



EMPLOYMENT TRIBUNALS

Claimant

Miss A Lanuszka

Respondent

Accountancy MK Services Limited

v

Heard at: via CVP

On: 1 August 2024

Before: Employment Judge R Wood

Appearances

For the Claimant: Ms P Mayenin (Solicitor)

For the Respondent: Mr B Coulter (Counsel)

RESERVED JUDGMENT REASONS

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.
2. In summary, I find that the Claimant has the requisite period of continuity such as to give the Tribunal jurisdiction to hear her unfair dismissal claim. My reasons are set out below.
3. This claim was listed on 1 August 2024 by Employment Judge Boyes at a case management hearing on 28 May 2024. On that occasion, the judge allowed an application to amend by the claimant which, in effect, added a claim of unfair dismissal to the action. The relevant dismissal occurred on 31 July 2023. This gave rise to an issue as to whether the Tribunal has jurisdiction to hear the claim of unfair dismissal. The respondent asserts that there was a break in employment in or around August 2021, which, in broad terms, coincided with a transfer of the business from Accountancy MK Limited (“AMK”) to the respondent. The respondent submits that there was therefore a break in continuity for the purposes of section 218 of the Employment Rights Act (“the Act”). The claimant submits that she continued to work throughout the period of the transfer of undertaking; that there were

no breaks; and that the fact of the transfer of an undertaking means that there was continuity of employment going back to 2017.

4. The issue before me is whether or not the the Tribunal has jurisdiction by reason of continuity of service of at least two years.

Procedure, Documents and Evidence Heard

5. The hearing took place on 1 August 2024. The claim was heard via a remote CVP hearing. I heard testimony from the the claimant, Miss Lanuszka, and from Mrs Krause, the proprietor/director of the respondent. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. I also had an agreed bundle of documents which comprises 356 pages; written skeleton arguments and closing submissions from both advocates; and a bundle of authorities from Ms Mayenin.
6. In coming to my decision, I had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

7. The relevant legislation in respect of the allegations of direct discrimination is contained in the Employment Rights Act 1996 (“the Act”). Section 108(1) ERA provides that the qualifying period of employment for claiming unfair dismissal is two years’ continuous service ending with the effective date of termination (EDT).
8. The main statutory provisions relating to continuity of employment are contained in Chapter 1 of Part XIV of the Employment Rights Act 1996 (ERA) (Ss.210–219), which is headed ‘Continuous employment’. There is a presumption in favour of the employee that any period of employment is continuous — S.210(5).
9. If an employer claims that an employee has overestimated the length of the employee’s period of continuous employment or that something happened during the course of the period to break continuity, then it is up to the employee to prove this. Employment is then presumed to have been continuous throughout unless the employer can show that at least one week did not count and therefore broke continuity.
10. Continuity of employment normally applies only to employment with a single employer (ERA s.218(1)). However, there are a number of exceptions where employment with one employer can be carried forward and added to employment with a successor employer. A change of employer will not break continuity where there is a transfer of a business or undertaking (ERA s.218(2)). Where there has been a transfer of a business or undertaking, continuity of employment may also be preserved by the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 (TUPE). The TUPE Regulations and s.218(2) of the Act should be

interpreted consistently as part of a 'single scheme' for preserving continuity in the event of a transfer.

11. Section 218(2) of the Act provides that: 'If a trade or business, or an undertaking... is transferred from one person to another — (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and (b) the transfer does not break the continuity of the period of employment.
12. Assuming that there is a transfer to which s.218(2) applies, the wording of that provision states that 'the period of employment of an employee in the trade or business or undertaking *at the time of the transfer* counts as a period of employment with the transferee'. This raises two interrelated questions: (1) when is the transfer regarded as occurring, and (2) is the employee to be regarded as being still employed at that time?
13. A 'transfer' is not necessarily limited to a point in time but can extend over a period. It is a question of deciding whether an employee is to be regarded as being employed at the time of the transfer in circumstances where his or her dismissal forms part of the 'machinery of transfer'. Any gap between successive employments may be ignored, provided that it is related to the 'machinery' of the transfer. This acts as an 'anti-avoidance' measure by preventing employees being dismissed at some point during an extended process of transfer and being re-employed by the transferee after a sufficient gap simply as a way to break their continuity of employment.

The Evidence

14. In her witness statements [4] and [7], the claimant explained that she worked for AMK from October 2017, having come to the UK from Poland in 2014. Between April-May 2021, she was told by Mrs Krause that she had started a new company and would close the old one down. She indicated that nothing would change for the claimant or for the business's customers. The claimant was told by Mrs Krause that she would need to up date her contract of employment to the new company name and number. She signed a new contract which did not appear to change her terms and conditions in her view. There were no changes in her duties or the premises in which the work was conducted.
15. In July and August 2021, the claimant explained that she was paid by wage slip which bore the respondent's name. She says that she worked throughout July, August and September and stated that she had produced 'google timeline' documents to demonstrate that she was travelling to and from her workplace at this time.
16. Ms Lanuszka answered questions at the hearing. She said there had been no breaks in her employment with AMK, and then the respondent, save for annual leave. She thought she had been told about the new company in May/June 2021. She had liked the job and had never told Mrs Krause that

she intended to resign to find new employment. She had annual leave from 23 August 2021 to 6 September 2021.

