EMPLOYMENT TRIBUNALS

Claimant: Mr T Mahenga

Respondent: Chelsea & Westminster Hospital NHS Foundation Trust

Heard at: London South (Croydon), in public, by CVP

On: 21 November 2023

Before: Employment Judge Tsamados
With Non-Legal Members:
Ms J Cook
Mr J Havard

Representation
Claimant: in person
Respondent: Ms C Ibbotson, Counsel

JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

The Claimant is entitled to a statutory redundancy payment from the Respondent in the sum of £2,077.16.

REASONS

Reasons were provided orally at the hearing. The Claimant requested written reasons. These reasons are fuller than those given at the hearing but do not contain any material differences unless otherwise stated.

Background

1. This is the remedy hearing following the liability Judgment of this Tribunal, which was sent to the parties on 1 June 2023, in which we determined that the Claimant was entitled to a statutory redundancy payment.

2. The parties were given the opportunity to agree the amount of the statutory redundancy payment due to the Claimant by 4 August 2023 and if that were not possible, we indicated that we would list the matter for ½ day remedy hearing. The Claimant subsequently requested a remedy hearing.

Today's Hearing

3. Notice of today's hearing was sent to the parties on 17 October 2023. A Case Management Order was sent to the parties the following day. This made it clear that today's hearing would be dealing purely with the Claimant's entitlement to a statutory redundancy payment and set out the manner in which this would be calculated by reference to section 162 of the Employment Rights Act 1996 ("ERA").

4. The Case Management Order invited the parties to endeavour to agree the various elements of the calculation so as to avoid an unnecessary hearing. In the event that this was not possible, they were ordered to set out their respective positions to each other with supporting documentation on sequential dates.

5. In the absence of an agreement, the parties were ordered to send witness statements for each witness they intended to call, this including the Claimant and the Respondent was ordered to prepare an electronic bundle for today's hearing.

6. The Tribunal received emails from both parties dated between 31 October and 14 November 2023 in which the parties set out their respective positions and their areas of disagreement.

7. The emails also raised the Claimant's allegations that the Respondent had not given full disclosure of his employment file despite being sent a Subject Access Request under the data protection legislation and further alleging that they had failed to disclose documents throughout the course of his claim. The Respondent's position was that it had given the Claimant all that it had and that he was attempting to reopen matters which were pertinent to the liability Judgment and not relevant to today's remedy hearing. That was certainly my understanding on reading those emails prior to this hearing.

8. The essential dispute between the parties is as to when the Claimant commenced employment as an employee with the Respondent. In our liability Judgment, we made no findings as to the start date or indeed the Claimant's employment status beyond commencement of his employment on a permanent basis as a Band 3 Clinical Support Worker in September 2016. Prior to that the Claimant stated that he was employed as a bank worker and the Respondent said that it did not accept that this was as an employee. Reference is made to paragraphs 27 and 28 of our liability Judgment.

Evidence and submissions

9. We were provided with an electronic bundle of documents from the Respondent consisting of 263 pages. We refer to this where necessary as "RB" followed by the relevant page number. During the course of the hearing, we were also sent an email from the Respondent's solicitors attaching a document entitled "Staff bank Members Handbook 2011" and an email from

the Claimant with a link to an item on the Respondent's website containing criteria as to the basis on which Long Service Awards were given. Neither

party provided witness statements. In effect we heard unsworn evidence from the Claimant and submissions from both parties.

10. The Claimant's position in the email correspondence referred to above is asfollows. He commenced his employment as a bank worker in January 2002. He originally worked at the West Middlesex University Hospital prior to its merger with the Respondent. He has 19 years' service. His gross weekly pay is £479.35 (by reference to pay scales that he found online). At the time is employment ended he was 38 years old. He therefore calculates that he is entitled to a statutory redundancy payment of £8,388.63. The only evidence that he has provided of his length of service is a Long Service Awards 2019 certificate which is at RB189.

11. The Respondent's position in the email correspondence referred to above isas follows. The Claimant commenced permanent employment in September 2016. His employment ended on 28 April 2021. He has 4 years' service. His gross weekly pay taking an average of the 12 weeks prior to his redundancy was £519.29. He was 38 years old at the time. He is entitled to a statutory redundancy payment of £2,077.16. Prior to September 2016, the Claimant worked from 2008 as a bank Health Care Asst at the West Middlesex University Hospital. The Respondent is not aware of any agreement that his ad hoc work as a bank worker on the Trust's Bank would provide him with continuous employment service and it would be unusual for this to have occurred. He had a large number of breaks of service between the 12 February and 11 September 2015 (before he was substantively employed) and between 20 May and 16 August 2018 (whilst he was substantively employed).

