



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr U Obibuaka

AND

Respondents

Greta Bosch (1)
Richard Edwards (2)
University of Exeter (3)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

22 May 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondents: Mrs K Johnston, HR Department

JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim is dismissed.

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant has sufficient continuity of employment to pursue his claim for unfair dismissal. In this case the claimant Dr Ugochukwu Obibuaku, who is of Black British African nationality, has brought claims of unfair dismissal against his former employer the third respondent, and direct race discrimination and harassment on the ground of his race against all three respondents. The claims are all denied by the respondents. This tribunal's jurisdiction to hear the unfair dismissal claim against the third respondent turns on the claimant's period of continuous employment.
2. I have heard from the claimant, and I have heard from Mr Geoffrey Williams on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The claimant worked in the University of Exeter's Law School which is part of its College of Social Sciences and International Studies. In line with other disciplines the Law School uses a small number of Postgraduate Teaching Assistants to cover gaps in staffing requirements. There is an amount budgeted annually for the staff in the event that there are insufficient permanent staff or staff on fixed term contracts to deliver the teaching and marking requirements in each subject. They might also be used to cover staff who are absent and assist with seminars and extra marking. The staff may be engaged as either casual workers, or self-employed consultants.
5. The academic year runs from September to June and comprises three terms, namely September to December, January to March, and April or May to June. Student numbers are often uncertain and a decision on the use of casual workers or consultants is not normally confirmed each year until after A-level results and the "Clearing" process in August.
6. The claimant was originally engaged by the third respondent as a Postgraduate Teaching Assistant in January 2013 to deliver contract law workshops for the second term of that academic year between January and March 2013. This is the claimant's first contract. The relevant contract was headed "contract for services" although the claimant was engaged as a casual worker and was paid by claim. This means that he completed timesheets and submitted them by way of claims for payment. The claimant worked for 64.5 hours during this period. This was consistent with the third respondent's normal use of casual workers which is set out in the document explaining "why and when to use a casual worker". The general policy of the third respondent is that this casual claims process should only be used for engagements which are "ad hoc or of very short duration, such as ... Postgraduate Teaching Assistant". The claimant was paid for hours which he claimed in respect of work on the following dates: 31 January 2013, 26 February 2013, 5 March 2013, 26 March 2013, and 28 March 2013.
7. Whilst he was working the claimant was under the direct control of the third respondent in the manner in which he worked and was not entitled to delegate or send a substitute. He was required to work in the manner and at the times instructed by the third respondent.
8. The claimant did not do any further work for the third respondent until 28 November 2013. This second contract under which he was engaged was also headed "contract for services" and he was engaged on a similar basis on 24 October 2013, theoretically between the first two term dates of 23 September 2013 to 29 March 2014 with precise workshop dates yet to be agreed. The claimant delivered some contract law workshops, again on a casual basis, and he submitted claims for work done on the following dates: 28 November 2013, week ending 15 December 2013, 6 February 2014, 10 March 2014, and 27 March 2014. He also did some extra marking and submitted a claim for this on 6 May 2014. During this period he worked a total of 115 hours.
9. The claimant did no further work until the commencement of his third contract with effect from October 2014. There was a vacancy for a fixed term Associate Lecturer commencing on 1 October 2014 and the claimant successfully applied for this. A letter dated 9 October 2014 confirmed this appointment. The letter of appointment confirmed that the post was of limited duration and was offered on a fixed term contract basis from 1 October 2014 until 30 June 2015. The appointment letter went on to say: "There is no expectation of re-engagement beyond this date and consequently this employment will terminate on this date without further notice from the University." The appointment letter also stated: "For the purposes of your statutory rights, the date of commencement of this employment and therefore your continuous service date with the University of Exeter will be 1 October 2015."
10. The claimant was treated as "term-time staff" meaning staff who worked less than 52 weeks per year including holidays. Under the third respondent's normal practice for term time staff the claimant's pay, including holiday pay, was averaged over 52 weeks and he was paid monthly. The claimant received monthly pay at the end of each month from 30 October 2014 until 29 June 2015 and his employment was terminated with effect from 30 June 2015 as earlier notified, and also as subsequently confirmed in a letter dated 24

