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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101650/2022

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**Held by CVP on 6 February and 9 March with written submissions provided
on 31 March 2023**

Employment Judge E Mannion

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Mr A McAleavy

**Claimant
In person**

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The Harmony Employment Agency Limited

**Respondent
Represented by
Gabriella McGrath,
Lay Representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant was employed by the respondent from 18 November 2019 and so has sufficient service to raise an unfair dismissal claim under Section 108 of the Employment Rights Act 1996.

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REASONS

Introduction

1. This is a preliminary hearing dealing only with whether the claimant has sufficient service to raise a claim of unfair dismissal against the respondent. It focuses on when the claimant's employment with the respondent began.
2. The claimant gave evidence on his own behalf and also called two witnesses, Yvonne Spedding and Peter Wojtaleswki, both former employees of the respondent. The respondent also called two witnesses, Iain McGill and Harmony Scofield, directors of the respondent organisation. A join bundle of productions was prepared and lodged with the Tribunal in advance of the hearing.
3. The hearing was originally scheduled to take place for one day. As all the evidence was not heard by the end of the first day, a second day was scheduled, with adjustments to take into account the claimant's medical conditions. While the evidence was concluded by the end of the second day, there was insufficient time to make submissions, and the parties agreed to provide written submissions. A period of three weeks was agreed to take into account the claimant's dyslexia.

Relevant law

4. Section 108 of the Employment Rights Act 1996 (the ERA) provides that:
 - (1) Section 94 [the right not to be unfairly dismissed] 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.
5. Section 211 of the ERA provides that:
 - (i) 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.

6. This effectively means the start date of work under a contract of employment with the relevant employer.

Issues

- 5 7. The respondent's position was that the claimant's employment began on 6 January 2020. The claimant's position was that his employment began on 18 November 2019. Therefore the Tribunal has to determine the following issues:

7.1 Subject to the provisions of Section 211, did the claimant start work for the respondent on 6 January 2020 or on some other date prior to 6 January 2020?

7.2 In consideration of the answers to questions 7.1 does the claimant have sufficient continuous service under Section 108 to bring a claim for unfair dismissal?

15 **Findings in fact**

8. The Tribunal makes the following findings in fact:

8.1 The respondent is an organisation involved in the health and social care sector. It acts as a recruitment agency for the sector and is also a registered care service provider. Mr McGill and Mrs Schofield are founders and joint directors of the respondent organisation. The claimant has extensive experience in health and social care, having spent his career to date in various organisations in health and social care, with a particular focus on mental health.

8.2 The claimant has known Mr McGill and Mrs Schofield for a substantial period of time, and at least since the respondent organisation was established in 2005.

8.3 The claimant has had a particularly close friendship with Mr McGill. The two regularly met for breakfast or lunch to discuss their careers amongst other things. Mr McGill viewed him as a mentor.

5 8.4 The claimant's partner Yvonne Spedding at one point, and during the relevant period, worked for the respondent organisation.

8.5 Due to the friendship with Mr McGill and relationship with Ms Spedding, the claimant regularly attended at the respondent premises. Mr McGill called on the claimant for advice relating to the respondent organisation from time to time as well as wider advice on the sector given the claimant's skills and experience. The claimant also engaged with the respondent organisation when representing clients who were availing of their services. In this latter capacity the claimant attended meetings both at and outwith the respondent premises to discuss service users.

10 15 20 8.6 In November 2019, the claimant and Mr McGill discussed the possibility of the claimant taking up the role of Senior Manager with the respondent organisation. This role would be the most senior role within the respondent organisation, save for Mr McGill and Mrs Schofield. A number of discussions took place between the two about salary and the role. At that time, the organisation, in particular the care service side of the organisation, was undergoing a period of change and review due to an expansion of the service and the recruitment of a Senior Manager was in response to this.

25 8.7 On 18 November 2019, the claimant met Mr Me Gill and agreed to take up the role, working for the respondent for two days per week. A start date was discussed and Mr McGill gave the claimant the freedom to pick a start date which suited him. The claimant was due to undergo hip replacement surgery and had other work commitments he required to complete.

8.8 A start date of 6 January 2020 was discussed and agreed. Mr McGill also agreed that if the claimant wanted “to do things” in advance of that date, he could do so and anticipated that the claimant would in fact do so.

