 and binding upon the Tribunal, and that accordingly s218 (6) cannot be relied upon in the circumstances of this case.
21. Further, the Tribunal noted that it is not in dispute that the claimant was not in 'relevant employment' in terms of s218(8) and (9) of the Employment Rights  
30 Act 1996. Neither does any question of TUPE apply in this case.
22. For these reasons the claimant's claim of unfair dismissal is dismissed on the grounds of no qualifying service in terms of s108 of the Employment Rights Act 1996.



**Case Management**

23. The issue of continuity of service having been discussed, the parties consented to the PH being converted to a PH on case management.

5 **The pleadings**

24. Further and Better Particulars of the claim will be intimated on or before the **7 December 2022**. The Further and Better Particulars will include details of the additional acts of discrimination relied upon by the claimant in these proceedings.

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25. Mr Brannan submitted that the claimant's case of discrimination is brought under s13 of the Equality Act 2010. To this end the Further and Better Particulars will also specify what is the less favourable treatment relied upon by the claimant; when did it occur; who did it; why the claimant states that it was because of her belief; and whether the claimant relies upon any actual (as opposed to hypothetical) comparators and, if so, who they are and how were they treated.

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26. The respondents will respond to the Further and Better Particulars on or before the **21 December 2022**. The respondents will then confirm whether they challenge the Further and Better Particulars as truly an amendment.

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**Further Procedure**

27. The parties were in agreement that it would be consistent with the overriding objective if this case is set down for a PH on Amendment/Time Bar/Case Management. If the respondents do not oppose the Further and Better Particulars as an amendment then the PH will take place on Case Management only. The date and time of the **2 February 2023 at 10am** was identified as suitable for all parties. The PH will take place on the CVP/Kinly platform.

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28. The parties agreed to liaise with one another on the preparation and production of a Joint Bundle of Documentation and a Joint List of Issues for use at the PH. These documents will be intimated to the Tribunal at least 2

working days in advance of the PH. In addition, the respondents will intimate their Note of Argument for the PH to the claimant at least 7 days in advance of the PH.

5 29. It is noted that the issue of whether the claimant meets the statutory test under s10 of the Equality Act 2010 remains outstanding. The question of how to determine this issue will be discussed at the PH on the 2 February 2023.

10 30. It was agreed that at the PH on the 2 February 2023 issues of loss and the question of Judicial Mediation will be discussed as part of case management. To this end the concept of Judicial Mediation was explained to Mr Brannan.

#### **Other matters**

15 31. The issue of obtaining legal advice via the CAB, a law clinic affiliated to one of the Scottish universities or the Free Legal Services Unit at the Faculty of Advocates was discussed. Mr Brannan undertook to make enquiries about the same.

20 Employment Judge: Jane Porter  
Date of Judgment: 25 November 2022  
Entered in register: 28 November 2022  
and copied to parties