EMPLOYMENT TRIBUNALS

Claimants: Stephen Noyce

Respondent: Redline Oil Services Limited

Heard at: Southampton On: 15 January 2019

Before: Employment Judge Gardiner

Representation:

Claimant: Mr Francis Payne, Counsel

Respondent: Mr Christopher Edwards, Counsel

JUDGMENT ON PRELIMINARY ISSUE

1. The Claimant has sufficient continuity of employment under Section 108 Employment Rights Act 1996 to bring a claim for unfair dismissal.

REASONS

1. This is a preliminary hearing to decide whether the Claimant has jurisdiction to bring a claim for ordinary unfair dismissal against Redline Oil Services Limited. Mr Noyce also brings a claim for failing to pay him his notice pay.

2. Mr Noyce was dismissed by Redline on 21 February 2018. In defending the claim, the Respondent argues that the tribunal does not have jurisdiction to consider the unfair dismissal claim because the Claimant was continuously employed for a period of less than two years ending with the effective date of

termination. Not less than two years continuous employment is needed by Section 108 Employment Rights Act 1996 in order to bring an unfair dismissal claim.

3. It is the Respondent's contention that the Claimant started work with the Respondent on 12 June 2017 and therefore, by the date of his dismissal he had only been employed for around eight months. The Claimant's answer is that he is entitled to rely on his prior employment to give himself the necessary continuity, given the terms in which 'continuous employment' is defined in the Employment Rights Act.

4. The Respondent had previously argued in the ET3 that there was an earlier period in which continuity of employment had been interrupted, namely a gap between 4 December and 10 December 2016. That argument has been withdrawn and the point is no longer pursued.

5. Witness evidence was given by the Claimant and by Zoe Burden, HR Generalist, on behalf of the Respondent. Both were cross-examined. There was an agreed bundle of relevant documents although I was only taken to a limited number of documents.

6. The relevant sections of the Employment Rights Act 1996 are as follows :

Section 212 Weeks counting in computing period

(1) 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
(2) …
(3) Subject to sub-section (4), any week (not within subsection (1)) during the whole or part of which an employee is –
    (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.

counts in computing the employee's period of employment.

Section 213 Intervals in employment

(1) When in the case of an employee a date later than the date which would be the effective date of termination by virtue of subsection (1) of section 97 is treated for certain purposes as the effective date of termination by virtue of subsection (2) or (4) of that section, the period of the interval between the two dates counts as a period of employment in ascertaining for the purposes of Section 108(1) or 119(1) the period for which the employee has been continuously employed.

Section 97 Effective date of termination

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"

a. In relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires;
b. in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.

(2) Where –

a. the contract of employment is terminated by the employer, and
b. the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(4) Where –

a. the contract of employment is terminated by the employee,
b. the material date does not fall within a period of notice given by the employer to terminate that contract, and
c. had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection(1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

Section 218(1) and (6) Change of employer

(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

…

(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer-

(a) The employee's period of employment at that time counts as a period of employment with the second employer, and

(b) the change of employer does not break the continuity of the period of employment.

Factual findings

7. The material facts are uncontentious. Mr Noyce had been employed by Redline Oil Services Limited since 2004. In late 2016 he left Redline and started working in Afghanistan for a company called NCS Fuel. It was common ground by the time of this Preliminary Hearing that the move from Redline to NCS in late 2016 did not interrupt his continuous employment. NCS and Redline are associated companies that belong to the same corporate group, whose parent company was World Fuel Services Europe Limited ("WFS").

8. Mr Noyce did not enjoy working in Afghanistan. On 29 May 2017 he resigned his employment giving his 30-day contractual notice (contract, clause 13.1), ending on 28 June 2017. At that stage, he had no other job to go to once he had worked his notice. On 1 June 2017 he was offered an alternative job working for Redline. The offer came from NCS's HR manager, who was based at World Fuel Service Limited's headquarters in London. It was agreed that the role would start on 12 June 2017 at Southampton Airport, and that he would not be required to work his contractual notice in Afghanistan. It was also agreed that the last date of his employment for NCS would be on 3 June 2017 and his pay entitlement on NCS's payroll would be calculated to that date. The email provided as follows :

> "By mutual agreement you agree to waive the PILON so you may start in your new role on 12 June 2017"

9. That wording was recognition that he would otherwise have been entitled to be paid for the remainder of his period of contractual notice from 3 June 2017 to 28 June 2017. There was no PILON clause in his contract. On 5 June 2017, Mr Noyce was emailed a contract for the intended role at Southampton Airport. This role was titled Temporary Aircraft Refuelling Technician. The document said that the role would commence on 12 June 2017. As with his previous contract with NCS, it required him to adhere to various WFS Foundation Policies.

10. Mr Noyce downloaded and printed this document, signed it and dated it 6 June 2017, and scanned it in, sending it back to Redline. He then started work for Redline on 12 June 2017.