5 8.9 Immediately after the meeting with Mr McGill on 18 November 2019, the claimant met with Ms Spedding and Mr Wojtaleswki for a transition meeting.

10 8.10 The claimant attended weekly transition meetings with Ms Spedding and Mr Wojtaleswki. The purpose of these meetings was to review the work of the respondent organisation, the needs of the service and what was required to be put in place to deal with underperformance in the service. These meetings were organised by Ms Spedding or Mr Wojtaleswki and both understood that they were dealing with the claimant in his capacity as Senior Manager.

15 8.11 At a team meeting on 21 November 2019, employees of the respondent organisation were informed that the respondent was seeking to recruit a Senior Manager. This recruitment was part of the ongoing transition work which Ms Spedding and Mr Wojtaleswki were undertaking. On 5 December 2019 at a
20 subsequent team meeting, the employees were informed that the claimant had been appointed as Senior Manager. The claimant was not in attendance at these meetings.

25 8.12 The claimant attended meetings described as business meetings on the 19 December 2019 and the 3 January 2020. These were meetings where the senior management team met to discuss the business of the respondent organisation and in particular client and staff issues. Mr McGill was not in attendance at these two meetings. The claimant also attended and chaired a team meeting
30 on 18 December 2019. Team meetings or staff meetings are attended by all employees of the respondent organisation. Mr

McGill was not in attendance at the meeting on 18 December but was aware the claimant was attending.

5 8.13 During this period the claimant also engaged in discussions with Mr Wojtaleswki about taking up the role of the role of Registered Manager within the respondent organisation whereby he would report directly to the claimant. Mr Wojtaleswki confirmed in a meeting with the claimant on 19 December 2019 that he would take up this role. He was previously employed by the respondent as a Transition Manager. Mr McGill was aware of these discussions and
10 authorised the claimant's actions.

8.14 Mrs Schofield was undergoing treatment for breast cancer at this time and so was not in the office during November and December 2019.

15 8.15 The claimant completed a HMRC starter checklist wherein he stated that his employment with the respondent began on 6 January 2020.

20 8.16 The claimant did not receive a contract of employment from the respondent. One was prepared by the respondent at some point indicating his employment with the respondent began on 6 January 2020.

25 8.17 The claimant emailed the respondent's finance department on 31 March 2020 attaching payroll information and forms. In this email he stated "I commenced by employment with Harmony week commencing 6 January, working 2 days per week. Prior to starting, by agreement with Iain, I worked 22.5 hours".

8.18 In the subsequent payroll run, the claimant was paid his normal salary and also for the 22.5 hours claimed in the email of 31 March.

Observations on the evidence

9. The claimant and his witnesses gave their evidence in a clear manner. The respondent witnesses were less clear. Given Mrs Schofield's ongoing medical treatment at the relevant time, her evidence was limited to events occurring before or after the relevant time. She provided her view on what would have happened during the relevant time rather than her direct experience. Mr McGill was at times evasive, particularly around whether the claimant in fact attended the meetings he claimed he attended and Mr McGill's knowledge of this but did acknowledge the various meetings during cross examination. There is then the unusual position where the respondent submissions state they neither confirm nor deny that the claimant attended these meetings, save for 18 December 2019 which was accepted. Where there is a dispute as to whether the claimant attended these meetings, and whether this was done with the respondent's knowledge, the claimant's position is accepted.
10. Evidence was led on whether the respondent took up references or updated the claimant's PVG checks with Disclosure Scotland. It would appear that these checks were not done by the respondent at any point, whether at the time the respondent states the employment started in January 2020, in the months following that date or indeed during the period November 2019 - January 2020, and so does not impact on the question as to when the claimant started employment with the respondent. I therefore have not made specific findings on this point or considered it in my decision making.

Respondent's submissions

11. Ms McGrath's submission turned on the following points - the start date of 6 January 2020 was agreed between Mr McGill and the claimant; this is reflected in the contract of employment as well as the HMRC checklist completed by the claimant and email from the claimant of 31 March 2020; if the claimant attended any respondent meetings prior to 6 January 2020, his attendance was as a friend and mentor or to ensure he was a good fit for the respondent organisation before his employment with the respondent began.

She referred to the long friendship that existed between the parties which served only to confuse matters as it meant the parties were casual with one another. The respondent accepted the claimant was in attendance at a respondent meeting on 18 December 2019 but that he was not there in his capacity as senior manager. They did not admit or deny in submissions whether he attended other meetings.

