EMPLOYMENT TRIBUNALS

Claimant: Mr M Brockway

Respondent: Mitie Care and Custody Ltd

Heard at: London South Employment Tribunal (via CVP)

On: 25 July 2023

Before: Employment Judge Armstrong

Representation

Claimant: In person
Respondent: Ms S King (counsel)

JUDGMENT

1. The Claimant was employed from 16 August 2021 until his dismissal on 8 April 2022. He therefore has insufficient continuous service to bring a claim for unfair dismissal.

2. The claimant's claim is struck out.

Oral Judgment having been given at a hearing on 25 July 2023 and a request having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 at that hearing, the Tribunal provides the following:

REASONS

Claims

1. The claimant brings a claim for unfair dismissal with two other claimants (Mr D Maynard and Mr J Lehan), whose claims were not listed today and are listed for full hearing in future. The claimant has also brought another claim, lodged several days prior to this claim, under claim number 2302225/2022. Mr Brockway told me today that he had not been made aware that he had been named on this claim until shortly before the case management hearing on 20 February 2023 at which this hearing was listed to determine whether

or not he has sufficient length of service to bring a claim for unfair dismissal. Mr Brockway had complied with case management directions for this hearing and did not seek to withdraw the claim. He (along with the respondent) sought for me to proceed to determine the issue of his length of continuous service today.

2. Mr Brockway's other claim number 2302225/2022 is for unfair dismissal, discrimination, and discriminatory dismissal. That claim is listed for a preliminary hearing (case management) on 13 September 2023 and final hearing on 4-6 November 2024. That claim was not listed before the Tribunal today.

3. I did not strike out the unfair dismissal claim number 2302225/2022 as it was not listed for preliminary hearing today and the requisite notice had not been given to the claimant. However, the question of the claimant's length of service and jurisdiction has been determined today. The respondent will apply for the unfair dismissal claim under that claim number to be struck out, relying on this judgment and written reasons.

Conduct of the hearing

4. Mr Brockway represented himself, supported by his fiancée Miss Furbear. Ms King (a barrister) represented the respondent.

5. The hearing took place via video. All parties and witnesses had access to the bundle and their witness statements. All parties were able to participate fully in the hearing.

Issues for the tribunal to decide

6. The sole issue for me to determine today was (as set out in an agreed list of issues submitted to the Tribunal):

   'Does the Claimant, Mr Brockway have the requisite length of service in order to bring a claim for unfair dismissal of two years?

   The Claimant states that he has the requisite length of service because:

   It is Mr Brockway's position that he was reinstated and not re-employed.'

Preliminary issues – application by the claimant

7. The claimant sent a document to the Tribunal the day before the hearing containing three preliminary applications arising out of the respondent's late service on him of documents and witness statements on 21 July 2023 in breach of directions: for the response to be struck out for failure to actively prosecute the case, to exclude documents which were sent on 21 July 2023, and to exclude the respondent's written and oral witness evidence sent on the same date.

8. The reasons for the claimant's application are set out in his written submissions and I heard some further oral submissions from him. In essence, he stated that he was at a significant disadvantage because the

documents and statements were received considerably after the directed deadline of 31 March 2023. He had sent his documents and witness statements in compliance with directions and the respondent had therefore had the benefit of his evidence for over three months before submitting theirs. The respondent's witness statements refer to his statements. He also submits that he may have been able to collect further documentary or witness evidence had he been given more warning of the content of the respondent's statements.

9. On behalf of the respondent, Ms King acknowledged that there had been some 'drift' in compliance with directions. She submitted that the respondent had provided the bundle to the claimant on 3 April 2023 (immediately prior to the previous listing of this hearing on 4 April 2023 which was postponed of the Tribunal's own motion). The claimant disputed this. Ms King acknowledged that witness statements were not provided until 21 July 2023. She highlighted that the notice of hearing of today's hearing was only received 10 days or so prior to the hearing (the claimant agreed with this) and that until that point preparation of this case was 'on the back burner' given the other two claims within this multiple and the issues in this claimant's other claim.

10. I considered the representations of both parties and gave the following decisions:

Strike out application

11. I refused the application to strike out the response to this claim. I was satisfied that would have been a disproportionate sanction for the respondent's breach of the orders. This is not a case where a fair hearing in the substantive claim is no longer possible. There are significant issues in dispute including the jurisdictional issue of length of service. It would potentially be a windfall to the claimant if I struck out the response in the circumstances. The prejudice to the claimant of allowing the response to stand did not in any way outweigh the potential prejudice to the respondent of striking out the response.

Exclusion of documents

12. I refused the claimant's application to exclude the respondent's documents. The issue of length of service is a fundamental jurisdictional issue. I took the claimant through the documents in the bundle and most are documents that the claimant has in fact received or seen in the course of his previous employment even if had only seen them in the bundle format recently. The only document he disputed was his purported contract of employment which he stated he had never received. I was satisfied that he could deal with that issue fairly in oral evidence. Considering overall proportionality and the interests of justice I considered it appropriate to admit the documents as included in the bundle.

Witness evidence

13. I was concerned by the late provision of the respondent's witness statements. The respondent should have complied with the case management directions to exchange these by 31 March 2023. However, I

took into account that the previous hearing had been postponed and that the parties had short notice of the hearing today. I could understand the respondent's attempt to reduce costs and focus on the elements of the claims which were more pressing, but they should have contacted the Tribunal and the respondent to amend the directions if additional time was sought.

14. In reality the statement of Clare Wilkins adds little information further to the documents already in the bundle and I considered that there would be little prejudice to the claimant in allowing it.

15. The statement of Paul Morris does refer to the claimant's witness statement. This emphasises why mutual exchange of witness statements is usually directed. However, there is little prejudice in this in fact as he would likely have been permitted to respond to the claimant's statement in supplementary examination in chief. There are two narrow factual issues as identified above - whether the claimant was provided with a contract and the alleged use of the word 'reinstated' by Mr Morris. The claimant would have the opportunity to cross-examine him on those issues.

16. I can understand the claimant's frustration that he may have been able to gather other evidence about his contract and usual practice around induction courses if he had known at an earlier date what the respondent's evidence would be. However I was satisfied that these issues could be dealt with by the claimant in his oral evidence today and in cross-examination. I indicated that I would bear in mind that he had not had the opportunity to gather further evidence which might exist, when considering the weight to give his version of the events.

17. The issue of length of service is a central issue going to the jurisdiction of the Tribunal. It is important that the Tribunal hears full evidence. I was satisfied that it was in the interests of justice to hear the respondent's witness evidence.

18. After I had given my decision on the preliminary applications, Ms King flagged up that during the short adjournment, she had forwarded on an email which showed that on 3 April 2023 the bundle had been sent to the claimant. This did not change my decision, but reaffirmed that there was no prejudice to the claimant in admitting the documents as they had in fact been in his possession in that format since 3 April 2023.

Evidence

19. I considered the bundle of documents, comprising **173** pages. Page references in **bold** refer to that bundle of documents.

20. I heard evidence from the claimant and Ms Furbear, whose statements were included in the bundle. I also heard evidence from Ms Wilkins and Mr Morris on behalf of the respondent, whose witness statements were separate from the bundle. I also considered written submissions provided by Ms King in advance of the hearing and oral submissions from both parties.

Background

21. The claimant commenced employment with the respondent (or their predecessors) on 24 March 2002. It is agreed that the claimant stopped working for the respondent on 10 April 2021 in order to take up employment with the prison service. His notice of resignation is at **110** and he received a P45 showing his leaving date as 10 April 2021 (**111**). The claimant then then went to work for the prison service for a period of time. However this employment did not turn out as he hoped and he returned to work for the respondent on 16 August 2023. There were conversations over a period of a few weeks leading up to this, and an offer letter was sent to him dated 30 July 2021 (**114-120**). This chronology is not disputed.

22. The issue for me to determine is whether on his return to work the claimant was 'reinstated' and his continuity of employment was preserved. The claimant relies on three facts: (i) he says he was not issued with a new written contract; (ii) he was not required to complete new starter training (which is agreed); (iii) it was said to him at or around the time of starting work again in August 2023 that he would be 'reinstated' (which is disputed).

Relevant law

23. Section 212(1) Employment Rights Act 1996 ('ERA 1996') provides that any week in which an employee is employed for the whole or part of the week will count towards his continuity of service - i.e. if a break in employment does not incorporate at least a full week, continuity of service will be preserved.

24. The claimant's break in employment was for over three months therefore it is not caught by s.212(1).

25. By virtue of s.212(3) ERA 1996 a full week during which an employee is absent from work will count towards his continuous service if it is due to sickness or injury (not applicable here), a temporary cessation of work (a 'factory shut down'-type scenario, again not applicable here) or where he is '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.'

26. The only clause which could potentially apply here is the 'arrangement or custom' scenario. There is no 'custom' put forward. The 'agreement' relied on here is that when the claimant returned to work in July / August 2021 he claims that there was an agreement that his continuity of service would be preserved – he would be 'reinstated'.

27. By virtue of section 218(1) ERA 1996, continuity of service provisions relate 'only to employment by the one employer'. The claimant's employment with the prison service cannot count towards his continuity of employment with the respondent, and he does not invite me to find that it does so.