12. In evidence/submissions from the Claimant the following emerged. Duringthe periods of employment identified by the Respondent as gaps in his bank work, he was working at the Cambridge Rehabilitation Unit, which we understand to be part of another NHS Foundation Trust. His inability to provide any evidence in support of his previous service as a bank worker with the Respondent is entirely due to their failure to provide his employment file which he alleges has been deliberately withheld or it has been lost and the Respondent has failed to report a data breach or undertake an investigation. He has attempted to get his employment file from the Respondent throughout these proceedings, but they have failed to provide it. He has made a Subject Access Request under the data protection legislation and the Respondent has refused it. He asserts that there is a wider NHS Policy which allows for all service with the NHS to be taken into account in calculating redundancy entitlement. He further asserts that the Long Service Awards 2019 certificate is proof that he was working for over 10 years at the time it was issued.

13. The Claimant has no documentation as to his prior employment as a bankworker. The reason for this is that he did not think he would have to provide all this evidence at a Tribunal many years later. I said that I understood what he was saying. I asked him if he had any other

documentation that might assist beyond what essentially is just his assertion. He referred to emails from Adora Depasupil which she had sent to the Respondent, but they had not included in the bundle. Whilst these did not relate to the matters before us today, the Claimant asserted their relevance to his allegation that the Respondent had withheld evidence.

14. By way of submissions based on instructions from the Respondent and herinstructing solicitors, Ms Ibbotson said as follows. The Respondent has disclosed all that it has access to in relation to the Claimant's employment records. It accepts that the West Middlesex University Hospital merged with the Respondent Trust in she believes 2015. However, despite what the Claimant alleges the only documentary evidence in the bundle shows that he commenced work as a bank worker in 2008 and not 2002 as asserted. There is no wider NHS policy that the Respondent is aware of. She believes that the Claimant is referring to a document relating to contractual redundancy pay which refers to "reckonable service". This relates to all work done at different NHS Foundation Trusts, but this is not the test for a statutory redundancy payment under the ERA which relates to "continuous service".

15. By way of more formal submissions, Ms Ibbotson made 3 points.

    a. Firstly, there is a dispute as to when the Claimant started working on the Bank. RB258-259 set out the Claimant's employee service records and in the second table at RB258 shows a start date of bank work as 1 May 2008. The Long Service Award at RB189 was awarded to the Claimant on 1 November 2019, at which point the Claimant would, taking 1 May 2008 as a start date, have been working about 11 ½ years. If the Respondent is right about the start date, then it makes sense to make this Award at that point. If the Claimant is right as to his start date, he would at this point been working almost 18 years and so the Award would not make much sense. The Claimant has provided no evidence that he worked as a bank worker from 2002 onwards beyond the submission points made today.

    b. Secondly, there is a dispute as to whether the Claimant was an employee whilst working on the Bank. The Claimant started in substantive employment in September 2016. His offer letter is at RB175-176. Reference is made in that letter to his new terms and conditions on a full-time permanent basis for an indefinite period. Before that, he was employed as a casual worker (under the Respondent's "Staffbank Agreement for Temporary Workers", as it is more properly called). Whilst the Respondent does not have his signed bank worker agreement, it has provided a template agreement and the Respondent's position is that this document governed his terms and conditions. Clause 1.1 at RB177 makes it clear that there is no mutuality of obligations. Clause 3 at RB179 indicates that each engagement is considered to be separate. Clause 4 at RB179 requires submission of timesheets in order to receive payment. The Bank data at RB198 onwards shows that the Claimant worked on various wards and not just one Ward. For all these reasons, the Respondent submits that the

evidence supports that the Claimant was a casual worker until 2016 when he then became a permanent employee of the Trust.

c. Thirdly, there are breaks in the Claimant's continuous service even if the Tribunal were to accept, he was an employee. He has had two long breaks of more than a week, one before he started in his substantive post and one after. Evidence of this is within the Bank work data at

B215 and 217, as highlighted in yellow. Whilst the Claimant had said today that he was working at another NHS Trust during these breaks, he has not provided any evidence of this, and we do not know whether he was working there as an employee or on the Bank. But we say that it is more likely he was working on the Bank otherwise he would have provided some evidence this. Further, if he was working as a bank worker at another Trust and you accept this, we say he was not employee.

