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EMPLOYMENT TRIBUNALS

Claimant: Mr O Faseku

Respondent: Central North West London NHS Foundation Trust

Heard at: London Central **On:** 3 March 2017

Before: Employment Judge Goodman

Representation

Claimant: Mr T Ojo, Legal Executive
Respondent: Mr A Aamodt, Counsel

JUDGMENT having been sent to the parties on 3 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for unfair dismissal. The background to the claim is that the Claimant has worked at the Respondent's hospital for over 14 years as a Health Care Assistant, booking shifts as a bank worker.

2. On 8 June 2016 and thereafter he has found himself blocked from working further shifts, after a patient on the ward, one of three for adults suffering acute stages of mental illness, complained to the police that a member of staff had taken him from the ward to a hotel, raped him, and then brought him back.

3. This is a serious charge. Nothing in the evidence today suggests that the claimant was responsible. The Claimant says he has never been interviewed about this allegation, either by the police or by the Respondent. It is not said that the Respondent has investigated this allegation. A recent exchange of emails between the police and the Respondent's solicitors shows that the police are unaware of Claimant's identity. Nevertheless, the Claimant remains blocked from booking further shifts and so unable to work for the Trust.

4. In the weeks following his de facto suspension the Claimant asked for updates on his position but received no reply. On 5 September he went to ACAS to commence the period of early conciliation. On 30 September 2016 he was told, through ACAS, that the Respondent denied that he had ever been employed by them.

5. The Claimant has treated this as a dismissal date, and on 25 October 2016 he presented an unfair dismissal claim to the Employment Tribunal.

6. The Respondent replied that he was not their employee, further, if he was, there was insufficient continuity of employment to bring a claim of unfair dismissal. At a previous Preliminary Hearing for case management today's Preliminary Hearing in public was listed to decide those two points.

Evidence

7. Today I heard evidence from the Claimant, Oluwole Faseku, and from Tommi Kristian Lopperi, the Respondent's Temporary Staffing Manager.

8. There was a bundle of documents containing emails, letters and policies about the terms on which the Claimant worked, together with a number of incomplete set of payslips. There are no timesheets in the bundle.

9. The Respondent was asked yesterday to provide a complete run of the Claimant's payslips but their solicitors were unable to contact anyone at the Trust who could do so. During the hearing the Claimant produced a diary in

which he said he had recorded the dates of his timesheets. The diary had not hitherto been disclosed. Given the documentary inadequacies I ruled that I would decide the contract of employment point today; if the claimant was an employee it may be necessary to hear evidence at a further hearing on whether employment was continuous over two years before June 2016.

Findings of Fact

10. The Respondent is an NHS Trust which maintains a bank of casual staff to ensure continuity of staffing, when permanent staff are absent because of sickness, annual leave, suspension, and so on. The Trust also covers its staffing needs by using locums, agency staff and short term contracts.

11. In October 2001, the Claimant applied to the Trust to be a bank nurse, and was appointed a healthcare assistant. The Trust's advertisement of 4 October 2001 said that they were presently recruiting for nursing assistants for early and late shifts Monday to Friday though currently there were no vacancies for nights and weekend shifts. Despite that the Claimant has gone on to work many nights and weekends, which are better paid. The Claimant's references were checked and found acceptable, he was invited to register, and was permitted to work from 7 November 2001.

12. The Respondent runs an online booking service where available shifts for bank staff is shown, and bank staff can then book shifts they want to work. In addition, sometimes emails, and, more recently, texts are sent to individual bank staff if there are particular needs (the example in the bundle was a requirement for a nurse who spoke Gujarati). In addition Ward Managers may contact bank staff known to them direct to ask if they can fill a shift.

13. However the booking is made, as a bank staff worker completes a shift he fills in a timesheet, which he is required to send it in on a Wednesday if he wishes to have the payment included in payroll for the following Thursday. He is also asked not to submit timesheets that are more than four weeks old.

14. When starting the Claimant also signed a declaration that he would not work more than 48 hours a week when averaged over a 17 week period. This appears to be intended to conform with the requirements of the Working Time Regulations 1998.

15. There is a Temporary Staff Handbook. This includes a conduct and capability policy, which provides that if there is a question about a bank worker's conduct, he may not access shifts while he is being investigated, in other words, a de facto suspension pending conclusion of the investigation.

16. The Handbook also provides that he is entitled to 5.6 week's holiday, including bank holidays, each year. He must take it within the Trust's leave year or lose it. In practice, the holiday pay amounts to 12.5% of the value of the hours worked, and paid pro rata. In order to receive the holiday pay, the bank worker has to submit an annual leave request form, booking some dates as holiday. Otherwise if he does not attend a shift he is not paid.

17. The Tribunal comments that by requiring bank workers to submit an annual leave request form the Trust probably has an eye to the Working Time Regulations, which provides that a worker must actually take holiday; he cannot be paid in lieu.

18. The hearing bundle contains emails in which the Claimant notified that he would be on holiday for particular dates, and some of his payslips show that from time to time he received holiday pay, calculated by reference to hours.

19. The Claimant's pay was subject to deductions for income tax and national insurance under PAYE.

20. There was a requirement that he should not work for another without giving written notice to the Respondent, and that this was stated to be to avoid conflict, although of what is not specified. There was no evidence that the Claimant had given such a notice, nor of what the Respondent did if notification was given.

21. The Handbook says that there is no obligation on the Trust: "to offer you work once you have registered and you have the right to refuse any work offered to you". It says: "you can choose whether or not to accept the engagement once it is offered".

22. If an engagement once booked is cancelled by the Respondent, its staff will "make every effort" to notify and supply an alternative. If an engagement is cancelled with less than 60 minutes' notice to the bank worker the Trust will pay a cancellation fee. If the bank worker arrives on the ward for a booked shift and finds that there is in fact no work for him he will be given two hours pay and sent away.

23. There is also provision, on the other hand, that if the bank worker wishes to cancel a booked engagement he may do so up to two hours before the commencement of the assignment. If he cancels later, or simply fails to turn up, then he may be subject to investigation, and possibly suspension from the register for his unreliability.

24. If a bank worker does no work at all for the Trust over a six month period, he will be automatically deregistered, unless the worker has notified that he intends to take a break. Even so, he will have to register when he starts again.

25. The capability and disciplinary policy in the handbook sets out that conduct can be investigated, as also can unreliability, and may result in the suspension of registration.

26. In addition to the Temporary Staff Handbook, the Respondent has a document entitled Temporary Staffing Procedure, which sets out the purpose and scope, and duties and responsibilities of the Trust on temporary staff, whether from the bank, agencies, short-term or locums, collectively known as "ad hoc workers". The document is intended to clarify the roles and responsibilities of eligible managers and delegated employees in booking temporary staff. So while bank workers such as the Claimant had in fact seen the document, it appears to have been primarily written from

the management point of view, to explain how to manage staffing resources economically.

27. This procedure contains a passage on which the Claimant particularly relies. It says:

> "bank workers are individuals not permanently employed within the Trust who are registered as available to work ad hoc shifts and assignments via the bank. Each assignment is a separate period of work and there is no mutual obligation for either the Trust to provide work or the bank workers to accept work that is offered to them. It should be noted that if a situation arises where a bank worker is used consistently on a regular basis over a prolonged period of time, their employment status will be changed. For that work they would be classified as an employee and have the same rights as permanent employees. Therefore, this situation should be avoided and dealt with in another way e.g. under a fixed term contract."

28. The Procedure document reiterates that once a shift has been filled both sides are expected to honour the engagement, cancellations or alterations should be avoided, or notification given with reasonable warning, and that when a bank worker fails to comply with this it may result in an investigation and disciplinary action. This is stated to include short notice cancellations made by a worker in order to attend a more lucrative shift - presumably where a worker cancels a day time shift in order to take up a better paid nightshift that has become available. It also reminds managers that where a ward has over-booked shifts, by failure to check the rostering for covered shifts, the night worker is entitled to be paid.

29. In addition, although it is not mentioned in the documents, it emerged in the oral evidence, after exploring a reference in an email, that the Claimant, as with other bank workers, was required to undertaken training for the Trust from time to time. Once every three years he had to attend a five day training course, for which he was paid at the hourly rate for day shifts. At other times, and more frequently, he might have to attend a one or two hour course, usually online, for which he was not paid. If he did not do this

training, and it could not be rearranged, then according to Mr Lopperi his working opportunities would be restricted, to the point where he may not have any shifts available to him at all.

30. Subject to these terms, the Claimant worked, as he says, pretty much constantly from 2001 until being blocked in June 2016. Some of the most recent P60s (end of year tax certificate) are in the bundle. These show that for the year ending April 2013 he earned £11,947.97, for the year ending April 2014 £13,623.69, for the year ending April 2015 £31,147.62, and in the year ending April 2016 £28,663.59. These substantial sums show that he must have been working almost constantly, at any rate in the last two years.

31. The Respondent provided Further and Better Particulars of their continuity argument. These state that in the twoyear period leading up to the suspension, the Claimant did not work any shifts for about a week between 14 and 21 June 2014. He did not work for a period of about eight weeks between 20 November 2014 and 16 January 2015. He took a further week between 24 March and 31 March 2015, and another five weeks or so from 17 September to 24 October 2015. He was then away for about five weeks from 9 December 2015 to 11 January 2016, and for a further six weeks or so from 16 March to 30 April 2016.

32. There is a list of the shifts, with the times of each shift, actually worked, compiled by Mr Lopperi. While the detail of the Claimant's working pattern has not been analysed, it seems that from time to time he worked very hard indeed. I take as a random sample the month of August 2015, when he seems to have worked a night shift on every day of the month except for the 1st and 16th. At other times he may only have worked two weekend shifts in the week - that is why it is difficult to assess continuity without more detailed records, because, for example, the gap in shifts might include days or nights when permanent workers or regular workers might be taking a break over the weekend, but suffice it to say that the pattern shows that the Claimant did work very regularly, and it may well be that his time off was no

more than amounted to the equivalent of an ordinary worker's weekend and holiday.

Relevant Law

33. The definition of an employee under the Employment Rights Act 1996 is set out in section 230. An employee is one who works under a contract of service, whether express or implied, written or oral.

34. What is a contract of service is left to the case law. The classic test is stated in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) 2QB 497**, a case not about employment rights but about National Insurance contributions. The features of the contract of service are that the employer offers his own skill and labour, he agreed to be subject to such control as was consistent with a contract of service, and other provisions were consistent with a contract of service. These a distinguished an employee from someone who works under a contract for services or an independent contractor.

35. In time the case law has identified employment under a contract of service to include, as an irreducible minimum, control, mutuality of obligation and personal performance.

36. Taking the last first, personal performance tends to suggest someone is not able to send a substitute to do their work, as might be the case with a skilled tradesman. Clearly in this case it was the Claimant who was expected to attend on shift, because he had been checked, his references taken up and he had been trained. He could not have sent someone else and claimed payment for it.

37. On mutuality of obligation, the Respondent relies on **Clark v Oxfordshire County Council 1998 IRLR 125** which on the facts is very similar, as that Claimant was a bank nurse, although she was said to have taken a number of breaks in the period leading up to the termination. On appeal it was held that a Tribunal making a determination as to whether there was a contract of service was entitled to rely not only on the documents but also on the

factual circumstances in which the work was performed as evidence of the nature of the contract, but upheld the Tribunal finding that in that case there had been no mutuality of obligation, in that neither was obliged to offer work to or undertake work for the other. The Respondent also relies on **Carmichael v National Power Limited 1999 1WLR 242**, which again emphasises the need for mutuality of obligation; the case concerned guides who were trained and offered their services regularly, but it was held that as they were not required to come to work they were not thereby employees. I was also referred to **O'Kelly v Trusthouse Forte 1983 WL 216985** about "regulars" in the hospitality industry, that is, casuals who worked frequently for the same establishment. On the facts it was held that they were independent contractors because the terms and conditions under which they worked involved no mutual obligation even though in practice they worked continuously.

38. The Claimant in turn relies on two cases involving agencies supplying workers to end users The first is **Brook Street Bureau v Dacas 2004 ICR1437**. The Employment Tribunal had found that the Claimant had a contract of service with the agency, but not with the end user. The Employment Appeal Tribunal held that there was a contract of service, and on appeal it was held that it was not a contract of service, but that neither had considered whether there was an implied contract of service with the end user.