17. The claimant accepted that she had had another job whilst employed by Mrs Krause. It was part time work in a Waitrose store, 1am-6am for 3 days a week. She had started this work on 11 May 2020. She still works there. She stated that she had never worked for her boyfriend, a Mr Costea.
18. She clarified that she had been given her new contract and a P45 in September. However, she had been oblivious to any termination of her employment. She denied having been given the P45 on 1 August 2021. She had received the contract and P45 on 14 September, which was two weeks after her holiday. It had stated 31 August on the first page. She had not mentioned the P45 in her witness statements because they had been completed in a hurry. She said she understood what a P45 was.
19. There was a discussion about the P45. It was suggested that the P45 for 2021 was not in the bundle. I was sent a copy by email by Ms Mayenin. It was surprising that neither party had thought to include this document given it's potential importance to the case. I was sent a 'employee' copy of the P45 which recorded the claimant's leaving date as 1 August 2021. During the hearing, the claimant suggested that she had a different version of the P45. However, she was unable to send it to me and I decided to continue with the case without it. I note that after the hearing, Ms Mayenin sent, it was suggested, another version of the P45 to me by email. The respondent does not seem to have been consulted about this, and I disregard to for the purposes of my decision. I would add that it appeared to be the employer file copy. It also appeared to record the same leaving date as the version I was provided with at the hearing.
20. The claimant was asked by Mr Coulter why she had not mentioned being on annual leave in August-September 2023. She said it had been referred to in her payslips. She explained that she was paid for 2 days of accrued annual leave each month, regardless of whether she actually took the leave in that month or not.
21. The claimant explained that she had worked for 7 hours on 20 August 2021. The google time line evidence at [133] related to this day. There had been a typographical error in respect of the date. She was referred to [49], and asked why she had referred to the start of her employment as 1 September 2021. She said she was not an expert in the law and had simply adopted the date on the new contract she has signed. She had not been aware of any probationary period.
22. I then heard evidence from Mr Krause whose statements are at [19] and [26]. She stated that she is the founder and director and the respondent company. She went on the say that accountancy is a profession of public trust. She suggested that the respondent was incorporated on 23 November 2021 [26][135]. This was clearly an error, which Mr Krause accepted when answering questions. It had been incorporated on 24 March 2021 [138]. She

also suggested that AMK had been incorporated in March 2021. This too was an error, and should have read 6 February 2014.

23. In June 2021, Mrs Krause explained that the claimant had told her that she would like to change jobs. She accepted her notice of resignation, and they agreed she would finish working for AMK by 31 July 2021. However, after a few weeks she said the claimant had change her mind and she was interested in working for her newly formed company i.e. the respondent. Mrs Krause explained that AMK had been 'liquidated' and the new company set up. As the business grew, the new company offered broader tax services. She explained that it focussed more on business clients, such as limited companies. She suggested that the duties of the claimant would change significantly as a result. They therefore agreed that the claimant would undergo a trial period for the first three weeks of August (1 August to 24 August 2021), to determine whether she was comfortable with the new role. During this period, Mrs Krause asserted that the claimant continued to look for other work, and was often late to work, or finished early, due to attending job interviews.
24. Mrs Krause went on to say that the claimant was off work from 25 August 2021 to 31 August 2021. She was not paid for this period. It was suggested that the claimant spent this time considering whether to take on the new responsibilities. On 1 September, the claimant agreed to accept the new working conditions.
25. Mrs Krause was also asked questions at the hearing. She explained that AMK has been registered for 'strike off' on 22 July 2021. She told me that the claimant had been dismissed on 31 August 2021. Later she changed her evidence to 1 August 2021. She conceded that there was no record or note of the claimant resigning, because it had happened orally in June. She had attempted to find a replacement at the end of July. She explained that there was no record of this either, or the claimant being offered a trial/probationary period. It was all done verbally she explained. Mrs Krause said there was a record of the claimant having resigned on her file. This had not been adduced as evidence.
26. The claimant had been paid by the respondent in July and August 2021 [142] and [148]. She stated that she had changed the name of the company because of a tax related issue with HMRC.

Findings

27. Based on the evidence that I heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that I had to determine.
28. The claimant was employed by AMK from 30 October 2017 as an office administrator. AMK was a small business, engaging in accountancy services. At any point, it appears to have ben made up of no more than Mrs Krause, the claimant, and perhaps one other, from time to time. It operated

out of small premises made up of perhaps two rooms. There is no dispute that the claimant worked for AMK throughout the period 2017 to 31 July 2021.