Arguments

11. The Claimant advances four arguments, which I will deal with in turn. All are addressed in the Claimant's Skeleton Argument and in the Skeleton Argument on behalf of the Respondent. The Claimant withdrew a fifth argument based on temporary cessation of work at the start of the hearing.

(1) Section 212 : Weeks counting in computing period

12. The Claimant argues that he has sufficient continuity of employment notwithstanding the apparent gap from 3 June 2017 to 12 June 2017. His argument is that his employment was governed by a contract of employment from 3 June 2017 to 12 June 2017 because on 1 June 2017 there was an oral agreement that he would work for Redline and on 6 June 2017 there was a written agreement that he would work for Redline. He relies on the authority of *Welton v Deluxe Retail Limited (t/a Madhouse)* [2013] ICR 428*,* a decision of Langstaff J, which considers the meaning of the words "*governed by a contract of employment*". In essence, Langstaff J held that an employee could be governed by a contract of employment even before the employee starts work, so long as the contract has been concluded.

13. At paragraph 27 of *Welton* Langstaff J said this, in summarising the EAT's conclusion :

> The apparent approach of the draftsman of Section 230 ERA, the principle adopted by a majority in *Gunton*, the reasoning in *Sarker*, and an argument from first principle all coincide : once a contract such as that in the present case was made, it was one of employment. Though not requiring performance of actual work until the week beginning 7th March, it governed the relations between the Claimant and Deluxe from its inception.

14. Against that, it is said on behalf of the Respondent, that this section does not apply in the present case. That is because of Section 218(1) and 218(6).

15. Section 218(1) states that "Subject to the provisions of this section, this Chapter relates only to employment by the one employer". In *Services for Education (S4E Limited) v Mr K White* UKEAT/0024/15/DM, at paragraph 29, Mrs Justice Laing said that the claimant could not rely on Section 212(3)(b) to tide him over a gap because this was prevented by Section 218(1). In that case there had been employment by two potential employers, namely a transferor and a transferee in a TUPE transfer situation. Laing J held that Section 218(2) applied to preserve continuity of employment. Therefore, it was not necessary for the Claimant to rely on Section 212 and Laing J's view that it was not possible to do so was *obiter*.

16. Mr Payne, Counsel for the Claimant, has directed me to two cases where it appears that a claimant was able to invoke Section 212 or its predecessor, in circumstances where there were associated companies rather than the same employer : *Bentley Engineering Limited v Crown and Miller* [1976] IRLR 146 and *Holt v EB Security Limited – In liquidation* UKEAT/0558/11. In neither case was reference made to Section 218(1) or its predecessor. It was integral to the result in each case that the claimant could rely on Section 212 notwithstanding that there was more than one employer.

17. Neither *Bentley* nor *Holt* was referred to in *S4E.* Laing J did not consider how her interpretation of Section 218(1) was consistent with the approach taken in those cases. As a result, I consider myself bound by *Bentley* and by *Holt* to reject the Respondent's argument that the Claimant is precluded from relying on Section 212 here merely because the potential continuous service derives from two associated employers rather than one employer. I interpret Section 218(1) as saying no more than that "normally weeks worked with one employer do not count for another", as stated in *Harvey on Industrial Relations and Employment Law* at H [35].

18. In addition, in *Harvey* at H [566]-[576] the authors state as follows, in the section on associated employers :

> Preservation of continuity in such cases rests on Section 218(6). A break in contractual continuity between the two employments may break continuity, but the bridging provisions of s212(3), if applicable,

> will apply to preserve continuity : see the cases discussed at para [188] ff above.

19. Such wording assumes that it is possible for a claimant who can bring himself within Section 218(6) to rely on Section 212(3), if necessary, to bridge a gap in continuity. The result accords with the statutory purpose of the continuity of employment provisions, as explained by Wood J in *Macer v Abafast Limited* [1990] ICR 234 at 242F :

> > Continuity of service as the basis of jurisdiction is an essential and fundamental notion in the protection of employees' rights and remedies. The computation works backwards from the date of dismissal. Thus, in approaching the proper construction to be given to the words of the Act of 1978, the court should lean in favour of that interpretation which best gives effect to the preservation of continuity of service and hence to the preservation of rights of the employee.

20. As a result, I consider that the Claimant is entitled to rely on Section 212(1), notwithstanding that there are associated employers. Adopting the analysis of Langstaff J in *Welton*, there was no week or part of a week in which the Claimant's employment was not governed by a relevant contract of employment. There is no break in continuity of employment. Mr Payne's first argument succeeds.

21. Strictly it is not necessary for me to consider the remaining arguments. However, for the sake of completeness, I do so.

(2) Arrangement or practice

22. I do not consider that there was any such arrangement or practice here that had the effect of giving the Claimant continuity of employment. The arrangement or practice must be one in which Mr Noyce is "*regarded as continuing in the employment of the employer for any purpose*" despite being absent from work. That is not the present case. Mr Noyce in evidence said that the arrangement was provided by the third bullet point in the email of 1 June 2017. That bullet point provides the exact opposite to what the Claimant seeks to argue. It provides that Mr Noyce will not be in employment from 3 June 2017 until 12 June 2017.