12. Ms McGrath referred to the cases of **General of the Salvation Army v Dewsbury** [1984] ICR 498; **Koenig v Mind Gym Ltd** UKEAT/0201/12; and **O'Sullivan v DSM Demolition Ltd** UKEAT/0257/19.

10 Claimant's submissions

13. The claimant submitted that he was employed by the respondent from 18 November 2019 onwards, that he worked on an ad hoc basis attending meetings with the respondent's knowledge as Senior Manager, the role he was employed by the respondent to undertake. He was paid for this work. He noted the inconsistent evidence from the respondent witnesses as to his involvement in the respondent organization prior to the 18 November 2019 and submitted that this discredited their evidence. He also referred to the cases of **Koenig v Mind Gym Ltd** UKEAT/0201/12; and **O'Sullivan v DSM Demolition Ltd** UKEAT/0257/19 as a basis for finding that his employment with the respondent began on 18 November 2019.

Decision

When did the claimant start work for the respondent?

14. Section 211 is clear that continuous employment begins "with the day on which the employee starts work". In the case before me however, there is a dispute as to when the claimant started work, whether this was the 6 January 2020 as per the respondent's position and documents I have been referred to or the 18 November 2019 as per the claimant's position and evidence.
15. The EAT looked at this question in the case of **General of the Salvation Army v Dewsbury [1984]** which both parties have referred me to. In that

particular case, a teacher began teaching on 4 May but her contract noted that her employment started on 1 May. The question was when her employment with the respondent began for the purposes of Section 211. The EAT held that the reference in Section 211 to the day on which the employee starts work “is not intended to refer to the undertaking of the full-time duties of the employment: it is intended to refer to the beginning of the employee’s employment under the relevant contract of employment.” This is due principally to the definition of employee in Section 230 of the ERA which is someone who works under a contract of employment.

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- 10 16. This precedent has been developed in the past ten years or so, firstly with *Koenig v Mind Gym Ltd* and more recently with *O’Sullivan v DSM Demolition Ltd*. Both cases involved work carried out by an employee before their official start date. In *Koenig*, the claimant attended a meeting with the respondent relating to the respondent’s project which the respondent deemed was “useful” for her to attend. This meeting took place the day before her employment officially started. Langstaff P confirmed the finding in *Dewsbury* that work must be done under the contract of employment, noting that attending a social function or attending the office for a coffee and discussion with a future manager would not constitute work under the contract. This could be contrasted with a situation where an individual attends the place of work prior to the contractual start date, is under the control of a supervisor during that period and is “plainly and obviously” engaged in work. In affirming the tribunal’s decision that the claimant was not working under the contract in advance of her official start date, the EAT noted that she was not obliged to attend the respondent meeting, she was not paid for attending and did not hold herself out as an employee of the respondent at that meeting.
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- 30 17. In *O’Sullivan*, the claimant’s statement of terms of employment noted the 2 November as his start date although this document was not signed or provided to the claimant. He was however paid under the terms of this statement. He argued that he undertook five days of work in advance of the 2 November, dismantling lifts for which he was paid cash in hand by another worker rather than the respondent themselves. He sought to argue that his

continuous employment began earlier than 2 November. The EAT did not agree with this position and found that the work done was collateral to the employment contract he entered into with the respondent, noting that he was undertaking work unofficially on site and paid cash in hand.

5 18. Turning to the case before me, I accept that the employment contract provided states that the claimant's employment with the respondent began on 6 January 2020. However, I also accept the claimant's evidence that he was not provided a copy of this at that time and the respondent did not have any witness evidence to confirm this was given to the claimant. I note that the
10 HMRC documentation which was completed by the claimant provides 6 January 2020 as his start of employment. So too in his email to payroll in March 2020 does he refer to his employment starting on 6 January 2020 although this email also refers to work done "by agreement" prior to that date totalling 22.5 hours. The paperwork therefore is not definitive and as the case
15 law provides, it is necessary to consider the work done in and of itself in the period 18 November 2019 to 6 January 2020.

