# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr S Wilcox**

**Respondent:** **NHS – Scarborough and Ryedale CCG**

**Heard at:** **Leeds** **On:** **3 April 2017**

**Before:** **Employment Judge Burton**

**Representation**

Claimant: In person

Respondent: Ms K Barry, Counsel

# JUDGMENT

1. The Respondent's application for a reconsideration of the Judgment sent to the parties on 17 January 2017 is refused on the grounds that it is not in the interest of justice to do so.
2. The Respondent's application for leave to amend their Response in relation to the Claimant's period of employment is refused.
3. In relation to the complaint of breach of contract the Claimant is awarded 12 weeks net pay in the sum of £635.47 being in the total sum of £7,625.64.
4. In relation to the complaint of unfair dismissal the Respondents shall pay to the Claimant:
    a. A basic award in the sum of £12,933;
    b. A compensatory award pursuant to section 124(1ZA)(b) of the Employment Rights Act 1996 in the sum of £50,467.00.
5. The Respondents shall, in addition, refund to the Claimant the Tribunal fees paid by him in the sum of £1,200.00.

# REASONS

1. On 5 and 6 January of this year I conducted a hearing at the conclusion of which I found that Mr Wilcox had been unfairly dismissed subject to 40% contributory fault and also found that his complaint of breach of contract was well founded. The matter was then listed for hearing today for me to deal with

the issue of remedy. On 16 February 2017 the Respondents submitted an application for me to reconsider my original Judgment because they now contend that the Claimant did not have the necessary period of continuous employment to enable this claim to have been brought in the first place. I directed that that application should be dealt with as a preliminary issue at the remedy hearing.

2. Going through the history of this claim, the claim form was lodged by Mr Wilcox on 9 September 2016. At section 5 of his claim form he was asked for the date when his employment began, he responded "*12 August 1996*". He was asked for the date when his employment came to an end and he responded "*16 June 2016*". The claim form was then served upon the Respondents who instructed solicitors to prepare and lodge a Response.

3. It should be said that it is within my knowledge that the Solicitors instructed by the Respondents are a very large firm of solicitors well used to dealing with National Health Service employers and employment claims. What anybody who has any experience of employment law knows is that when faced with a complaint of unfair dismissal there are three fundamental issues that first need to be checked. The first is whether the Claimant has gone through the necessary early conciliation process. The second being whether the claim was lodged in time (and of course the question of early conciliation may have a bearing upon that issue). The third is whether the Claimant has got the necessary period of continuous employment to enable such a claim to be brought. If the answer to any of those questions is "no" then an immediate application will be made to the Tribunal for a Preliminary Hearing to determine those fundamental issues.

4. When I look at the form of Response it is clear that these solicitors give consideration to that third issue. At section 4 of the Response, in answer to the question "*Are the dates of employment given by the Claimant correct*" they say "*no*". Against the box entitled "*When their employment started*" there is no entry, against the box entitled "*When their employment ended*" they insert "*15 June 2016*". So these solicitors did not just assume that what the Claimant said was likely to be correct they applied their mind to whether the Claimant had the necessary period of employment and conceded that he did albeit that he had got the termination date wrong by one day. On that basis the case was prepared for a hearing.

5. The Respondents' witness statements made no hint that there was any issue as to the Claimant's qualifying period of employment. The Claimant wasn't cross-examined as to whether he had the necessary period of continuous employment. No submissions were made at the end of that hearing that the Claimant did not have that necessary period of employment.

6. It was only a few weeks before the issue of remedy was to be determined that the Respondents came to the view that the Claimant did not have the nineteen years service previously conceded by them but, in fact, had less than two. Ms Barry tells me that this error, if such it was, arose because the computer system recording employees' length of service recorded the Claimant as having that nineteen years of reckonable service with the NHS and so they thought no more about it. It is said that it has now been realised that "*reckonable service*", which is an NHS concept which entitles NHS employees to transfer employment benefits from one NHS post to another, even though, technically, the employer may be a different legal entity does not, as such, create continuity of employment.