(3) Umbrella contract

23. Mr Payne, Counsel for Mr Noyce, argues that there was an umbrella contract here which has the effect of preserving continuous employment notwithstanding the move from NCS to Redline and the gap between 3 June 2017 and 12 June 2017. He argues that the umbrella contract is with World Fuel Services Europe Limited, essentially because the HR manager for NCS and Zoe Burden, the HR Generalist for Redline, have the same London work address, that emails were sent from those addresses to the Claimant, that the role with Redline was offered by the NCS HR Manager and that the Claimant

owed various obligations to abide by WFS policies and to maintain WFS confidentiality.

24. In order to imply a contract, it must be necessary to do so. I do not find that it is necessary to imply such a contract to give business efficacy to the arrangements between the parties. Rather the Claimant was employed by one company and moved to work with a different company, albeit within the same corporate group. The offer of employment with Redline was made by Mr Choy as agent for Redline. Even if there was an implied umbrella contract with WFS, then this does not give sufficient continuity of employment with Redline, who is the Respondent in the Employment Tribunal proceedings.

(4) Section 218(6) ERA

25. The question is whether this Section, on its own, is sufficient to bridge the gap in continuity of employment, if I am wrong in concluding that the Claimant is entitled to rely on Section 212.

26. It is necessary to analyse this Section with some care. The Section as a whole applies to situations where there is a change of employer. It governs a situation where there is a change of employer and for that reason it could potentially be argued that the periods of employment working for both employers should not be aggregated. It provides that in the situations that are specified, periods of employment for both employers counts, notwithstanding the change from one employer to another employer.

27. Thus where an employer dies and the employee is taken into the employment of the personal representatives, the fact of the change is not such as to break continuity. Again, where there is a change in the partners who employ someone, the change in the partners is not to be taken as breaking continuity of employment even though technically the identity of the employer has changed.

28. Therefore, where one employee transfers from one associated employer to another associated employer, the employee is entitled to rely on the periods of service with both employers, when calculating the total period for which he has been employed. However, the section is silent as to breaks in employment between the first employment and the second employment.

29. The Claimant's argument is that the different wording of this Section ought to be given the same interpretation as the wording in Section 212. Therefore, the Claimant argues that if Section 218(6) applies rather than Section 212, then Section 218(6) still has the effect of maintaining continuity because continuity applies from when the contract was agreed, not from when employment starts. Because it was agreed on 1 June 2017 (at least in outline) then there is continuity from 3 June 2017 onwards.

30. I disagree. The natural reading of Section 218(6) is that an employee is taken into the Respondent's employment when his employment starts with the Respondent. That was the case from 12 June 2017 onwards. There is

nothing in Section 218(6) that bridges what would otherwise be a gap in continuity.

The potential relevance of Section 213

31. At the conclusion of submissions, I reserved my decision. In considering the submissions and the relevant law, it appeared to me that Section 213 may be of potential relevance. I emailed counsel for both parties as follows :

> Please would both parties address the following point relevant to the issue of continuity of service:
>
> Is Section 97 ERA in conjunction with Section 213 ERA relevant to the question of whether there was a break in the continuity of employment between 3 June 2017 and 12 June 2017 ? See *Charnock v Barrie Muirhead Limited* [1984] ICR 641. If so, please set out your client's position as to the effective date of termination of the Claimant's employment with NCS and its impact on the period of continuous employment with Redline, if any.

32. I received written submissions on the point from Mr Edwards, Counsel for the Respondent. His position was that Section 213 was of no application. Mr Payne, Counsel for the Claimant, responded as follows :

> S97 ERA 1996, read in conjunction with s213 ERA 1996, is indeed another route by which an Employment Tribunal could bridge a gap in employment by two associate employers (as illustrated by the prior provisions of the Employment Protection (Consolidation) Act 1978, referred to in *Charnock v Barrie Muirhead Limited* [1984] ICR 641). However, the Claimant does not wish to rely on these provisions given the facts of his case. The Claimant maintains its position as set out in the skeleton argument and the submissions made during the Employment Tribunal Hearing on 15 January 2019.

33. The Claimant is thereby expressly waiving any reliance on Section 213 to argue this this bridges the gap in continuity that otherwise would apply. As a result, I have not considered whether the operation of Section 213 to this particular case, as applied in *Charnock v Barrie Muirhead Limited* [1984] ICR 641, may also have entitled the Claimant to establish the necessary continuity of employment.

Conclusion

34. For the reasons given above, the Claimant does have the necessary period of employment in order to bring a claim of ordinary unfair dismissal. The unfair dismissal claim will progress to a final hearing to be determined on its merits. If further Tribunal directions are required, then the parties are to ask the Tribunal to make those directions or request a further case management hearing.

Employment Judge Gardiner

8 February 2019