29. Importantly, the parties agree that there was a transfer of an undertaking from AMK to the respondent. There was little attempt by the parties to pinpoint when the transfer took place. The claimant says she was first spoken to about it in April/May/June 2021. This fits in with the fact that the respondent was incorporated in March 2021. The claimant was paid by the respondent from July 2021. I therefore find that the transfer took place over a period of time in July/August/September 2021.
30. One of the primary issues for me to decide is whether in fact the claimant resigned as suggested by Mrs Krause. I find that she did not resign. I confess that I didn't find either the claimant or Mrs Krause to be the best of witnesses. There were several examples in each of their testimonies when their accounts were confused and inconsistent. Neither of their witness statements really focussed adequately on the issues before me at the Preliminary Hearing, and instead chose to address matters in 2023. This was not what the Tribunal's directions had required them to do.
31. It is the respondent's case that the claimant gave notice and resigned with effect from 31 July 2021, and that she immediately resumed work on 1 August 2021 but on a trial period for three weeks. Further, that there was then a break of a few days from 25 August to 1 September, when she did not work, after which she agreed to take on the new role. However, there is hardly any contemporaneous evidence of this from the respondent. One would expect an accountant to be an assiduous record keeper; to be someone who understood the importance of maintaining a record of important decisions and of preserving an audit trail of such matters. In my judgment it is unlikely that Mrs Krause would have made no record of the claimant handing in her notice; or of her resignation taking effect; of her search for a replacement member of staff; or of re-hiring the claimant on a trial basis. I infer from the absence of these documents that this part of Mrs Krause's account is not correct.
32. I do not accept that Mrs Krause would have needed to re-employ the claimant on a trial basis. The claimant had worked for her for many years. She would have been aware of her aptitudes. Neither am I convinced that the respondent business's activities significantly different from those of AMK, or that the claimant's role altered to any material degree. There was insufficient evidence of this aspect of the respondent's case to satisfy me.
33. I prefer the simpler account of the claimant that she worked throughout the relevant period, without resigning or other breaks in employment. It is the account which is largely supported by the nature (or absence) of the documentary evidence. The exception to this is the existence of a P45. Of course, the P45 does not show how employment comes to an end, or why. The P45 is part of the pay-as-you-earn system under which income tax and National Insurance Contributions (NIC) are withheld from an individual's

salary and paid to Her Majesty's Revenue and Customs (HMRC) on the employee's behalf. The P45 form provides a record of the details and amount of tax and insurance paid by the employee from the start of that current tax year until the termination of their employment. A new employer will typically request the P45 when an individual is about to start work.

34. In this case, the P45 states that the employment came to an end on 1 August 2021, but it does not state when it was handed to the claimant. I accept that claimant's evidence on this point that it was probably given to her at about the time she signed the new contract with the respondent i.e. in September 2021. There is no dispute that the claimant's employment moved from AMK to the respondent. I find that this was part of the process of the transfer of undertaking. As the only regular employee, and one of some experience, she was a valuable asset.
35. I find that at some point in July/August/September, the claimant's employment with AMK was terminated, and her employment transferred over to the respondent. In general terms, the transfer of the claimant's employment appears to have happened gradually. She was paid by the respondent from July onwards [68]. The P45 suggests the change came later, on 1 August. The new contract was signed on 14 September 2021 [91]. It demonstrates that the transfers occurred over a relatively broad period, during which the claimant was first employed by AMK and by the respondent.
36. In my judgment, this is a case where there has been some attempt by Mrs Krause to 'dress up' the circumstances of this case in a misleading manner, so as to avoid the implications of the transfer of undertaking on the claimant's employment. I find that the claimant did not resign, or indicate she would resign. I find that she continued to work as she had always done. I reject the suggestion that there was a trial period. I find that the claimant came into work, as is shown by her Google time line evidence. I also accept that she took annual leave at the end of August-early September 2021. Mrs Krause told me that she did not keep a record of when her staff took annual leave. Again, I find that this is a surprising omission which undermines her credibility as a witness.
37. In summary, I find that the claimant has over 2 years of continuous service. Indeed, that all of her period of employment with AMK and the respondent counts in this regard. The Tribunal therefore has jurisdiction to hear the claim of unfair dismissal. Of course, I make no observations about the merits of this case. This will be for the Judge at the final hearing to decide.
38. I would like to add an apology to the parties for the delay in the providing of this reserved judgment. This is entirely my fault, the combination of work load and an oversight on my part. I appreciate that waiting for decisions like this can be stressful. I hope the delay has not caused too much added anxiety.

Employment Judge R Wood

Date: 25 October 2024

Sent to the parties on: 28 October 2024

For the Tribunal Office