7. I am told that the Claimants contract of employment, which, at all relevant times, was in the possession of the Respondents, shows that he had less than two years continuous service with the Respondents. I am told that further confusion arose because the majority of the Respondents employees transferred to their employment, when the Respondents were created as a legal entity, and so enjoyed continuity of employment pursuant to the Transfer of Undertaking Regulations whereas the Claimant applied for a new post within the Respondent organisation and left his existing NHS post when successfully appointed which did not give him that statutory protection. I make no findings, at this stage, as to whether the arguments now advanced by the Respondents are correct or not. My first decision is to determine whether I should reconsider this Judgement at all.

*8.* Rule 70 of the Employment Tribunal Rules tells me that "*A Tribunal may either on its own initiative (which may reflect a request from the Employment Appeal Tribunal), or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision,(" the original decision") may be confirmed varied or revoked. If it is revoked it may be taken again".*

9. So the first hurdle that these Respondents have to get over is to satisfy me that reconsideration is necessary in the interest of justice. I have referred myself to the decision of the Employment Appeal Tribunal in a case known as **Lindsay v Ironsides Ray and Vials** [1994] IRLR 317 where the then President Mr Justice Mummery said as follows:

   "*The power to grant a review on the grounds that the interests of justice requires such a review is in very wide terms. It is however a power which should be cautiously exercised. As was observed by Phillips J in Flint v Eastern Electricity Board [1975} IRLR 271 the interests of justice include not only the interests of the person seeking a review but also the interest of a person resisting a review on the grounds that once a hearing which has fairly been conducted is complete that should be the end of the matter. There are also the interests of the general public in finality of proceedings of this kind*".

   He then in the same Judgment goes on to say:

   "*In essence the review procedure enables errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument*".

   He then concluded by referring to a previous decision of the Employment Appeal Tribunal in **Trimbell v Supertravel Ltd** [1982] IRLR 451 and then by saying as follows:

   "*Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to re-argue his case by blaming his representative for the failure of his claim. That may involve the Tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. If there is a justified complaint against the representative that may be the subject of other proceedings and procedure*".

10. In this case these Respondents, represented at all stages by highly experienced solicitors, would know full well the ins and outs of the systems that operated within the National Health Service. They had before them all the

information that they needed to determine whether Mr Wilcox did have the necessary period of continuous employment to enable them to bring this claim. They conceded that he did. They permitted Mr Wilcox to go through the anxious process, as an unrepresented litigant, of preparing for this hearing and of representing himself at what was without doubt a difficult and contentious hearing.

11. Ms Barry suggests that, as regrettable as all that may be, the interests of justice require that I should reconsider my Judgement. That submission, of course, focuses upon the interests of justice in relation to the Respondents. What about the interests of justice in relation to the Claimant. This is an issue that could, and if it has any merit, should, have been raised right at the start of these proceedings. If it had been, and if the Respondents are right in what they now say, this claim would have gone no further and Mr Wilcox would have been relieved of all the worry and anxiety that, as a litigant in person, these Respondents have put him through by defending his claims.

12. Instead, he now finds himself in the position where the Respondents, at this late stage, seek to deprive him of the compensation which my Judgement would justify by reason of the apparent incompetence of the Respondents or their advisors. If I were to allow the application to proceed and, if as a consequence, the Judgement were to be varied although Mr Wilcox would be compensated for his contract claim he would receive nothing for his claim of unfair dismissal and would have no recourse against the Respondents for putting him through that process, unnecessarily, if what the Respondents now say is correct.

13. In contrast, if the Respondents are correct that the Claimant did not have the necessary period of continuous employment to enable him to bring this claim either the fact that they now have to compensate the Claimant is a problem of their own making or alternatively they may look to their representatives to compensate them for their loss.

14. On that basis I do not see that it is necessary, in the interests of justice, to reopen that issue. These proceedings were fairly conducted, the claims were determined upon the basis that the respondents were able to present all the evidence that they chose and advance all the arguments that were available to them. The Claimant is entitled to rely upon the Judgement that he obtained at the conclusion of those proceedings. That should be the end of the matter.

15. Ms Barry points out that in determining remedy the issue of his length of service will be a relevant factor. I accept that is right and will deal with that question in the way I consider appropriate. In determining, however, whether it is necessary, in the interests of justice, to reconsider my Judgement I conclude that it is not.

16. Having arrived at that decision I then went on to deal with the issue of remedy. Ms Barry then raised with me the issue that it was her wish to argue that the basic award for unfair dismissal should not be based upon the nineteen years of continuous service which the Claimant relied upon but upon the much shorter period of service that the Respondents now asserted to be the case. Furthermore she wished to argue that when I came to determine what level of compensation should be awarded pursuant to section 123(1) of the Employment Rights Act 1996 she wished to resurrect the issue as to whether the Claimant had in fact the necessary period of continuous

employment on the basis that she sought to argue that if he did not it would not be just and equitable to award any compensation pursuant to that section.

17. In considering that application we agreed that, in effect, she was seeking leave to amend the Response in relation to that section to which I have previously made reference so as to release them from the concession made within that Response namely that the Claimant had nineteen years continuous service with the Respondents. That application engaged the principles set out by the Employment Appeal Tribunal in **Selkent Bus Company Ltd v Moore** [1996] ICR 836. Firstly I had to consider the nature of the amendment sought. This was of the most fundamental sort the Respondents now seeking to argue that the Claimant had no right, at all, to bring this complaint of unfair dismissal. I then had to consider the timing and the manner of the application. As I have already said, earlier in this decision, the timing of the application could really be no worse. This application comes about after a fully contested hearing has taken place and on the day that remedy was to be determined. If I were to be permit the application further witness evidence would need to be called and, for all I know, this remedy hearing would need to be further adjourned.

18. Of key significance, however, to me is the manner of the application. For the reasons previously given I refused to reconsider my earlier Judgment. If I were to permit this amendment application I would, in effect, be compelled to deal with the issue of remedy as if my earlier Judgment had been reconsidered. It would be entirely inconsistent for this Tribunal to proceed on that basis. I have delivered a Judgment that will entitle the Claimant to substantial compensation. As I have previously indicated all the information which the Respondents now seek to rely upon to assert that the Claimant did not have the nineteen years continuous employment which he relies upon was in their possession. The Respondents and/or their legal advisers simply failed to identify that issue at an earlier stage or to raise it when they could and, if they are right, should have done so. I see no reason why, therefore, I should permit the Respondents to have leave to amend their Response at this late stage in relation to such a fundamental issue.

19. Having arrived at that determination I then proceeded to deal with the issue of remedy. Ms Barry acknowledged that in relation to the contract claim on the basis of my earlier findings the Claimant was entitled to 12 weeks net pay in the total sum of £7,625.64.

20. She also accepted that, on the basis of my earlier findings in relation to the period of the Claimant's employment his entitlement to a basic award was correctly calculated in the sum of £12,933.00.

21. As far as the compensatory award was concerned it was clear that this claim was likely to be limited by the provisions of section 124(1ZA)(b) of the Employments Right Act 1996 namely that the compensatory award was likely to be limited to 52 weeks pay.

22. The Claimant's evidence indicated that he had not found alternative employment since his dismissal in June of 2016. He had the benefit of a public sector final salary pension scheme and of course he would be entitled to be compensated for the losses arising out of his dismissal in advance of whatever would have been his expected retirement age. Before taking detailed evidence from the Claimant in order to carry out a detailed calculation as to the Claimant's losses attributable to this act of unfair dismissal I

suggested to Ms Barry that, even in the light of the finding of 40% contributory fault, it seemed improbable that this compensatory award would be worth less than the Claimant's annual salary of £50,467.00. Helpfully Ms Barry took time to consider that proposition and sought instructions upon it. Recognising the Respondents' wish to preserve their right to appeal other parts of this decision she helpfully indicated that, although she was in no position to consent to a specific Judgment in favour of the Claimant, in the light of the observations that I had made she neither sought to cross-examine the Claimant nor make any positive submissions as to why I should not make an award in that amount.

23. The Claimant having succeeded in this claim I also order that the Respondents should reimburse to him the Tribunal fees that he has paid in the sum of £1,200.00.

Employment Judge Burton

Date: 7 April 2017

Sent: 10 April 2017