EMPLOYMENT TRIBUNALS

Claimant: Mr N Sobot

Respondent: PRI Association

Heard at: East London Hearing Centre **On:** 24th July 2017

Before: Employment Judge Reid

Representation

Claimant: Mr S Wyeth (Counsel) (Instructed by DWF Solicitors)

Respondent: Ms S Berry (Counsel) (Instructed by Bristows Solicitors LLP)

Ms Huggins (Counsel) also attended on behalf of DAS law in relation to the Respondent's costs application regarding the costs of the previous hearing.

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's period of continuous employment with the Respondent commenced on 23rd October 2014. His employment ended on 2nd November 2016. He therefore has sufficient continuous employment under s108(1) Employment Rights Act 1996 to bring a claim for unfair dismissal. His claim for unfair dismissal therefore proceeds. ***

2. **The Claimant's bonus claim is dismissed on withdrawal by the Claimant.**

3. **I make a costs order of £800 against the Claimant in favour of the Respondent under Rule 76(2) of the Tribunal Rules 2013.**

*Note: the case management (telephone) hearing booked for 16th October 2017 at 10am will therefore go ahead in order to fix a hearing date and to deal with any other directions required.

REASONS

Background

1. A preliminary hearing was ordered to decide the issue of the date on which the Claimant's period of continuous employment started, for the purposes of whether he can bring a claim for unfair dismissal.

2. At the hearing on 24th April 2017 the Respondent said that a costs application would be made for the costs of attending that hearing, which application was subsequently made on 28th April 2017.

3. On 14th June 2017 the Claimant applied to amend his claim form to record the start date of his period of continuous employment as 23rd October 2014.

4. These were the three matters to be decided at this hearing.

Issues

5. The first issue before me at this hearing was the start date of the Claimant's period of continuous employment. The Claimant's case (as amended) was that his start date was 23rd October 2014 when he attended the first of two paid induction/handover days at the Respondent, prior to formally starting at the Respondent's office full time on 17th November 2014. The Claimant also said he had done some (unpaid) work for the Respondent in between those dates from home. He said he therefore met the two years continuous employment requirement under S118(1) Employment Rights Act 1996 by the time he was dismissed on 2nd November 2016. The Respondent's case was that the Claimant's continuous employment start date was 17th November 2014 (para 3 of Grounds of Resistance, although also explaining why the contract of employment stated 13th November 2014)) and therefore did not meet the two years requirement so could not bring an unfair dismissal claim. The end date of the employment was not in issue.

6. Prior to considering this issue I granted the Claimant's amendment application made on 14th June 2017 to be allowed to change the continuous employment start date on the Claimant's claim form to be 23rd October 2014 (rather than 13th November 2014, as stated originally). I gave oral reasons for allowing this amendment.

7. The other matter was the Respondent's costs application dated 28th April 2017 for the costs of attending the hearing on 24th April 2017.

8. It was confirmed on behalf of the Claimant that he did not now pursue the claim for a bonus contained in his claim form.

9. I was provided with a one file bundle, a supplemental bundle and, in relation to the Respondent's costs application arising out of the costs of the previous hearing, a list of bullets points and documents produced by the Claimant on the morning of the previous hearing on 24th April 2017.

10. I heard oral evidence from the Claimant and from Mr Blair and Mr Kupara of the

Respondent. I also heard oral evidence from Mr Fergusson (formerly of the Respondent) via Skype on the Respondent's laptop due to Mr Fergusson needing to be in Edinburgh due to serious family illness.

Findings of fact

11. I find that the Claimant was recruited to work for the Respondent by a recruitment agency, TPP (page 55) in October 2014. The Claimant's then employer was Future Development Foundation. The role at the Respondent was as Head of Fundraising and had arisen because Mr Peter Boonman, the then incumbent, was leaving. The Respondent was keen to get a replacement for Mr Boonman as soon as possible (page 56). The Claimant's notice period was 6 weeks according to TPP (page 55) but the Respondent was keen to see if that could be reduced by negotiation so that he could start sooner. This was to reduce the gap as far as possible between Mr Boonman leaving and the Claimant starting.

12. The Respondent verbally offered the Claimant the role and he accepted at a meeting with Mr Fergusson (HR) and Mr Blair (Chief Financial Officer) (page 59, the offer of employment having been accepted by 15th October 2014 according to the email). He was sent a contract for his review on 15th October 2014 recording the start date as 14th November 2014 which I find to be the estimated date when it was thought the Claimant could start at that stage, pending the Claimant speaking to the directors (referred to as trustees) at Future Development Foundation to get an agreed date when he might be released. The email from Mr Fergusson emphasised (3rd para) that the sooner he could start the better so that London fundraising could start. I find that the final comment at the end of the 3rd paragraph was not, as claimed by the Claimant, some sort of instruction that the Claimant himself start doing work for the Respondent immediately and before the indicated start date of employment but only a statement that the sooner the Claimant started employment with the Respondent the better.