16. By way of reply, the Claimant asked if the Respondent had an earlier versionof the Bank work agreement (the version at RB 177 is dated December 2016). Ms Ibbotson stated that she would take instructions.

17. The Claimant also raised queries about other documents that theRespondent has not provided. His rationale for this was that if the Respondent has his records from 2016, then it would have his application form in his he provided Equality Act information about his disability. He raised similar concerns regarding his return-to-work documentation, in which he says he described his disability and how it affected him.

18. Whilst this was straying into what I perceived to be his attempts to go behindthe liability Judgment, I did accept his point that he believed it relevant to prove that the Respondent was withholding documents. Ms Ibbotson again stated that she would take instructions.

19. The Claimant also asked for the criteria on which length of service awardsare made. Ms Ibbotson replied that there was no written policy, the Respondent's position is that it is given to staff who work for more than 10 years but no distinction is made between employee status or bank status. Finally, the Claimant asked the Respondent to provide the evidence regarding Adora Depasupil. Ms Ibbotson again stated that she would take instructions.

20. At this point we adjourned for half an hour to allow us to take stock of wherethings were and whether we were in a position to proceed, or not, given the Claimant's concerns as to the alleged failure to disclose documents, and also to allow Ms Ibbotson to take instructions on the above matters as best she could.

21. On our return, Ms Ibbotson stated the following. Her instructing solicitors hadsent an email attaching the earliest copy that they could find relating to Bank work, which is from 2011, and which contains the same clauses that she relies upon in the 2016 document. The Respondent has been unable to locate any earlier documents, or they simply do not exist. Her instructing

solicitors had been unable to find any return-to-work records. The Claimant has repeatedly asked for these and has been told that the Respondent has carried out a thorough search but has been unable to locate such documents. With regard to the Adora Depasupil documents, the Claimant states that has provided them to her instructing solicitors, but they cannot locate them. Whilst the Claimant has them, he did not ask for them to be included in the hearing bundle.

22. I invited the Claimant to respond but his view was that anything he said wasnot going to help and he would simply look like a crazy person, as he put it. I assured him that we did not view him in this way, and we took what he said seriously and were weighing up the evidence.

23. With regard to the Claimant's employment with the Cambridge RehabilitationUnit, I asked him if he had any evidence of his employment there and he replied, no. I asked him if he had made Subject Access Request was clearly, he knew how to do that. He again responded no.

24. I asked him if he knew the exact date in September 2016 that he commencedpermanent employment with the Respondent. He said he did not know the dates but it was a month before his daughter was born because after that he went on paternity leave. I asked him when his daughter was born and he replied, 20 October 2016. I took him to RB258 which in the bottom left corner of the first table indicates that his employment status changed to that of an employee on 26 September 2016. He was not sure whether this was the date or not. I explained to him the significance of this in terms of determining complete years of service.

25. I asked him whether he accepted what the Respondent said as to his casualwork status as a bank worker. He accepted that this was the case and the earlier document provided from 2011 said exactly the same thing as the one from 2016. I took him through various points to make sure he understood what was being said. He accepted that he registered for engagements on the Respondent's Bank, that he was not obliged to accept engagements and the Respondent was not obliged to offer him any, and so he was free to refuse work if it was offered to him. He added that there was a condition that he could be removed from the Bank register if he refused work after a period of, he believes to be, 3 months. In fact, clause 3.2 at RB177 indicates that a failure to undertake any work for the Staff bank for at least 13 weeks will result in automatic deregistration. He received holiday pay, sick leave and was paid under the PAYE system.

26. Having considered the Staffbank Members Handbook and the email from theClaimant linking to the criteria for the long service award, we did not think either of them added to or changed the position from that set out above above.

27. We decided that we are in a position to continue today and adjourned to reachour decision.

Essential Law

28. Under section 162 ERA, a statutory redundancy payment is calculated byreference to the Claimant's age, complete years of service as an employee and weekly gross pay (subject to the then weekly maximum of £544 per week), as at the date that his employment came to an end (in this case, at the expiry of the Claimant's period of notice). The calculation allows for oneand-a-half weeks' pay for each year of employment in which the employee was not below the age of 41, one week's pay for each year of employment when the employee was below 41 but not below 22, and half a week's pay

    for each year of employment below the age of 22. A maximum of 20 years' employment will be counted.

29. Only employment as an employee counts towards length of service. Notemployment as a casual worker. For reasons which become obvious as this Judgment continues, if was not necessary for us to set out the legal position regarding establishing employment status or to consider it further.