- March 2015. A form P45 confirming the termination of his employment was issued as at 30 June 2015.
11. During May 2015 Prof James Devenney of the Law School sent an internal e-mail confirming that a number of fixed term Associate Lecturer contracts were due to end in June 2015 but that the department intended to run an internal competition to determine which contracts to renew. 18 June 2015 was set as a prospective date for the interviews. The claimant applied for one of these positions but was informed by Prof Devenney by e-mail dated 25 June 2015 that he had not succeeded in his application and that offers have been made to two other candidates. Prof Devenney informed the claimant: "I would be very happy to meet with you to give you some feedback and also to discuss your position further particularly in respect to other opportunities which might be on the horizon. If this would be helpful, do you have any availability next week?"
 12. The claimant then met with Prof Devenney in early July 2015 and Mrs Hustwayte e-mailed the claimant on 10 July 2015 to this effect: "I understand that you met with James this week and that he is exploring opportunities for you within the Law School. In the meantime I wonder if you would be happy to teach on our first year Criminal Law module (contractual basis to be confirmed)? ... If you felt able to be part of this team we would like you to take four seminar groups for 9 x 2 hour cycles across both terms. As we work through the teaching allocation we will be in contact with other opportunities but I wanted to get your thoughts on Criminal - please would you let me know by Monday 13 July if this is something you feel able to do?"
 13. The claimant responded immediately to this effect: "Thanks for your e-mail. I would like to teach Criminal Law and I am able to cover for seminar groups for 9 x 2 hour cycles across both terms/teaching team meetings etc. I look forward to being part of the team."
 14. Circumstances then changed for the better within the Department and by e-mail dated 29 July 2015 Prof Devenney e-mailed his senior academic colleagues to this effect: "I'm happy to report that it is likely that we will be able to make a third Associate Lecturer (E&S) appointment from 1 September. Are you all happy to offer to our third candidate Ugo Obibuaku? I would certainly like to do so." The other senior colleagues agreed and this was confirmed in an e-mail of 12 August 2015.
 15. Accordingly the claimant was then offered his fourth contract by letter dated 12 August 2015. Again this was a fixed term contract as an Associate Lecturer expressed to be on a fixed term contract basis from 1 September 2015 until 30 June 2016. Again the appointment letter included the following phrase: "There is no expectation of re-engagement beyond this date and consequently this employment will terminate on this date without further notice from the University." The appointment letter also stated: "For the purposes of your statutory rights, the date of commencement of this employment and therefore your continuous service date with the University of Exeter will be 1 September 2015."
 16. Just before this there had been a helpful and supportive exchange of e-mails between Prof Devenney and the claimant from 17 August 2015. Prof Devenney sent the claimant an e-mail on 17 August 2015 confirming that he was about to receive "a new draft contract" and to let him know if there were any issues. By e-mail dated 20 August 2015 the claimant confirmed to Prof Devenney: "I have received and signed the contract. There are no issues. Many thanks."
 17. The claimant commenced employment under this his fourth contract on 1 September 2015. In March 2016 he was given notice that his fixed term contract would end on 30 June 2016 as envisaged. This was subsequently extended to 31 July 2016 because of some uncertainty about fixed term contracts in the Law School for 2016/2017. The third respondent had confirmed that two Associate Lectureship roles and one Lectureship role has become available in June 2016. Selection was by competitive interview. The claimant applied but was unsuccessful hence the termination of his employment on 31 July 2016.
 18. Having established the above facts, I now apply the law.
 19. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of

- employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
20. Under section 94(1) of the Act the right not to be unfairly dismissed is limited to employees. Under section 108(1) of the Act, section 94 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.
 21. Under section 212 of the Act, any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment. In addition, for any week which is not within this definition up to a maximum of 26 weeks, any week during the whole or part of which the employee (s212(3)(b)) is absent from work on account of a temporary cessation of work, or (s212(3)(c)) 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.
 22. In the first place in this case I find that the claimant was employed as an employee during each of his four contracts. Although the first two contracts were expressed to be contracts for services, he was contractually obliged to carry out work or perform services himself and whilst doing so was under the direct control of the third respondent. He was not entitled to delegate or subcontract his services to another, and there was mutuality of obligation between the parties. Each of the claimant's four periods of engagement or employment were therefore contracts of service and the claimant was an employee whilst he worked for the third respondent during these times.
 23. It is clear from the contemporaneous documents, including the pay and tax records, that there were breaks in the claimant's continuous employment between his four contracts. There was a break of eight months between the end of the first contract on 28 March 2013 and commencement of the second contract on 28 November 2013. There was a break of about five months between the end of the second contract on 6 May 2014 and commencement of the third contract in October 2014. There was a further break of at least two months between the termination of the claimant's third contract on 29 June 2015 and commencement of the fourth contract on 1 September 2015.
 24. These breaks in the periods of employment are sufficient to break the claimant's period of continuous employment with the respondent unless continuity is preserved by virtue of section 212 of the Act. The claimant was not absent on account of sickness and asserts that his continuity of employment is preserved by either of section 212(3)(b) or (c), namely that he was absent from work on account of a temporary cessation of work, or 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.
 25. To deal with the latter point first, I have heard no evidence to the effect that there was any custom or arrangement within the third respondent or its Law School, to the effect that there was any arrangement or custom whereby either Postgraduate Teaching Assistants, or Associate Lecturers on fixed term contracts, were treated or regarded as continuing in employment during any breaks in their employment. Indeed, the opposite is the case, because they were not paid during those periods, often subject to competitive interview for renewal of positions, issued with contracts specifying the temporary or fixed term nature of the relationships, and issued with forms P 45 confirming termination of employment at the end of each relationship. All these factors applied to the claimant. I do not find that he is assisted by any arrangement or custom under section 212(3)(c) of the Act which cannot be said to apply and which cannot therefore preserve his continuity of employment despite the obvious breaks.
 26. The remaining question which arises is therefore under section 212(3)(b) of the Act and the extent to which there can be said to have been a temporary cessation of work during the periods which would otherwise break the claimant's continuity of employment.
 27. In the first place it is clear that the third respondent engages Postgraduate Teaching Assistants on a casual and ad hoc basis only to fill temporary vacancies for teaching or marking if and when these arise. This can be for a number of reasons including fluctuating student numbers and absences of more permanent staff. Some of the Postgraduate Teaching Assistants are not employees, and in any event I have heard no

- convincing evidence to the effect that they are regarded or treated as being absent because of a temporary cessation of work between these ad hoc and temporary assignments. The contracts were used to cover gaps in staffing requirements and staff shortages and there was never any guarantee or reasonable expectation at the end of each contract that there would be any further work available. For these reasons in my judgment there cannot be said to have been any temporary cessation of work between the first and second contract, and the second and third contracts.
28. The claimant was engaged as an Associate Lecturer on a fixed term contract basis before both the third and the fourth contracts. Each contract made it clear that he was being engaged on a fixed term contract only, with a confirmed commencement date for the statutory period of continuity of employment and with a specified termination date at the end of the fixed term. Any re-engagement was always going to be subject to student numbers and other funding issues, and subject to a competitive interview process.
 29. The claimant asserts that his meeting with Prof Devenney in July 2015 and the subsequent exchange of e-mails with Mrs Hustwayte effectively amounts to offer and acceptance of a teaching position in Criminal Law and that there was no break in employment or only a temporary cessation of work. I do not agree with that analysis. Mrs Hustwayte made it clear that she and Prof Devenney had been exploring opportunities and that the contractual basis of any future relationship had yet to be confirmed. She was merely enquiring whether the claimant might be available to teach Criminal Law. No offer was made to the claimant until funding subsequently became available, and only then with effect from 1 September 2015. The claimant then signed the letter of appointment dated 12 August 2015 making it clear that it was a fixed term contract and that the commencement of his statutory period of employment was 1 September 2015. He later confirmed in his e-mail to Prof Devenney that: "there are no issues". As a lecturer in contract law he can reasonably be assumed to have understood the position as it was explained to him, and he raised no objection.
 30. At the time of the termination of the third contract, at the end of the claimant's first stint as an Associate Lecturer under a fixed term contract, there was never any assurance, understanding or guarantee that the claimant was to be re-engaged or re-employed on any basis. In my judgment it cannot be said that following the termination of the third contract the claimant was then absent on account of a temporary cessation of work.
 31. Accordingly I find that there was yet another break in the claimant's period of continuous employment between the third and fourth contracts. His period of continuous employment commenced on 1 September 2015 which was the date understood and agreed by the parties. His employment was terminated on 31 July 2016. Accordingly the claimant does not have sufficient continuity of employment to pursue his claim for unfair dismissal and that claim is hereby dismissed.
 32. For the purposes of rule 30(6) of the Employment Tribunals Rules of Procedure, the issues which the tribunal identified as being relevant to the claim are at paragraph 1; all of these issues were determined; the findings of fact relevant to these issues are at paragraphs 4 to 17; a concise statement of the applicable law is at paragraphs 19 to 21; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 22 to 31.

Employment Judge N J Roper
Dated 22 May 2017
*Judgment sent to Parties on
30 May 2017 by email only
Mr JA Ongaro for the Tribunal*