13. I find that the Respondent was keen for the Claimant to meet with Mr Boonman to do as much of a handover as possible before Mr Boonman left, because if the Claimant was to start in around mid-November then there would be no overlap (page 59). Mr Fergusson asked the Claimant to come in for 2 days handover in Mr Boonman's final week (23rd and 24th October 2014) for which the Claimant would be paid the contractual rate; the way the payment would be made was via the payroll after he officially started in November 2014 and the mechanism suggested was to back date the November 2014 start date by 2 days to achieve this. It was not paid in October 2014 under a separate arrangement for those two days only. In addition, in recognition of the Claimant giving up the time to do this, he would be granted 5 days extra holiday. I therefore find that it was clear from the outset that the two days were to be paid via the payroll at the rate payable under the employment contract and it was not a case of an employer after the event recognising extra commitment and subsequently deciding to make an additional discretionary payment to say thank you. The 'deal' clearly identified was attendance at the two handover days at full pay. I also find that the additional 5 days holiday was also to recognise the Claimant's willingness to do these two days (page 59, Mr Fergusson witness statement para 7). I find this to be a recognition that the Claimant was making himself available at a time he was still committed to Future Development Foundation. I find that the quid pro quo for the two days attendance was the full pay and the extra holiday. Without that attendance the Respondent would not otherwise have been able to arrange a handover from Mr

Boonman to the Claimant, in terms of them actually being able to meet. The Respondent set up a series of meetings for both days (page 60). The second day was scheduled to be spent entirely with Mr Boonman. Both days were fully allocated to what the Respondent wanted the Claimant to cover in the handover. That handover was also evident from the setting up of a meeting at that stage for 20th November 2014 with Standard Life, an important external contact (page 99).

14. The Claimant's new email address with the Respondent was set up in advance of the two handover days (page 63). The Respondent's normal procedure was to set up a new employee's email in advance of their start date so that their inbox could 'fill up' in the period before they arrived (Mr Kupara witness statement para 4), including receiving any emails they had been added to the group distribution list for. It also meant that meetings could be booked in for after they started (page 300-309). That procedure would normally be activated on receipt of the new starter form from HR. The Claimant's new starter form was not completed until 17th November 2014 (page 51) so the way the Claimant's account was set up was not in accordance with the usual practice, although it was not unusual for it to be set up in advance so ready for the first day.

15. Whilst I find that the email account was often created before a new employee started, the Claimant was notified (page 63) that he was being set up with his email not only so that he could access emails during the two handover days but also so that Mr Boonman's emails could be redirected to the Claimant after Mr Boonman left at the end of that week. In addition, he was informed that he could log on from home via the web interface, pending starting formally in the office in November 2014. I find this to be an implicit message on behalf of the Respondent that the Claimant was expected to get 'up to speed' (Mr Blair's phrase in his oral evidence) on Mr Boonman's emails and the role generally prior to his 'official' start date in November and to familiarise himself with what was going on, broadly speaking. It was not however implicit in that that the Respondent was expecting the Claimant to do or produce any work in excess of that in the gap between the handover days and the 'official' start date in the office. The Respondent was not expressly instructing the Claimant to do anything in the gap but in the context of the prior two paid days handover from Mr Boonman (and the extra holiday) and in the context of the forwarding of Mr Boonamn's emails to the Claimant I find it was implicitly expected of the Claimant that he read the forwarded emails so that he could familiarise himself with matters before the 'official' start date. In Mr Blair's words at the hearing, this was so that it would not be a 'blank sheet' when he started in the office. He was not however implicity or expressly expected to read or react to routine emails sent in group distribution lists (such as 'Ops' emails see for example page 156, 157,159). See below for findings regarding the Claimant's other employment at this time.

16. The Claimant was also set up on the Respondent's 'Salesforce' system on 28th October 2014 (page 148). I find he was not expected to do or produce anything using it (because this is only a computer generated email informing him it has been set up). It was the Respondent's normal practice to set this up in advance (Mr Kupara witness statement para 6) but this was being set up some 2-3 weeks in advance and following two handover days and having been given email access from home (so that the Claimant would see that email). Mr Boonman had also emailed the Claimant explaining some tips about the use of Salesforce (page 132). Again this is consistent with an expectation of getting up to speed on how Salesforce worked because he could have a

look at it, before he started.