28. The Employment Appeal Tribunal ('EAT'), has made clear that a later agreement to ignore a break in continuity of employment cannot confer jurisdiction on the Tribunal by preserving that continuity of employment. See *Welton v Deluxe Retail Ltd* [2013] IRLR 166 (EAT) at para 40 where

Langstaff J summarised the decision in *Murphy v A Birrell and Sons Ltd* [1978] IRLR 458 as follows:

> The EAT decided that the break nonetheless deprived her of the continuity necessary to enforce the statutory right not to be unfairly dismissed, whatever the contractual position might be. There were two principal reasons and one subsidiary one for this. The first was one of construction: an absence fell to be regarded as continuing employment only if *'by arrangement or custom'* . 'Custom' has necessarily to exist at the time when the absence began: the same should apply to 'arrangement'. Second, the Tribunal agreed with an earlier case which pointed out that if an 'arrangement' could be made retrospectively it could open the way to calculated fraud. The subsidiary support was derived from Lord Parker CJ's suggestion in *Southern Electricity Board v Collins* [1969] ITR 277 , to the effect that paragraph 5(1)(c) [of the preceding legislation] was intended to apply to a situation where an employer lent his workman to another man for a short period on the understanding and intention that he would return to work for the first employer.'

29. And at 54 where he concluded:

> 'This view is supported by the fact that the central word is part of a phrase: it is "by arrangement or custom". The meaning of a word may in part be derived from its companions. In this context, "custom" necessarily pre-dates the absence. The placing of "arrangement" in the same phrase together with "custom" indicates that it, too, is something made before or at the time of the absence from work.'

30. This is different from the test for a transfer of employment under the Transfer of Undertakings and Protection of Employment Regulations 2006 ('TUPE') to which the claimant referred me during his submissions. The claimant accepted that this scenario is not the same and he does not claim that his employment transferred from one employer to another. However he submitted that by analogy the same situation should apply here. I do not agree that this is a correct interpretation of the law.

Findings of fact

31. I was satisfied that all the witnesses I heard were honest and were trying to give me their best recollection of events.

32. As set out above, it was not disputed that the claimant left the employment of the respondent in April 2021. It was agreed that he received a P45 and went to work for the prison service. He commenced employment with the prison service (i.e. a different employer), with the intention of staying there, until it later transpired that the work there was not as he had hoped it would be.

33. Given the agreement of the parties as to their intentions at the time of the claimant leaving the respondent's employment in April 2021, the only potentially relevant factual issue would be if I were to find later facts from which I could properly infer a finding that the parties intended at the time that the claimant left the respondent's employment that his employment would be continuous.

34. The claimant provided a witness statement from Alex Jackson (**173**) who he told me was his immediate line manager. Mr Jackson did not attend to give oral evidence and be cross-examined therefore I place limited weight on his evidence. In any event he does not state that the claimant was

'reinstated' or that his employment was considered continuous. Rather he states that Mr Brockway was not required to attend training because he was not deemed a new starter.

35. I accept that the claimant was not treated the same as a 'new starter' because of his length of previous experience and previous accreditation

36. However, when he started working for the respondent again he was sent a written offer of employment (**114-120**) which clearly gives a start date of 16 August 2021 (**115**). It also asks for the claimant to sign and return a contract of employment (**116**). There is no signed copy in the bundle and the claimant tells me, and I accept, that he did not receive one. However he did tell me that he expected one. The absence of a signed written contract is not inconsistent with the commencement of a new period of employment.

37. The claimant was not required to complete full induction training. The respondent accepts this. The claimant places considerable emphasis on this, stating that all new starters were required to complete this training, including some of his colleagues who had taken breaks from employment with the respondent and were considered to be 're-engaged' rather than 're-instated' like the claimant.

38. I do not consider that the reduced training requirements for the claimant are inconsistent with a break in his continuity of employment. I accept that as per the claimant's email at **152** he was not required to complete the full training because of his previous length of service and relatively short break since he was previously employed. I accept Mr Harris's oral evidence that the decision whether or not to require employees to complete full training was for the Home Office and was made on a case by case basis.

39. There has been significant dispute between the parties about the use of the word 'reinstatement' at the time that the claimant began working for the respondent again. There is an email at **151** referring to '*Reinstatement of [security] clearance'.* This is a different issue from reinstatement of employment and I do not find it persuasive.

40. There is an issue as to whether or not Mr Morris used the word 'reinstatement' during discussions with the claimant during July / August 2021. I think in reality it is unlikely that either party will have an accurate recollection as to whether the word 're-instatement' or 're-engagement' was used during the course of those conversations because it would not have been considered significant at the time and has taken on more significance a lengthy period of time thereafter.

41. I am satisfied that whatever was said during those conversations does not matter. It was too late. Both parties' clear intention at time of the claimant leaving the respondent's employment in April 2021 was that it was the end of his employment with the respondent, and nothing which occurred later was inconsistent with that.

42. Therefore the claimant's continuous service started in August 2021 and he does not have sufficient service to bring a claim for unfair dismissal.

Conclusions

43. The claimant's claim on the multiple claim, number 230472/2022, is struck out due to lack of jurisdiction.

44. This finding will mean that the claimant's other unfair dismissal claim under claim number 2302225/2022 will be struck out but I cannot make that order today as it has not been listed for a public preliminary hearing.

45. The claimant's discrimination claims will proceed to the preliminary hearing and final hearing as listed.

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Employment Judge **Armstrong**

26 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 September 2023

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FOR EMPLOYMENT TRIBUNALS