



Case No. 2200958/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr D Sinobad

Respondents: UK Mission Enterprise Limited

Heard at: London South (By CVP) **On:** 20-21 June 2022

Before: Employment Judge Self

Appearances

For the Claimant: Mr M Singh - Counsel

For Respondent : Mr M Humphreys – Counsel

RESERVED JUDGMENT

1. The Claimant's continuous periods of employment with the Respondent are.
 - a) 1 March 2003 until 26 January 2017;
 - b) 19 April 2017 until 20 September 2019;
 - c) 30 May 2020 until 9 December 2020.
2. The Claim for "ordinary" unfair dismissal is dismissed as the Claimant does not have the requisite service to bring such a claim.
3. This matter will be listed for a further Telephone Case Management Hearing to finalise the issues and timetable to a final hearing.

WRITTEN REASONS

1. By a Claim Form dated 26 February 2021 the Claimant brought claims against his former employer UK Mission Enterprise Limited for unfair dismissal, notice pay and “claims related to whistleblowing and fixed-term employee status”. The Claimant had entered Early Conciliation on 24 January 2021 and that concluded on 1 February 2021. Within that Claim Form and importantly for the purposes of this hearing the Claimant stated that he was engaged as a chauffeur and that his employment started on 1 March 2003 and ended on 9 December 2020. The Claimant was thereby asserting that he had the necessary continuous employment to satisfy section 108 (1) Employment Rights Act 1996 i.e., that he had continuous employment of not less than two years.
2. The Respondent filed their Response and at section 4.1 of the Response stated:
“The claimant was employed under a series of fixed term contracts. His continuity of employment was broken between each contract. Consequently, he has not been employed on a continuous basis since 2003”.
3. The matter came before EJ Elliott by way of a Telephone Case Management Hearing and this Open Preliminary Hearing was listed to consider:
 - a) What was the Claimant’s period of continuous service and
 - b) Further Case management as necessary including listing the full merits hearing.
4. EJ Elliott recorded at paragraphs 2.4 as follows:
“The matter of continuity of employment is relevant to the unfair dismissal claim. The Claimants case is that he has continuity from March 2003 and the Respondent’s case is that he has continuity from May 2020 . The Claimant’s case, in the alternative, is that he has continuity from April 2017.

If the Respondent is correct, the Claimant does not have sufficient service to claim ordinary unfair dismissal and any further claim for Notice Pay would fall away. There may also be implications for the claim under the Fixed Term Employee Regulations.

The Claimant is to give further particulars of the detrimental treatment relied upon below. The continuity issue is also likely to affect the period over which the Claimant may be able to claim.”

5. The matter was heard by me over two days. Counsel represented both parties and I wish to express my thanks for the assistance they both provided. On the first day I heard some evidence from the Claimant and from Mr Nimrod, a chauffeur who was also engaged by the Respondent. I then heard evidence from Mrs Aslett, who needed to be interposed as she was not

available on the following day. Both parties were in agreement with that course of action.

- 6.** All witnesses provided a written witness statement. On Day 2, we concluded the evidence of the Claimant and I read closing statements from both parties and also listened to the closing submissions of both counsel. There was a bundle in excess of 1,000 pages and I considered such documents as the parties directed me to. In the circumstances and taking into account the time the hearing concluded and the issues that I needed to decide I elected to reserve my decision.
- 7.** It is agreed between the parties that the Claimant's contract came to an end on 9 December 2020 and therefore to have the necessary two years continuity he would need to have had continuous employment from 10 December 2018.
- 8.** At paragraph 3 of Ms Aslett's statement she records that the Claimant was employed as a Chauffeur under a series of fixed term contracts since 2003. She was not engaged by the Respondent until 2008.
- 9.** The Claimant states that he started driving for the Dubai Royal family via an agency called Beauchamp Bureau in March 2003 and that he did two seasons on this basis. He then states that the next two seasons (2005 and 2006) through an organisation called Change UK. For each of these four years the Claimant believes that he worked from March /April to October – a period of 7-8 months.
- 10.** According to Companies House the respondent came into being in October 2005 and the first documentary evidence of it engaging the Claimant was when the Claimant, at the end of October 2006, was told that the Peak Season had now ended and he was offered an Off Seasonal Temporary Assignment (109). That assignment came to a conclusion on 31 January 2007 (126).
- 11.** It is not disputed that the Claimant worked for the Dubai Royal Family via different agencies / employers from 2003 and via the Respondent from 2006. The parties have agreed a chronology and that sets out that each year the Claimant would become reemployed on varying dates from late February to early April and would be let go between late October and late January. Over the years from 2006 the shortest period was approximately six months and the longest almost 11 months.
- 12.** The rationale behind why the patterns were as they were is that the Dubai Royal Family have, for many years been very involved in horse racing in the UK and the world and in the UK the main flat season runs from around March until early November and that is why a large number of chauffeurs are

required over that period. I was told that after that time there is a lesser need for drivers during the shooting season.