17. The Respondent was not holding the Claimant out to third parties at this time as yet having started (example page 115) and was saying he was due to start on 17th November 2014, consistent with not expecting the Claimant expressly or impliedly to do more than get up to speed on the role in the period after the two handover days. This was consistent with not expecting the Claimant to be speaking to external contacts.

18. The Claimant signed the contract with the Respondent on 23rd October 2014. The Claimant confirmed that he was free to start on 17th November 2014. In order to facilitate the payment for the two handover days, the contract was therefore amended by the Claimant in manuscript (initialled by the Claimant and Mr Fergusson) to include a start date of 13th November 2014 (page 46A) being two working days prior to 17th November 2014. I find that the start date of 13th November 2014 did not reflect the reality on anyone's account or anyone's basis but was a mechanism to effect the two handover days pay. The two extra days at the usual contract rate were paid via the payroll on 30th November 2014 (page 264), added on to the other days actually worked in that month.

19. After the two handover days the Claimant was also sent various emails specifically to him (as opposed to because he was on a particular general distribution list). Mr Boonamn sent him some contacts (page 124). I find the second sentence of the first paragraph not however to be an instruction that the Claimant go ahead and contact them all before he started in the office but sent in order to get the Claimant familiar with who the contacts were so he had them ready for his first day in the office. I find the 'Ops' email at page 156 likewise not to be an instruction to the Claimant to produce anything as regards business planning at this stage because had that been required I find that Mr Blair or Mr Boonman (before he left) would have specifically asked the Claimant to do this because the 'Ops ' email was general. It would also be inconsistent with the implicit 'get up to speed' arrangement to require him to produce something when he did not yet have access to all the information needed for him to contribute in the required format. The Claimant's first Partnerships budget was set in January 2015 (Mr Blair witness statement para 7) and I find that there was no express or implied expectation that the Claimant would embark on this type of work before he started in the office.

20. I find that some of the emails sent to the Claimant were from Mr Boonman because he was forwarding anything relevant in his inbox to the Claimant as he was leaving (example page 73). He was not sending him emails because he was telling the Claimant to undertake any particular task before the Claimant started in the office but because he was clearing out emails and wanted to forward things would assist the Claimant in his new role.

21. During this period the Claimant kept his out of office on (page 265) giving the Respondent's general switchboard number as the contact number in his absence and saying he would start on 17th November 2014. Whilst he may have set it up this way so as to be consistent with his existing employment contract with Future Development Foundation (see below) it was also consistent with what being required of him was 'getting up to speed' and no more. It was also consistent with the Claimant not in fact dealing with external parties who might otherwise be confused by such a message.

22. Despite claiming that he undertook significant amounts of work for the Respondent during this period (Claimant witness statement paras 20,21,22) for around 5 hours a day (for which he never claimed payment), the Claimant has not produced any evidence of the contacts with stakeholders and the fundraising plan he says he drafted. Despite producing emails he received in this period he did not produce emails that he had sent showing the claimed extensive contact with stakeholders during the period 25th November 2014 and 17th November 2014. He produced no phone records either; whilst it may be the case that now the phone provider cannot go back that far which was his explanation, he produced no evidence that he asked for records and that this was he reason in fact given. He did not have the list of fundraisers he said he done in this period and the typed business plan he said he later gave to Mr Blair (in person or electronically and which Mr Blair did not have either), despite being able to produce emails he was sent from this time and despite that any such documents must have been produced on his own computer at this time. The Respondent's searches had also not produced these documents (Mr Kupara witness statement para 5). Taking into account my findings below as to his other employment, I therefore find that the Claimant was not doing the levels of work he claims to have done in this period. In any even the Respondent had not asked him to do such work, beyond the 'getting up to speed' levels.

23. I find that during this period between the two handover days and the Claimant's first day in the office after that on 17th November 2014, the Claimant was not on holiday from his employment with Future Development Foundation and was not free from his existing contractual obligations with that employer. The Claimant has not produced a copy of his contract of employment with Future Development Foundation or any documents showing his resignation or any arrangements he made about his departure date or showing his termination date – he filled in a P46 (he completed the first page) on the basis that he had no P45 (page 262). He said he did not have any documents but he could have obtained a copy of at least his contract or a copy of his P45 from them had he asked; he produced no evidence that he had even asked. This is relevant to whether he was in fact free to work in the way he claimed to work after the two handover days because working in the way claimed (sometimes 5 hours a day for the Respondent) would, in the absence of evidence to the contrary, be likely to breach his existing contract. If there was no clause prohibiting other work (which type of clause is relatively common in senior appointments) the Claimant has not produced his contract. He also said he was on holiday in the last 3 weeks of his employment yet if his then employer was prepared to allow him to be on holiday for the last 3 weeks, it was strange that he would not then have in fact been released to start his new job sooner than he said he was (taking into account the Respondent was keen he started as soon as possible). He then said in his oral evidence that he had been tying up a few things for Future Development Foundation in this period but I find this to be an attempt to explain how he was on the one hand able to do claimed significant hours for the Respondent and yet on the other hand not be free to join the Respondent earlier, in a context where he has not shown that he was in fact free to work as claimed for the Respondent during this period between the handover days and his starting in the office. I find the Claimant has been reticent about his contractual situation with Future Development Foundation. He is careful not even to name his previous employer in his witness statement (para 8) and does not explain how he was able to remain employed by them and yet claim to work so many hours for the Respondent at the same time. His account is not convincing.

24. I find that the Claimant printed out the copies of the received emails he said he had from October 2014 (dated between 24 October 2014 and 8th November 2014 and provided by the Claimant on the day of the last hearing), not at that time as claimed but subsequently. His motive for doing so is not however relevant to the commencement of his continuous employment though potentially relevant to credibility as to the work claimed to be done. I find based on Mr Kupara's evidence (witness statement para 13) that the format of these printed out emails is not the format expected if the Claimant printed them off at the time, using the web based access he had at that time. I find based on Mr Kupara's oral evidence that had the emails been printed off in the web format, there would be no signature and mobile phone details at the end of the email (see for example page 133) and that the font size would be different. The Claimant's account of how he now has these emails from October 2014 (and largely received ones (some very trivial eg page 113 regarding Christmas menu) with very limited sent ones or other documents or records, despite claiming significant amounts of work in this period) does not hang together and affects the credibility of his claim to have been working so many hours for the Respondent during this period after the two handover days.

Relevant law

25. The relevant law is sections 108(1) (two year continuous employment requirement) and 211(1) (period of continuous employment start date) Employment Rights Act 1996.

26. I considered *The General Salvation Army v Drewsbury* [1984] IRLR 222, *Smith v International Development Co PLC* UKEAT 1422/01 and *Koenig v Mind Gym Ltd* UKEAT 0201/12.

27. The parties' perception or labelling of the start date of the continuous employment (whether now or at the time) or what was written down at the time does not determine the start date of the period of continuous employment because it arises under statute *(Koenig v Mind Gym Ltd* para 11). The Claimant's motive for raising it now when he did not raise it at the time or until he was dismissed is also not relevant. The test is when the employee 'starts work' (s211(1)(a)) and the work referred to is work done under the relevant contract of employment (*The General Salvation Army v Drewsbury* para 13, looking at the previous incarnation of s211(1) containing the same phrase). Doing something under or by virtue of the contract is more than doing acts consistent with there being a contract (*Smith v International Development Co PLC* para 15). The work must be under and not collateral to the contract of employment (*Koenig v Mind Gym Ltd* para 21). There is a spectrum of preparatory work (*Koenig v Mind Gym Ltd* paras 8-9) at one end of which it is not work done under the contract and at the other end it is.

Reasons

28. Taking into account the above findings of fact I find that the Claimant started work within s211(1) Employment Rights Act 1996 on 23rd October 2014, the first day of his two day paid handover/induction with the Respondent.

29. The Claimant had already verbally accepted the Respondent's offer of employment prior to this date (though the exact start date in the office was not finalised

till 23rd October 2014 when the contract was signed by both parties). The contract of employment was therefore in existence on 23rd October 2014 and the Claimant had agreed to do two paid handover days. Looking at where these days fit on the spectrum identified in *Koenig v Mind Gym Ltd* , based on the above findings they were more than just calling in for a quick meeting to meet new colleagues but were a structured set of meetings over two days of working day length, in particular to enable a handover from Mr Boonman who was leaving imminently. The Respondent had enabled email access for the Claimant for these days, and paid him for them via the payroll, albeit delaying that payment until the end of November payroll. It was accepted in *Koenig v Mind Gym Ltd* (para 8) that at one end of the spectrum indicating having started work was someone who in advance of the contractual start date goes in for a full working day under the control of the employer during that day. The Claimant went in for two days for the handover (so of clear benefit to the Respondent as without these two days there would have been no handover with Mr Boonman) and was paid the rate under the employment contract via the Respondent's payroll. He was not paid separately under a different arrangement or rate for those two days. If the Claimant was in breach of his obligations to Future Development Foundation in what he did with for the Respondent before that previous employment ended, that does not of itself affect the start date of his continuity of employment with the Respondent.

30. Assessing the period between 25th October 2014 and 17th November 2014 and only the 'getting up to speed' in this period, I would have found that this on its own was insufficient to amount to the Claimant 'starting work' within 211(1) Employment Rights Act 1996, taking into account it is common practice for senior roles for an employee due to join a new employer to do some reading up on their new role before they start – but that is work consistent with the employment contract, not work done under it as an employee.

31. The Claimant therefore started work for the purposes of his period of continuous employment on 23rd October 2014. Thereafter the contract of employment was in existence though the Claimant was not expected to be in the office till 17th November 2014. The preparatory 'getting up to speed' in that period was work consistent with there being an employment contract but not work done under or by virtue of the employment contract. However the Claimant's employment had already started on 23rd October 2014 and the weeks in the gap between the two handover days and the start date in the office were weeks which 'counted' under s212 Employment Rights Act 1996, being weeks when the contract of employment had already been entered into and the Claimant had started work.

Costs application by Respondent dated 28th April 2017

32. The Respondent's costs application dated 28th April 2017 claimed costs on two alternative bases (para 9): either against DAS Law Ltd (formerly representing the Claimant) or DWF Solicitors (currently representing the Claimant) under Rule 80 or against the Claimant under Rule 76(2). The costs arose out of the Claimant's application to postpone the hearing on 24th April 2017, which application was granted.

33. I make a costs order in favour of the Respondent of £800 (ie Counsel's fees only) under Rule 76(2) of the Tribunal Rules 2013 based on the following findings and for the following reasons.

34. The Claimant attended the hearing on 24th April 2017 with a typed up numbered list being his account of when and how he started work with the Respondent, together with copies of supporting emails which were relevant. I find it was these documents which made it significantly more obvious that the Claimant needed to produce a witness statement. It was the Claimant who arrived with these documents which were not in the hearing bundle (DWF response to costs application dated 4th May 2017, para 12) and these had not already been provided to DWF and were only provided to Counsel and DWF on the morning of the hearing and so had not been disclosed to the Respondent. The Claimant turned up for the hearing with his notes and the new documents and accordingly the Claimant was largely responsible for the need to postpone the hearing because he only produced them for the first time to his Counsel and DWF on the morning of the hearing. This was despite being aware that both DAS when instructed and DWF when they took over had been liaising with the Respondent over relevant documents and that documents needed to be disclosed ((DWF response to costs application dated 4th May 2017, para 8-9).

35. I find that the change of solicitors occurred on 19th April 2017 when DWF were instructed and DAS came off the record. This was the Wednesday before the Monday of the hearing on 24th April 2017. It was unfortunate timing and I find that there was inevitably going to be some difficulties given the time pressure in making sure that DWF had all the relevant documents and that everything relevant was disclosed to the Respondent before the hearing the next Monday. As I have found that his own Counsel and solicitors did not have the new documents and detailed list of matters relied on till the morning of the 24th April 2017, I find that it was the Claimant who was producing this material at the last minute. There was no prior order that the Claimant produce a witness statement to deal with the preliminary time limit point and neither party had suggested it prior to the hearing although they were liaising on other matters. I therefore find that whilst it was certainly not ideal that documents were produced last minute by the Claimant and that it became very clear in the light of those new documents that a witness statement was now required, I find that this does not reach the high threshold to fall within Rule 80(1) of the Tribunal Rules 2013, taking into account the guidance in *Ridehalgh v Horsefield* [1994] 3 All ER 848; the actions of DAS and DWF did not meet the first stage of the three-stage test that they had acted improperly, unreasonably or negligently in the way disclosure had been handled or in failing to identify earlier that a witness statement was required. This is because it was only when the Claimant produced his list of points and new supporting documents on the morning of the hearing that it became clear that a witness statement (and further disclosure) was in fact clearly required and this occurred in the context of the to a degree inevitable (but unfortunate) disruption caused by a change of representative a few days before a hearing.

36. I make the order for the costs of Counsel only. It was accepted that VAT on top of Counsel's fees was not being claimed. It was not however necessary for two solicitors to also attend the hearing along with Counsel, even taking into account the fact that they had recently been instructed and there had been limited time to get the Claimant's case ready. They could have been available on the telephone had Counsel needed to ask about the documents DWF had from the Claimant or from DAS or about documents provided to the Respondent the previous week. It was not a complex case and the issues to be dealt with at the hearing were limited.

Employment Judge Reid

8 August 2017