39. The Claimant also relies on **Frank v Reuters 2003 EWCA Civ 417** in which on the facts the case was remitted to the Employment Tribunal to determine whether there was an *implied* contract of service where a driver supplied by the agency had worked for the end user for a number of years on a constant basis. It appears from the facts that in neither case was there any question of the employee being free to leave when he wished or to cancel the assignment, and in each case it seems to have been one, very long running, assignment with the end user, which was arranged by the agency.

Discussion

40. On the particular facts of this case, on the face of it the Claimant has suffered an injustice, because after long and constant hours of hard work

for the Respondent, washing and feeding some very challenging patients, he has been left dangling and without work in the face of an allegation by a patient which, while very serious if true, appears not to have taken seriously by either the police or the Respondent. The apparent lack of investigation suggests that neither the police nor the Respondent think the allegation is any more than the fantasy of a mentally disturbed person; if the Respondent has not reached that conclusion, then it is astonishing that they have not investigated a serious breach of its duty to care for the safety of patients, whether looking at the conduct of individual staff members or at their systems of work.

41. However unfair the effect of this on the Claimant, only if he is an employee can he bring an unfair dismissal claim. It might be possible to bring a claim for breach of other contractual rights, but not in an Employment Tribunal.

42. The core challenge in this case relates to mutuality of obligation. The staff handbook is clearly a contractual document, setting out the rights and obligations of the arrangement between the parties. On paper the claimant was not obliged to work if he did not want to, though if he did not want to for more than six months the arrangement would be ended altogether. This does not appear to be a penalty for failing to meet an obligation to work, but rather an administrative measure, not to have people on the bank who did not wish to offer their services at all. On paper the Trust was not obliged to offer the claimant any work, though in practice so much work was available that the claimant was able to work and earn as much and more as a qualified nurse would. There are no facts to suggest that at the formation of the contract under which the claimant worked either side was obliged to offer work or accept it if offered. There was no mutuality of obligation, so it was not a contract of service.

43. The passage from the Procedure document quoted suggests that a bank worker who worked regularly and consistently for a long period could become an employee with a permanent contract. The Tribunal's finding is that this document was drafted as a commentary for managers on how to manage temporary resourcing, with a warning to them to be careful not to rely on a particular worker in a particular place long term, in case he may be

deemed a permanent employee. It was not intended to have contractual force. It is simply a statement of the Respondent's perception of the law, and of the risk of such a finding being made on the facts, rather than a contractually binding statement that in certain circumstances the Trust will offer permanent employment status, obliged to provide work, and the claimant obliged to take it. There is insufficient detail on what conditions would obtain when an arrangement which imposes no obligation either side would become a contract of employment if it was not a contract of service from the beginning, as in my finding it was not. There is no indication of what hours would be worked. There is no evidence of any discussion taking place between the Claimant and any manager to indicate some change in status. Despite his regular working, the ward managers could not place him on a work roster unless he had himself booked the shifts. The terms on which he worked appear to have remained unchanged. He simply took the opportunities the arrangement allowed to work long and regular hours and earn, and from time to time he took breaks of up to two months.

44. In conclusion, the lack of mutuality of obligation, both at the outset and as worked in practice, is fatal to the Claimant's case. He was not employed by the Respondent under a contract of employment, but was a worker under a contract for services. In consequence the unfair dismissal claim fails.

45. After these reasons were delivered orally the successful respondent asked for written reasons to be provided under rule 62(3). It is assumed that the intention of the request is to report the case to the Trust, as the Respondent will not wish to appeal. It is to be hoped that these Reasons will be read by members of the Trust Board, who may conclude that although the Claimant was not their employee, they owe a moral obligation to him, as a long serving, hard- working, and apparently blameless bank worker, regularly undertaking care of very difficult patients at unsocial hours, to check if there is in fact any reason why he cannot be permitted to book shifts and continue working for them. At the very least they should inform him of the progress of the investigation of the allegation leading to his blocking which they are to carry out under the bank worker's Conduct and Capability procedure.

Employment Judge Goodman
8 March 2017