13. The Claimant contended that his manager was David Walsh. The Respondent denied that Mr Walsh worked for them and contended that he was a key member of staff of the Dubai Royal Family. I accept the Respondent's evidence on this point. I have no doubt that Mr Walsh was very involved in the Claimant's life when he was working but I am entirely satisfied that he was a third party who had the authority to direct the Respondent according to the needs of the client. It would appear that the Respondent was created to service the needs of the Dubai Royal family whilst in the UK. There is no doubt in my mind that as the sole client (or most significant client) their influence was huge and at all times determinative.
14. I have no doubt that the Claimant was highly valued by the Dubai Royal family and it is also clear to me that he was one of their (and Mr Walsh's) preferred drivers. Later in the Claimant's employment when the Claimant was dismissed by the Respondent for speeding, pressure was exerted by the client to ensure he was reengaged by the Company for the next season.
15. I am satisfied that each year there was an estimate made of the number of drivers that would be required and the Respondent would be charged with undertaking the administration to ensure those numbers were met. I have no doubt that some advertising was undertaken but many of the drivers returned back year after year especially those who were favoured (such as the Claimant) by Mr Walsh and/or individual members of the Dubai Royal Family.
16. Each year the Claimant would be informed that the Respondent were recruiting and because the Claimant was a favoured driver I have little doubt that Mr Walsh or others from The Dubai Royal Family may well have tipped the Claimant off as well. The Respondent suggested that each year there was a "formal and robust" recruitment exercise. I do not accept that. There was an interview of sorts in the sense that a form was filled out that recorded what the Claimant had done in the down time, whether he enjoyed the role last year and anything he would improve and an update on matters such as start date and any penalty points. In my view the interview was little more than a means to update the records for the driver. If a favoured driver, as the Claimant was, wanted to return then it was little more than a formality. Indeed, the control of the client over the Respondent was such that even when they had dismissed the Claimant for misconduct he was still re-engaged.
17. Ms Aslett in her statement gave evidence that some returning drivers were unsuccessful at interview but she gave no concrete examples over and above that broad statement unsupported by any evidence. I do not accept her evidence on that point as she could easily have brought concrete

examples. I have no doubt that onboarding checks would be undertaken and that there was an induction day of sorts but I do not accept that this would indicate that there was not a temporary cessation of work.

18. On 4 January 2016 Ms Dosova, a HR Coordinator, sent a letter to the Claimant (519) which stated that the company were making preparations for 2016 and that they would like to utilise the Claimant's services again. The Claimant was required to register his interest via the recruitment website and the previously held Login ID and password could still be used. He had to apply by 30 January 2016. All applications had to be via that means and he was told that any offer *was subject to a "recruitment process"* which would commence in January 2016 and start dates were anticipated *"April/May/June 2016"*.
19. There is a Returner Interview Questions Form (520-521) dated 28 January 2016 and the Claimant confirms the dates he worked the previous year and other basic questions. On 15 March 2016 the Claimant was offered

"A fixed term position as a chauffeur commencing on 4 April 2016 and, subject to operational requirements, to end on the 28th of October 2016. One week's notice will be given in the event your contract ends before the stated contract end date come up except during the first month of employment during which either party may terminate the contract at any time."
20. The letter (522-523) made reference to a twelve-week probationary period and set out the weekly pay rates and a Loyalty and Performance bonus which would be paid at the end of the year, subject to a number of factors. The offer was accepted on 4 April 2016 by the Claimant. The Claimant signed a fixed-term contract of employment on the same date.
21. On 19 October 2016 an extension to the fixed term contract was agreed until 25 November 2016 and the letter states ***"your continuous date of service has been notes as the 4 April 2016"*** (551). On 9 November the Claimant was offered another extension via a Casual Worker Agreement which does not seem to guarantee the Claimant any work nor has any end date.
22. On 16 December the Claimant received a letter in identical terms (save for dates) about registering interest for 2017 (570). On 11 January 2017 (572) the Claimant was told that his last working day would be 31 January 2017 and given instructions about what he was required to do upon the contract terminating.
23. On 19 January 2017 the Claimant was invited to attend a disciplinary meeting on 26 January 2017 to respond to an allegation that he had exceeded the

speed limit (62mph in a 40mph zone) despite having a final written warning on 24 August 2016 for a kindred offence.

