



EMPLOYMENT TRIBUNALS

Claimant: Ms K Lloyd
Respondent: Connah's Quay Town Council
Heard at: Cardiff via CVP **On:** 26 June 2023
Before: Employment Judge S Moore

Representation:
Claimant: Mr Menson (Counsel)
Respondent: Mr Jangra (Counsel)

JUDGMENT having been sent to the parties on 27 June 2023 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background and introduction

1. The Claimant presented a claim to the Employment Tribunal on 7 September 2022. She brought a claim of automatic unfair dismissal under Section 103A Employment Rights Act 1996 ("ERA") which does not require continuity of employment of at least two years. The claimant subsequently applied to amend her claim to add a claim of "ordinary" unfair dismissal under Section 98 ERA.
2. A preliminary hearing was listed before me to determine whether there was such continuity. If so, I would determine whether or not to permit the Claimant to amend her claim so as to add the claim of ordinary unfair dismissal.

3. The claimant had prepared a witness statement and gave evidence by video. There was an agreed bundle of 137 pages. A further document "Explanation of Modification Order arrangements" was admitted by consent during the hearing.

Findings of fact

4. The Claimant was employed as a senior financial assistant at Cheshire West and Chester Council from 7 July 1986 to 17 April 2022.
5. In February 2022 the claimant applied for the position of Town Clerk and Responsible Financial Officer with the respondent. She attended an interview on 28 February 2022. She was offered the role subject to referencing and accepted it by email on 3 March 2023. On 14 March 2022 she was offered the position in a letter which enclosed a contract of employment and outline of the role description. The letter was authored by Mr Goodrum who at that time was the acting / interim clerk of the Council and Financial Officer.
6. On 16 March 2023 the claimant signed acceptance of the appointment confirming she had read understood and accepted the terms and conditions of employment as outlined in the said letter and in addition signed the contract of employment. She returned this to Mr Goodrum by email dated 16 March 2022. In that email she stated:

I received my formal offer of employment this morning and can confirm I wish to accept this. Please find attached a photograph of the signed letter which is being returned first class today.

I am required to provide four weeks notice to my current employers. My letter of resignation is being submitted this afternoon with a termination date of 12 April 2022. I would like to take up my new role with The Town Council on Wednesday 13 April so there is no break in my Local Government Service. Obviously, this will depend upon dates being agreeable to all parties.

7. The respondent did not challenge the claimant's understanding she had set out in the email above. The claimant sent a further email on 6 April 2023 advising she would be able to start on 12 April 2022. She referenced being able to start at the latest on 18 April 2022 on basis she understood that in order to preserve her local government continuity of employment there should be a gap of no more than one week. It was agreed she would start on 18 April 2022 which was a bank holiday.
8. I accept that the claimant understood and believed that she was preserving her continuity of service.

9. At paragraph 2 of the claimant's contract of employment it stated as follows:

Continuous Service

2.1 Your employment with any other public employer as set out in the NJC agreement will be considered as part of a continuous period of employment with the Council for the purposes of your contract of employment.

10. Paragraph 14 of the NJC Agreement (the agreement on pay and conditions of service for the National Joint Council for Local Government Services) provides at paragraph 14:

Continuous Service

14.1 For the purposes of entitlements regarding Annual Leave, the Occupational Sickness Scheme and the Occupational Maternity Scheme continuous service will include continuous previous service with any public authority to which the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999 applies.

14.2 Where an employee returns to local government service following a break for maternity reasons, or reasons concerned with caring for children or other dependents he or she will be entitled to have previous service taken into account in respect of the sickness and maternity schemes provided that the break in service does not exceed eight years and that no permanent paid full time employment has intervened. For the purpose of the calculation of entitlement to annual leave the eight years' time limit does not apply provided that no permanent full time employment has intervened.

