



EMPLOYMENT TRIBUNALS

Claimant: Mr Ramsi Seef

Respondent: DHL Services Limited

Heard at: Birmingham

On: 16 January 2020

Before: Employment Judge Flood (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr Frew (Counsel)

JUDGMENT ON PRELIMINARY HEARING

The claim is dismissed because the claimant is not entitled to bring his claim for unfair dismissal as he was employed by the respondent for less than two years.

REASONS

Background

1. By a claim form presented on 1 July 2019 the claimant brought a complaint of unfair constructive dismissal against the respondent following his resignation with effect from 9 May 2019. There was a suggestion in the claim form that the claimant may be bringing a disability discrimination complaint. He confirmed on 30 August 2019 that this was not pursued.
2. The respondent submitted a response on 6 August 2019 and in that it contended that the claimant was employed by it between 10 September 2017 and 9 May 2019 and therefore did not have 2 years continuous employment and so the Tribunal did not have jurisdiction under section 108 Employment Rights Act 1996 to hear his complaint of unfair dismissal.
3. The specific circumstances where the 2 years' continuous employment requirement do not apply do not appear to apply to the claimant's claim.
4. The matters was therefore listed for a preliminary hearing on 14 September 2019 to determine whether the claimant has sufficient qualifying service to bring his claim which came before me today.
5. I heard evidence from the claimant and I had a written witness statement from Mr Nigel Wood, HR Officer of the respondent, although he did not appear. I had a bundle of documents from the respondent ("Bundle") and some additional documents brought by the claimant.
6. An oral decision was given as above at the conclusion of the hearing. The claimant requested written reasons so these are now provided.

Issues

7. Does the claimant has two year's qualifying service with the respondent? In deciding that I have to determine:
 - a. Was there a change of employer ar the time the claimant started to work in August 2016? If so;
 - b. Do any of the exceptions as set out in section 218 ERA or otherwise apply which mean the claimant's employment was treated as being continuous notwithstanding the change of employer?

The relevant facts

8. The claimant started working at the respondent's Spectrum for Arcadia Warehouse site in August 2016. The respondent provides warehouse and distribution services for Arcadia Group Limited, the largest fashion retailer in the UK. The services to Arcadia are provided through a business unit called Spectrum for Arcadia. The respondent staffs this business unit with a combination of directly employed workers and workers employed via various employment agencies. At this point the claimant was employed by an employment agency called Transline Recruitment ("Transline"). He accepts that he was employed by Transline, not the respondent at this time.
9. There were around 50/60 workers on site, a mixture of agency workers and those directly employed by the respondent. He had a team leader who he believed to be directly employed by the respondent and the team was made up of agency and non-agency workers. They all wore the same uniforms and it was not clear who worked for which organisation. He arranged shifts with Transline by text message but there was always plenty of work and he worked pretty much continuously for them. In around April 2017 he arrived for work and was told that Transline was going into liquidation and that a new agency, called 24/7 Recruitment Services ("24/7") would be taking over staff that had been employed by Transline. He signed up for this new agency that same day. He was introduced to this new agency by the respondent managers on site. He signed documents with 24/7 that day but does not retain a copy.
10. He started work immediately for 24/7 and carried on working as normal carrying out the same duties within the same team and had the same team leader. They had a new uniform with 24/7 branding. He received his pay weekly from 24/7 and showed me the payslips he received which were at pages 31-57 of the Bundle. His employee number changed after a couple of months on such payslips but the name throughout was 24/7. The rate of pay was the same as it has been with Transline. His work with 24/7 was arranged by him responding to text message requests to work initially. This changed so that he affectively attended every day unless he received a text saying no work was available. He generally worked full time hours but there were times where hours fluctuated. I saw payslips at page 51 and 53 of the Bundle which illustrated this fluctuation.
11. In around July 2017 he saw an advertisement in the staff room for a permanent role with the respondent. He applied; attended an interview on 17 July 2017 (notes pages 84-87 Bundle) and was offered employment with the respondent by a letter dated 15 August 2017 which enclosed a contract of employment (shown at pages 28-38) for him to sign and return. The claimant signed and returned these documents and accepted this offer of employment. He noted that at clause 1.6 the contract said that his continuous service with the respondent started on 10 September 2017 and that no period of employment

counted as part of his continuous service (page 29 Bundle). He did not discuss this issue of continuous employment with anyone nor was he given any assurance that this would not be the case.

12. He was on the same rate of pay at when employed by the respondent as he had been previously and had the same team leader and carried out the same duties. He was provided with a new uniform with respondent branding. He moved from weekly to monthly pay and his first payslip with the respondent is shown at page 58. He was provided with a P45 from 24/7 shortly after starting with the respondent which we saw a copy of in the claimant's documents. This showed that the claimant's employment ended on 1 October 2017 and identified his employer as Avmerya Limited, a company which the claimant had not heard of before. From the Companies House website, Avmerya Limited is a company which was incorporated in April 2017 and dissolved in September 2018. It has one director, Mr Anilbhai Jimaniya who is shown as someone with significant control, owning 75% or more of the shares.
13. The claimant described working with the respondent as stricter than with the agency. He was employed on a minimum number of weekly hours of 23 and an average number of weekly hours of 37.5.
14. The claimant resigned from his employment on 9 May 2019 (page 96 Bundle) and was processed by the respondent as a leaver on the same day (page 97 Bundle).

The Law

15. Section 94 the ERA provides

"94 The right

(1)An employee has the right not to be unfairly dismissed by his employer."