24. Mr Atkinson conducted the meeting and at the end of it decided that the Claimant had committed the offence and that he would deem it to be misconduct and would dismiss the Claimant immediately but with a week's notice paid in lieu. There was an express dismissal for misconduct on 26 January 2017. Matters were confirmed by a letter of the same date (586-587) and the Claimant was informed of his right to appeal.

25. On 6 March 2017 the Claimant sent a letter of appeal to the Respondent (589-590) explaining that he had been overseas from 27 January 2017 and had only just returned. On 13 March 2017 Ms Brimpong, an HR manager, told the Claimant that he was too late to appeal (591).

26. There was no appeal but the Claimant was offered a new fixed term position from 19 April 2017 to 24 November 2017 on similar terms to the previous year (592-593). The same process was undertaken as per the previous year and the chronology informs me that the employment went onto 5 February 2018 (also 632 and 633).

27. On 12 February 2018 the Claimant was offered work to start on 9 April 2018 and to go on to 23 November 2018 (640-641). The Claimant was offered an extension on 24 November 2018 but that was of short duration as his contract ended on 2 December 2018.

28. The same process was undertaken and the Claimant was offered a start on 25 March 2019 until 22 November 2019 (738-739). The additional assignment was offered to run from 23 November 2019 until 17 January 2020.

29. On 12 December 2019 the Claimant wrote as follows to the Respondent:

“I would like to inform you that I want to be stood down with my last day to be 20 December. I hope this will be OK with you. Many thanks for your helpful stop I wish you all Merry Christmas.” (803)

30. On 12 December 2019 the Respondent wrote back as follows:

“I am writing to confirm that your resignation has been accepted and your last working day will be 20th December 2019. You will be paid for all periods worked up until this date. You will receive your final payment in the normal way and will pay slip and P45 will be sent in the post to your home address thereafter....”

We sincerely hope that you have found your seasonal assignment with the company of rewarding one . On behalf of UKME I would like to take this opportunity to sincerely thank you for your service and commitment to the organisation and wish you the very best of luck for the future.”

(806)

- 31.** On 11 March 2020 there was an email from Mr Edmondson who was an Assistant Logistics Manager stating that he had just received a call from Dave Walsh amending the start dates for some of the drivers and asking if the Claimant plus two others could start back on season contract on 23 March 2020.
- 32.** The Claimant worked until 9 December 2020 when his contract came to an end. That year his contract was not extended as it had been in previous years. There is a lot of detail relating to what took place in the last year but it is not necessary for me to go into those matters at all taking into account the matters that I have to determine.
- 33.** The parties closing submissions were extremely helpful (both written and oral) and I have taken them fully into account. I note that there was little difference between the two sides in terms of their interpretation of the law to be applied and I summarise it below.
- 34.** Working backwards the first issue I have to consider is whether there was continuous service between the 2019 and 2020 period. It is always wise to go back to the statute. **Section 212 Employment Rights Act 1996** so far as is relevant is as follows:
- 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.***
- (3)....., any week (not within subsection (1)) during the whole or part of which an employee is.....***
- (b) absent from work on account of a temporary cessation of work,***
- (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.***
- (4) Not more than twenty-six weeks count under subsection (3)(a) . . . between any periods falling under subsection (1).***
- 35.** Weeks during which there is a contract of employment in existence at any time count as weeks of continuous employment- S.212(1) of the Employment Rights Act 1996 (ERA), while weeks during which there is no contract of

employment generally break continuity. However, there are a number of exceptions to the latter rule which are contained in S.212(3), which sets out the circumstances in which continuity is preserved during a gap between two contracts of employment of at least a week. It applies where the employee is:

- a) Incapable of work in consequence of sickness or injury — S.212(3)(a)
- b) Absent from work on account of a temporary cessation of work — S.212(3)(b), or
- c) Absent from work in circumstances such that, by arrangement or custom, the employee is regarded as continuing in the employment of the employer for any purpose — S.212(3)(c).

36. The provisions contained in S.212(3) only apply if a contract of employment remains in existence during the break in work. They only apply to the interval between the termination of one contract and re-employment under a new contract (**Ford v Warwickshire County Council 1983 ICR 273**). The provisions of S.212(3) cover situations where, after a contract of employment has been terminated, there is a period where no contract subsists that is followed by employment under a new contract with the same employer. Where there is a change of employer either side of the gap, continuity can be preserved in the particular situations specified in S.218 ERA, such as where there has been a transfer of a business or undertaking (S.218(2)) or a transfer to an associated employer (S.218(6)).

37. In this matter focus was placed upon the second of those provisions – the temporary cessation of work. Section 212(3)(b) of the Employment Rights Act 1996 (ERA) preserves continuity during any week when the employee is absent from work on account of a temporary cessation of work. There is no limit to the number of weeks that can count under this sub-paragraph other than that implied by the word ‘temporary’. There are three essential elements to S.212(3)(b):

- a) There must be a cessation of work
- b) The cessation must be temporary, and
- c) The reason for the employee’s absence must be the cessation of work.

38. The ERA does not give a definition of ‘cessation of work’. Some facts clearly point to a temporary cessation of work and other cases are not as clear. In **Fitzgerald v Hall, Russell and Co Ltd 1970 AC 984, HL**, the House of Lords held that it was necessary to look at the position of the individual employee and consider whether there was work available for that employee. A cessation of work means a period during which an employee would have been at work but for the fact that the employer could not find any work for the employee to do.

39. However, for there to be a cessation of work it seems that some work must have ceased to exist. A redistribution of the same amount of work among fewer employees is not a cessation of work, even if work thereby ceases to be available for a particular employee or employees (**Byrne v Birmingham City District Council 1987 ICR 519**).
40. Whether or not a cessation of work is temporary is a question of fact for a tribunal to decide. In **Fitzgerald** it was held that the question of whether a cessation in work was temporary should be considered from the point of view of the individual employee and with hindsight, that is, at the date when the final dismissal took effect.
41. A key factor in determining whether a cessation in work is temporary will be the length of the cessation relative to the periods in work. How this factor is approached, however, will depend to a large extent on whether there was a single absence from work or several absences, and, if there were several absences, whether these were intermittent or regular.
42. Issues have arisen over a mathematical approach as against a more generalist approach i.e., considering all the circumstances of the case. The latter is favoured although, of course, the length of absence compared with time working will be one of those relevant considerations. Temporary does not mean very short but needs to be considered relatively to the time employed.
43. Despite the approval of a general approach adopted by the Court of Appeal in **Flack and ors v Kodak Ltd**, a stricter mathematical approach is not always wrong, at least where there is a regular pattern of absence e.g., **Sillars v Charrington Fuels Ltd 1989 ICR 475**, S had worked for 15 years as an HGV driver delivering fuel during the winter months. He was employed from around October each year until around May. S's employment had followed a fairly regular pattern, with the period of employment each year varying between 21 and 32 weeks. His last two periods of employment had been for 30 weeks and 27 weeks. When S's employment came to a permanent end in 1986 and he claimed unfair dismissal and a redundancy payment, the employer argued that he did not have the requisite continuous employment because of his absence from work during the summer months. S argued that these breaks were due to temporary cessations of work, so that continuity was preserved. He maintained that the fact that it was the intention of both employee and employer that the work would resume again before the following winter and that seasonal workers kept the same payroll number, overalls and lockers from season to season pointed to the cessations being temporary and not permanent. The employment tribunal compared the periods when S was absent with the periods when he was working and concluded that, since the absences were not relatively short, there was no temporary cessation of work. The Court of Appeal held that 'temporary' had

to be construed as a relatively short period of time and, whichever period was looked at in this case, S had only ever been employed for approximately half of each year. The fact that a cessation is not permanent does not mean that it is 'temporary'.