14.3 Where an employee is transferred to an organisation not covered by the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999, continuity of service is protected under the TUPE Regulations where there is a TUPE transfer. However, if that employee returns voluntarily to local government service continuity is broken. Where an employee returns in such circumstances, without a break between employments, all previous continuous service will be recognised for the purposes of calculation of entitlements to annual leave, occupational maternity leave/pay and occupational sick pay. This is subject to the return to service being within five years of the original transfer.

11. The Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999 preserves continuity of employment for the purposes of redundancy for employees who move from one Local Government employer to another. Under the Employment Rights Act 1996 ("ERA"), an employee can count service with an associated

employer towards the required service for redundancy pay. However local authorities are not deemed to be associated employers under the Act. The effect of the Order is to make local authorities associated employers for the purposes of the redundancy provisions of the ERA.

12. The Local Government Employers website provides guidance on the order (the document referenced at paragraph 3 above). This states that the order it does not affect unfair dismissal rights and that employees would need two years continuous service in the new job before he or she had the right to claim unfair dismissal.
13. The Claimant's employment with the Respondent was for a period of just over one month; from 18 April 2022 until her employment was terminated by a letter sent by email on 20 May 2022.

The Law

14. In order to bring a claim of unfair dismissal under section 108 ERA 1996, an employee must have been continuously employed for a period of not less than two years ending with the effective date of termination.
15. Section 211 ERA 1996 provides:

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

(a) (subject to [subsection] (3)) 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.

(2) ...

(3) If an employee's period of continuous employment includes one or more periods which (by virtue of section 215, 216 or 217) while not counting in computing the length of the period do not break continuity of employment, the beginning of the period shall be treated as postponed by the number of days falling within that intervening period, or the aggregate number of days falling within those periods, calculated in accordance with the section in question.

Conclusions

16. The claimant was employed for just over one month with the respondent.
17. In my judgment the Claimant cannot rely paragraph 2 of the contract of employment to establish she has continuous employment of a longer term. Whilst this term incorporates the NJC provisions into the claimant's contract of employment, it only provides for previous continuity of service to be included when applying annual Leave, Occupational Sickness Scheme and the Occupational Maternity Scheme continuous service or a break for

maternity reasons, or reasons concerned with caring for children or other dependents. None of these reasons applied to the claimant's situation.

18. The Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999 only applies to redundancy situations. It does not apply to unfair dismissal proceedings.
19. The NJC provisions do not preserve continuity on a wider scale and certainly not in respect of continuity for the purpose of bringing an unfair dismissal claim.
20. I also do not think the claimant is assisted by the pre-contractual communications in which she set out her understanding of when she must start in order to preserve continuity. I accept that the claimant was certainly seeking to preserve her continuity, but it does not follow that because the claimant understood this to be the case that it becomes so. Continuity is a creature of statute.
21. I asked Counsel for the claimant whether the claimant was pursuing a case that there had been an agreed contract term that continuity would be preserved based on the email communications. Counsel's position was that the claimant "was not going this far but there had been no rebuttal by the respondent". This was in reference to the lack of any response from Mr Goodrum when the claimant raised the matter of preserving her continuity of employment in the emails referred to above.
22. The claimant had already accepted the terms of the contract (in which the terms relating to continuity are specifically set out in paragraph 2) on 16 March 2022. This express term on continuity therefore prevails unless the claimant can show otherwise, by way of a variation or other such established route to persuade the Tribunal that the contract did not reflect the whole bargain between the parties. This was not a case seriously pursued by the claimant and rightly so as it was bound to fail. The claimant's genuine albeit misguided statements regarding continuity, after the express terms had been reached establish no such position. The lack of rebuttal by the respondent is insufficient to show that the contract was in some way varied so as to preserve continuity. In any event the respondent could not seek to bind the former employer to such a term.
23. For these reasons, the claimant does not have sufficient continuity of service to pursue a claim of unfair dismissal under s94 ERA, her claim under s103A proceeds.

Employment Judge S Moore
Dated: 25 July 2023

REASONS SENT TO THE PARTIES ON 26 July 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche