



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mrs R McDougall**

v

**Respondent**

**LGSS Law Ltd**

## PRELIMINARY HEARING

**Heard at: Cambridge**

**On: 19 January 2018**

**Before: Employment Judge Ord**

**Appearances:**

**For the Claimant: Mr I McDougall, Claimant's Husband**

**For the Respondents: Ms S Ismail, Counsel**

## JUDGMENT

1. The claimant's period of continuous employment with the respondent began on 31 October 2016. No previous employment counts as continuous employment with this employer.

## REASONS

1. This matter came before me today to determine the question whether the claimant's period of continuous employment with the respondent began on 31 October 2016, the day she began work for the respondent, or from an earlier date; either when she began employment with her previous employer, Northants County Council (NCC), or the date when her local government service began on 14 February 2012.
2. The claimant was employed by Northants County Council from November 2013. She appears to have been employed by Bromley Council since 14 February 2012 and when she joined NCC that earlier service was apparently accepted by

them as continuous as she had been employed by a previous local government organisation.

3. In August 2016, the claimant saw an advertisement on the local government shared services website for posts within LGSS Law Ltd., the respondent. The claimant applied for the post, was interviewed, was offered it and accepted it. Once references were received by the respondent the claimant tendered her resignation from NCC on 20 September 2016. Her last date of employment was 20 October 2016. The claimant says that her employment with NCC should be treated as continuous into the respondent for one or more of the following reasons;

3.1 First, because of the presumption of continuity in s.210 of the Employment Rights Act 1996; and/or

3.2 Secondly, because the respondent and NCC are associated employers within the meaning of s.218(6) of the Employment Rights Act; and/or

3.3 thirdly, because the respondent has accepted continuity of employment either in the contract of employment or elsewhere and/or

3.4 fourthly because of the modification order in relation to redundancy payments.

I will deal with each of those in turn.

4. First, there is no doubt that the claimant's employer changed on 31 October 2016. She had been employed by NCC. She became employed by LGSS Law Ltd. They are separate entities. On that basis the presumption of continuity in s.216 simply does not apply. That chapter of the Act relates only to employment by one employer (s.218(1)), so the presumption does not apply where there is a change of employer.

5. We then therefore move on to s.218(6) which says this:

“If the 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 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.”

6. Under s.231 of the Employment Rights Act, for the purposes of the Act:

“Any two employers shall be treated as associated if one is a company of which the other directly or indirectly has control or both are companies of which a third person directly or indirectly has control and associated employers shall be construed accordingly.”

7. I have had regard to the Employment Appeal decision in Schwartzbach v Jones EAT/100/15 which was specifically handed up and I have also referred during the course of the hearing to the Court of Appeal decision in South West Launderettes v Leadbetter [1986] ICR 455 and Secretary of State for Employment v Newbold [1981] IRLR 305.

8. The first of those cases sets out the rule that for two employers to be associated the control of the employers must be in the hands of the same person. Control

does not mean management or control of day to day issues. It is control by virtue of votes in a general meeting; ie the controlling person to be in control of an organisation must have 50%+1 of the voting shares or voting rights. That confirmed the decision in Secretary of State for Employment v Newbold which emphasised that the de facto day to day management of the company was not the relevant issue.

9. It is accepted that at the time the claimant began employment with the respondent there were three shareholders of LGSS Law Ltd. One of them is the claimant's previous employer, NCC, the others being Cambridgeshire County Council and Central Bedfordshire Council. Each of those three councils had one third of the voting shares each. It is clear therefore that no one person (and not the claimant's previous employer) has control of LGSS Law Ltd within the meaning of s.231 as clarified by the authorities. NCC could be out-voted by the other two shareholders and they cannot control the company on their own by means of votes in a general meeting. Accordingly, the two employers are not associated employers within the meaning of the Act.
10. The third question is whether there has been some acceptances by contract or otherwise of continuity of employment. The contract of employment which was issued to the claimant gives the following information. First, the start date "in this post" (the post being the post of legal assistant) which was 31 October 2016; second, the start date with LGSS Law Ltd which was the same date; and thirdly the local government service start date the employer stating: "Your period of continuous employment within local government started on 14 February 2012. For details about how your local government continuous service start date affects your terms and conditions please see the appendix to this written statement of particulars".
11. In the appendix under the heading "Continuity of Service" these words appear: "Your written statement will include three start dates:

"Your written statement will include three start dates.

1. Start date in this post
2. Start date with LGSS Law Ltd
3. Local government service start date

If prior to joining LGSS Law Ltd you have previous continuous service with an organisation covered by the redundancy payments (continuity of employment in local government services) (modification) order (which covers other local authorities and related bodies) this continuous service will be included in calculating your entitlement to:

- A redundancy payment
- Annual leave
- Occupational maternity pay
- Occupational sick pay
- Notice pay

Further details about your local government continuous service can be found on LGSS Law Ltd's intranet site."

12. I am satisfied that this is not a general acceptance of continuity of service. It is acceptance of continuity of service for specific purposes as set out in the appendix to the contract. The question therefore is whether other documents indicate an acceptance of continuity of service. I have been referred to emails passing between NCC and the claimant and ACAS and the claimant. The first in time is dated 27 October 2016 and thus pre-dates the claimant's commencement of employment and relates to the issue of annual leave. The relevant passage reads:

“We only pay annual leave if an employee is no longer going to be working for NCC. As this is an internal transfer you will need to transfer your annual leave entitlement over to your new job.”

13. The second in time is dated 4 January 2017, again relates to annual leave and the relevant words are:

“Yes this would be continuous employment, your manager will be able to work your leave out on the annual leave calculator.”

14. The final email is from ACAS and refers to discussions between ACAS and the respondent stating that:

“The respondent agrees that the claimant has continuous service so they state that her annual leave has been understated.”

15. I am satisfied that all three of these emails relate to the issue of annual leave in respect of which the claimant did have continuity of service by virtue of the terms of her contract of employment but they are not acceptances of a general agreement that services with LGSS Law Ltd should be treated as continuous from the start date of the claimant's employment in the local government service.

16. Turning finally to the modification order which is referred to in the contract, this relates solely to the question of continuity of employment being accepted for the purposes of redundancy. It has no application in these proceedings. For those reasons, therefore, the claimant's continuity of employment was broken when she left the employment of NCC and her period of continuous employment began on 31 October 2016.

17. For those reasons, I am bound to say that the law is against the claimant but I am concerned that first she was not told that she would lose her continuity of service when she applied for this post and secondly, that the officers of NCC by email and communications indicated that this was “an internal transfer”. It was no such thing. Thus the claimant was to a degree unaware of the consequences of her resignation and her commencement of employment with LGSS Law Ltd and that is why she finds herself in the position she is in now. She said in evidence that had she been aware of the consequences of beginning her employment afresh with LGSS Law Ltd she would not have taken up the post.

18. As I have said, the law is against her in this matter but I do trust that the relevant officers within both the respondent and Northants County Council will be made aware of the contents of this judgment and in particular these later comments

and will ensure that the issue is not repeated for any further employees within any local authority applying for a post within the respondent organisation.

## ORDERS

### Made pursuant to the Employment Tribunal Rules 2013

1. The case management orders issued by Employment Judge Sigsworth on 20 July 2017 are amended to this extent:
  - 1.1 The date for compliance with paragraph 6 of that order is amended to **26 January 2018**.
  - 1.2 The date for compliance with paragraph 7 of that order is amended to **9 February 2018**.
  - 1.3 The terms of paragraphs 8 and 9 of those orders are amended so that the respondent is to prepare a detailed neutral chronology and a list of issues for the hearing, provide them to the claimant by not later than **19 February 2018** for agreement if possible. If the documents cannot be agreed the claimant is to identify those matters which are not agreed as soon as possible thereafter.

### CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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**Employment Judge Ord**

sent to the parties on:

...22/2/18.....

For the Tribunal:

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