44. Depending on the factual circumstances, it may be appropriate in some cases to combine the mathematical approach of **Sillars v Charrington Fuels Ltd** with the more general approach advocated by the Court of Appeal in **Flack and ors v Kodak Ltd**.
45. As is clear from some of the cases discussed above, a further factor that may be relevant in determining whether a cessation of work was temporary is what the parties expected at the time the work ceased. This is not a decisive factor, but it may nonetheless be relevant.
46. To rely on S.212(3)(b) ERA, an employee must be absent from work because of the temporary cessation of work. Thus, an employee dismissed for misconduct but re-engaged sometime later is not absent because of a temporary cessation of work even if the employer's requirement for workers diminishes at the same time.
47. In cases where there appears to be more than one reason for the temporary absence, all the circumstances of the case need to be considered when determining the operative cause.
48. The fact that the employee takes a job with another employer during the break in employment is not fatal to the operation of S.212(3)(b). This was emphasised by the EAT in **Compass Services (UK) Ltd v Offord** EAT 140/97, where the employee was forced to take another job during the break in her employment with CS Ltd in order to meet her financial commitments. This fact did not prevent the tribunal and the EAT from concluding that she had been absent from work on account of a temporary cessation. It is only if the new job is shown to be the cause of the employee's absence in the first place that it will affect the question of continuity.
49. It is clear from the wording of the statute and as confirmed in case law that under section 212(3)(b) the reason why there is an absence from work must be the temporary cessation of work. If the absence is not caused by the temporary cessation then continuity is not preserved.
50. Was there work available for the Claimant as of 12 December when the Claimant tendered his resignation and on 20 December when he left his role? I remind myself that at that time of the year there was a diminishing need for drivers, of which at peak season there were many but the Claimant had expressly been extended on or around 23 November 2019 until 17 January 2020 which in my view is strong evidence that it was anticipated that there

was work for him to do over that period. Asking oneself the question as to why the Claimant ceased working on 20 December 2019, the only answer possible is that it was because the Claimant tendered his resignation on 12 December 2019 and brought that engagement to an end.

- 51.** In his statement the Claimant indicated that the impetus to “**stand down**” was because Mr Walsh had suggested this to him. As stated previously I do not accept that Mr Walsh was an employee of the Respondent and I accept that he was a client of the Respondent acting on behalf of the Dubai Royal Family. I do not accept that the Claimant was told he could stand down as there was no work for him. I find that there was work available that he could have done and it was his choice to terminate the contract as was his right.
- 52.** In my view it makes absolutely no difference whether there was an understanding that the Claimant might return next racing season as the key matter is how did the 2019 contract come to an end and I am satisfied it was because the Claimant asked it to. There was a resignation and the gap between contracts in 2019 and 2020 was not covered by the continuity of employment legislation and accordingly for the purposes of this claim the Claimant’s continuous employment is from 30 May 2020 until 9 December 2020 i.e., a shade over 6 months and accordingly the Tribunal has no jurisdiction to consider a claim of ordinary unfair dismissal.
- 53.** I now deal with the “dismissal” that the Respondent contends would also break any continuity. Having looked through the correspondence it seems to me that there was a disciplinary matter that was heard, considered and the outcome was that the Claimant should be dismissed. I am quite satisfied that it was the dismissal for conduct reasons that brought an end to the contract at that time and not the temporary cessation of work. Conduct was the operative cause.
- 54.** It is correct that the Claimant was still employed the following year but this is on account of third-party pressure from the client of the respondent. He was not re-engaged because his appeal was successful. He sought to appeal and he was told he was out of time and the Respondent refused to deal with it. The Claimant was re-engaged at the behest of the client. The gap between the two are not covered by the temporary cessation of work provisions.
- 55.** I am satisfied however that save for the two occasions detailed above the rest of the gaps between contracts after 2006 can properly be described as falling within section 212 (3)(b) ERA. Although there were differences in the periods not covered by the contracts there was always a core period between March / April to October /November when the Claimant was under contract. There was a regularity as to the core period covered. The Claimant did not work less but often had to work for longer duration. From the evidence once

you were in the scheme and were liked by the client then it was highly likely that you would be reengaged and the “interview process” was not going to weed the Claimant out.

56. I am satisfied that the breaks were temporary and during the time the Claimant worked for the Respondent the gaps between them were of a comparatively short duration (or “relatively short time”) although varying from year to year according to need. The Claimant used his same login ID from year to year. I am satisfied that at the end of the contract everybody knew and expected that there would be further work available as soon as the next flat horse racing season kicked in. I find that the Claimant often only worked for a small amount in the gaps between contracts as he firmly believed and understood on reasonable grounds that he would be well paid during the next cycle when reengaged. I am told by the case law (Flack) to use the benefit of hindsight and doing so I am satisfied that from March 2003 onwards the Claimant was engaged by the Respondent continuously until his dismissal on 26 January 2017 with a series of temporary cessations that fall under the Employment Rights Act 1996.

57. The Respondent has accepted the fixed term contracts before 2006 and I accept their concession. and I find that the Claimant’s periods of employment are:

- 1 March 2003 until 26 January 2017
- 9 April 2017 until 20 September 2019
- 30 May 2020 until 9 December 2020.

The Claim for ordinary unfair dismissal must be dismissed because the Claimant does not have the requisite service to bring such a claim.

Employment Judge Self
26 August 2022