Section 108 of the ERA provides

"108 Qualifying period of employment

(1)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."

Section 210 (5) of the ERA provides

"A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous"

16. That presumption does not apply where the person's employer has changed: see *Jones v Schwarzenbach* (2015) UKEAT/0100/15, [2015] All ER (D) 145 (Sep).
17. The concept of continuity of employment is a statutory concept (see *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1979] IRLR 327, [1979] ICR 706). This cannot be overridden by means of a contractual agreement (see *Collison v BBC* [1998] IRLR 238).
18. Section 218 (1) of the ERA provides

"218 Change of employer

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

Therefore for employment to be continuous, employment must be with one employer and separate companies are treated distinct entities. The 'corporate veil' may only be pierced if it is sham arrangement concealing the true facts (National Dock Labour Board v Pinn & Wheeler Ltd [1989] BCLC 647).

19. There are exceptions set out in section 218 (2) to (10) ERA. The relevant sections are:

Section 218 (2) of the ERA which provides

“(2) If a trade or business, or an undertaking (whether or not established by or under an Act), 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.”

and

“Section 218 (6) which provides

(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.”

Submissions

20. The claimant said that he was not sure who his employer was prior to starting work with the respondent in September 2017 and says that there was a transfer between Transline and 24/7 in May 2017. He says that it was managers at the respondent that introduced him to 24/7 and it was only after he moved to the respondent that he became aware of the company referred to as Avmerya limited. He is unsure whether this is an associated company with the respondent or related to 24/7. He accepts that he was employed by three different employers during this period but contends that he worked continuously throughout this period without a break of at least a week between each period of employment. Therefore he contends that his employment with Transline and 24/7 or Avmerya Limited is continuous with his employment with the respondent giving him more than 2 years’ continuous employment.
21. Mr Frew submitted that there is no basis to argue that simply working without a break in service as said by the claimant is enough for there to be continuity

of service as there are in effect three different employers here and three different periods of service. Therefore, he submits, as a matter of law he does not have continuity of employment. He took me through section 218 ERA which provides all the exceptions to the rule that a change of employer breaks continuity and sets out where employment can be continuous where there has been a change of employer but he says that none of these apply to the claimant's situation. There was no transfer of employment between 24/7 or Avmerya Limited he says, under TUPE or otherwise, and neither is an associated employer of the respondent. None of the other exceptions are relevant. There is no suggestion that this is a tripartite arrangement where the true employer was DHL throughout. Therefore, he says that as no exception applies, there is no continuous service and accordingly no jurisdiction.

Conclusions

22. Section 108 ERA provides that if the claimant does not have two years continuous employment that the tribunal has no jurisdiction and cannot hear the claimant's claim for unfair dismissal. As the presumption of continuous service contained in section Section 210 (5) of the ERA does not apply if there has been a change of employer, I firstly considered whether there was a change of employer when the claimant started to work for the respondent in September 2017. It is clear on the facts found at paragraphs 10-12 above that there was. He was previously an agency worker employed by firstly Transline and then 24/7 to provide service for the respondent organisation. He saw an ad for, applied for and was successful in getting a role with the respondent and therefore started work for them directly in September 2017. A contract was issued which very clearly set out that this was a different employer. Different terms and conditions applied and it expressly and confirmed that no previous employment counted towards continuous service. It is not necessary for me to determine whether there was a change of employer at the time he moved from Transline to 24/7 as neither of those companies are a respondent to this claim. We do not have that information in any event, but it seems likely that there was a change of employer at that time too.
23. I have looked at whether this is the sort of case where the claimant could allege that his employment with Transline and/or 24/7 was some sort of sham and in fact he was employed by the respondent throughout via some sort of tripartite arrangement. I do not see any grounds at all for suggesting this is the case. The claimant clearly understood himself to be employed by the two agencies and was so employed by each agency separately before joining the respondent as a direct employee on 10 September 2017.
24. The next question I considered was whether any exceptions apply as set out in section 218 of the ERA or otherwise which mean employment was continuous notwithstanding the change of employer. The only possible relevant sections appeared to me to be section 218 (2) where there was a transfer of a business or 218 (6) where it is an associated employer. As for section 218 (2) I see no basis or suggestion that there was a transfer of any business or undertaking that applied at the time that the claimant joined the respondent in September 2017 and this is the key date as this is the date that would break continuity. No evidence has been produced suggesting this is the case and the claimant's evidence and supporting documentation I have seen suggests otherwise. Whether or not there was a transfer of business or undertaking between Transline and 24/7 back in April/May 2017 is not relevant because neither company is the respondent and it is the link to the respondent in September 2017 that is the crucial point on this issue. Therefore I do not

see any basis for suggesting that employment was continuous by reason of section 218 (2).

25. Section 218 (6) deals with where there is a transfer to an associated employer. The only possible suggestion raised by the claimant relates to the fact that respondent managers referred him to the 24/7 agency and he wonders whether they are associated companies. There is no evidence of this and I do not accept that the respondent is in any way an associated company of either Transline, 24/7 or indeed Avmerya Limited. The company search information does not suggest any link at all.
26. None of the other exceptions apply therefore the claimant does not have continuous service with the respondent before 10 September 2017. Therefore he does not have two years continuous services as required under section 108 ERA and the Tribunal has no jurisdiction to hear his claim. It is therefore dismissed.

**Employment Judge Flood
16 January 2020**