30. Under section 212 ERA, continuous employment is measured by "qualifying"weeks. Any week during which all or part of which the employee's relations with his employer are governed by a contract of employment is a week which counts. Some gaps can still count towards continuing employment. The most applicable one to this case is where it is a gap in such circumstances that, by arrangement or custom, the employee is regarded as continuing in employment for all or any purposes.

31. Under sections 210 & 211 ERA, there is a presumption of continuity that theperiod of continuous employment begins on the day the employee starts work and is presumed to continue until the effective date of termination of the contract of employment, ie when it comes to an end. This presumption of continuity is very important for employees, since it means that it is for the employer to prove there has been a break which is not recognised by the law as preserving continuity.

Findings and Conclusions

32. The documentary evidence in this case is woefully lacking. Whilst theClaimant believes that evidence has been deliberately withheld or in the very least has been lost without a data breach being reported and investigated, and the Respondent maintains that it has provided all it has, we can only go on what is before us today. At its highest, it is apparent to us that the Respondent may have lost other documents relating to the Claimant's employment but there is nothing to support the Claimant's assertion that it has deliberately withheld documents. If there has been a data breach, then perhaps, this is something more appropriate for the Claimant to take up with the Information Commissioner.

33. The Claimant worked as a bank worker for many years prior to his permanentemployment in September 2016. He says from January 2002 and for West Middlesex University Hospital which we understand merged with the Respondent from approximately 2015. He has not provided any evidence of this but we have no reason to doubt it. The long service award he produced at B189 is indicative of over 10 years' service in 2019 but does not indicate in what capacity or whether the service is continuous employment under the ERA.

34. The Claimant referred to a wider policy which included service with all NHSTrusts within the redundancy policy. Ms Ibbotson said that she believed this to be a reference to "reckonable service" which is different from the definition under the ERA.

35. After the hearing we looked at the liability hearing bundle which contains adocument entitled "Managing Organisational Change" at pages 187-208. Clause 3 on page 189 sets out the definitions of "continuous service" and "reckonable service" under the document. The former reflects the definition under the ERA. The latter is wider and includes any service with a previous NHS employer where there has been a break of 12 months or less. It therefore does not assist the Claimant, as he believes it does, because it relates to a non-statutory entitlement.

36. We find that the presumption of continuity has been rebutted by the evidencefrom the Respondent and so it is for the Claimant to show that he was continuously employed between his alleged start date and end date of employment.

37. We were provided with copies of template Staffbank Temporary Workeragreements which indicate that employment as a bank worker was on a casual basis with no mutuality of obligation and on an assignment-byassignment basis. The Claimant accepted that this was the reality of the working situation. We note from the bank work records that there are a number of weeks where the Claimant was not working. There is no evidence that any of these gaps in employment fell within the exceptions within the ERA.

38. The Respondent pointed to the gap in the Claimant's employment as a bankworker between February and 11 September 2015. The Claimant said that he was employed at Cambridge Rehabilitation Unit as a bank worker at that time but has provided no evidence in support of this.

39. We established that the earliest he could have started his permanentemployment with the Respondent was 20 September (he placed the start date as a month before his daughter was born which was on 20 October 2016). B278 shows the first period of fixed term employment but we believe this is his permanent employment as commencing on 26 September 2016. Being generous to the Claimant, if we take 20 September 2016 as his start date, then his length of service will be measured in the number of

complete years served from that date to the date his employment ended which was at the end of his notice period on 28 April 2021.

40. Whilst there is no documentary evidence to support the Claimant's assertedservice back to January 2002, there is a clear break in his service between February to 11 September 2015. Even if we were to accept that the Claimant was an employee at that time, which we do not, and the break in service did not break his continuous employment, which we do not, it would only have the effect of providing him with an additional year of service. This was a conclusion we clarified after giving our oral Judgment. I stated orally that I believed this start date did not provide the Claimant with any additional length of service but on reconsideration I realised this was incorrect. However, this change does not have any effect on the outcome of our judgment.

41. On the evidence we have heard and have before us, we conclude that theClaimant was employed as an employee from 20 September 2016 until his employment ended on 28 April 2021. This is four complete years of service.

    We accept the figure of gross weekly pay put forward by the Respondent of £519.29 (which is more generous than the one put forward by the Claimant). The Claimant was aged 38 as at the date his employment ended. £519.29 x 4 years = £2,077.16.

42. We therefore award the Claimant a statutory redundancy payment of£2,077.16.

Employment Judge Tsamados
21 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

4 December 2023

FOR THE TRIBUNAL OFFICE