19. I am required to consider the meetings during that period and whether it can be said that the claimant was working under the employment contract with the respondent at that time. In their submissions the respondent accepts that
20 the claimant attended a team meeting on 18 December 2019 but does not confirm or deny his attendance at earlier meetings. I find that the claimant was in attendance at a number of meetings with various employees of the respondent organisation between 18 November 2019 and 6 January 2020.

20. Both Mr McGill and Ms Schofield submitted that if the claimant attended the
25 meetings as set out, his attendance was as a mentor or friend, was similar to how he engaged in the respondent organisation previously or amounted to informal preparatory work to see if he was a good fit with the organisation prior to his employment beginning formally in January 2020.

21. I do not accept the respondent position that any meetings attended was part
30 of the normal recruitment process to allow the claimant to see if he was a good fit with the respondent organisation. The evidence of the claimant, Mr

5 McGill and Mrs Scofield was consistent in that the claimant was well known to Mr McGill in particular and was known to Ms Scofield. The evidence of all three witnesses was also consistent in that he had knowledge and understanding of the respondent organization through his own experience in the sector and having engaged with the respondent as a third party, and from his friendship with Mr McGill who sought business advice from the claimant. I do not accept that the claimant would therefore require to attend and observe internal meetings or meet other employees of the respondent organisation to see if the role would be a good fit, given the wealth of history between the parties.

10 22. I also do not accept that the claimant attended these meetings as a mentor or friend. The claimant confirmed his understanding that he was undertaking the work of Senior Manager within the respondent when attending transition meetings, business meetings and team meetings. So too did Ms Spedding and Mr Wojtaleswki who confirmed that the claimant chaired the transition meetings he attended and that they understood he was in attendance as Senior Manager. The claimant also attended business meetings and team meetings following the announcement that he was coming on board as Senior Manager. The meeting note provided of the team meeting on 18 December 2019 confirmed that the claimant chaired this meeting. Ms Schofield was not in the workplace at the time due to her ongoing medical treatment and so could not speak directly to these meetings. Her view was that if he attended these meetings, it was on a voluntary basis. Mr McGill was evasive when questioned about his contemporaneous knowledge of the claimant attending various meetings but conceded that he (the claimant) attended these meetings.

25 23. I am also conscious that Mr McGill in his evidence and in particular in cross examination confirmed while a start date of 6 January 2020 was agreed, he was aware the claimant spent time "thinking and planning" prior to the 6 January 2020 and also that the claimant "did some stuff before [he] started" including recruiting Mr Wojtaleswki from the role of Transition Manager to the role of Service Manager which was done with Mr McGill's knowledge and

approval. Further Mr McGill confirmed that while the claimant could choose his start date, and indeed chose the start date of 6 January 2020, the claimant could also “do things” before then and it was up to the claimant if wanted to do so, understanding that the claimant would want to “hit the ground running”.
5 It cannot be said therefore that the claimant was acting as a mentor or on an informal basis. He was holding himself out as an employee of the respondent organisation and the other witnesses who attended those meetings understood that he was acting in the capacity of an employee of the respondent organisation. Considering the findings in Koenig, these meetings
10 went beyond a social meeting or an introduction to staff. They were not collateral to the employment contract but rather under the employment contract.

24. The claimant emailed the payroll department of the respondent organisation advising that he undertook 22.5 hours work prior to his official start date of 6
15 January and he was paid by the respondent for this time. The calculation of his pay was on the basis of his salary calculation for his work undertaken from 6 January onwards. This further indicates and confirms that the work done from 18 November 2019 was under the employment contract.

25. In conclusion, the claimant attended meetings starting from 18 November
20 2019 up until his official start date on 6 January 2020. These meetings were with other respondent employees who understood that the claimant was there in his capacity as Senior Manager of the respondent organisation. He participated in these meetings, discussing and planning for the transition of parts of the respondent service and leading team meetings. The respondent
25 understood that he would likely undertake some work prior to his official start date. He was paid for this time. I therefore find that the claimant started work for the respondent on 18 November 2019 and so has sufficient service to bring a claim for unfair dismissal.

Further procedure

30 26. The Tribunal will contact the parties separately about further procedure in this claim. For the avoidance of doubt, the findings in fact in this judgment relate

only to the issue of when the claimant's employment with the respondent began. They would not bind a future tribunal dealing with the merits of the claim.

5 **Employment Judge: E Mannion**
 Date of Judgment: 12 May 2023
 Entered in register: 19 May 2023
 and copied to parties

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