



EMPLOYMENT TRIBUNALS

Claimant: Mr C Ntaka

Respondent: Lancashire Care Foundation Trust

Heard at: Manchester

On: 18 July 2017

Before: Employment Judge Porter

Representation

Claimant: Mr R Oliver, consultant

Respondent: Mr B Williams, counsel

JUDGMENT having been sent to the parties on 19 July 2017 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues to be determined

1. At the outset it was confirmed that the issue was whether the claimant was continuously employed for a period of not less than two years ending with the effective date of termination

Submissions

2. Consultant for the claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-
 - 2.1 The letter dated 12 January 2015 (page 34D) is clear evidence of an agreement reached between the parties that the claimant's employment began on 16 February 2015. There is a clear offer and acceptance of a post commencing on a date;
 - 2.2 the claimant tried to obtain work immediately and regularly contacted the respondent to get shifts between 16 February 2015 and May 2015;
 - 2.3 the respondent's witness asserts that the claimant could not get shifts in this period because notice was needed to be given to the employment agency;
 - 2.4 the fact that the claimant was working elsewhere did not prevent him from being in employment with the respondent at the same time;
 - 2.5 the claimant was continuously employed from 16 February 2015 to 17 February 2017, when he resigned.
3. Counsel for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here.
4. Counsel for the respondent made a number of further detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was additionally asserted that:-
 - 4.1 respondent has not conceded that the claimant was an employee within the meaning of the Employment Rights Act;
 - 4.2 it is not necessary to determine that issue because even if the claimant was employed, he was employed for less than the requisite two-year period;
 - 4.3 The documentary evidence is clear that the claimant's first shift was 29 August 2015 and that was the start date of any employment;
 - 4.4 The claimant has agreed that he was not eligible for work until May 2015 because he was not on the system. There is no evidence that he carried out any work from that date until August 2015;

- 4.5 Even if the claimant is right, even if he did start work on the 16 February 2015, any employment relationship terminated on 9 January 2017;
- 4.6 The claimant contrives to give himself two years service by resigning on 17 February 2017 after receiving legal advice. The claimant's employment with the respondent had already ceased by that time.

Evidence

5. The claimant gave evidence. He had not prepared a witness statement in advance of the hearing. No case management order had been made for exchange of witness statements.
6. The respondent relied upon the evidence of Candace Morgan, Temporary Staffing Team leader, who provided her evidence from a written witness statement.
7. Both witnesses were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.
8. An agreed bundle of documents was presented. Additional documents were presented during the course of the Hearing with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

9. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.
10. The respondent Trust operates a Temporary Staffing Bank to provide short term temporary cover for the Trust as and when necessary. Bank staff are engaged by the Trust on terms of engagement which set out the terms and conditions on which the Trust engages staff on the Temporary Staffing Bank.
11. From 2008 to 2015 the claimant was employed as a support worker through an agency, Care Staff solution. He was employed by that agency to work for the respondent Trust and continued to do so until May 2015.
12. The claimant made an application to the respondent for the post of bank Health Care Support Worker.

13. By letter dated 12 January 2015 (page 34D) the claimant was advised as follows:

Further to our recent conversation regarding the post of Bank Health Care Support worker, we have now received satisfactory pre-employment clearances and come confirm your appointment to this post, starting from 16/02/2015

I must inform you, however, that you will not be able to commence working bank assignments until you have completed your mandatory training requirements as detailed below....

You will be required to attend the Trust Basic Life Support and Moving & Handling training. This has been arranged for...16/2/15....

To register yourself on the IG Training tool to allow you to complete the mandatory IG training modules, please follow these instructions.....

Training Tracker

You will soon receive an e mail providing login details for your Training Tracker account. You will be required to complete the modules on training Tracker prior to starting work.

I would like to take this opportunity to congratulate you on your appointment and wish you every success in your new role with the Trust.

14. The letter dated 12 January 2015 includes a reference to a temporary staffing induction pack, which has not been provided to the tribunal.
15. The claimant attended, and was paid for his attendance at, the training course on 16 February 2015.
16. There is no clear evidence as to when the claimant completed the further on line mandatory training.
17. The claimant acknowledges that he was unable to register online.
18. The claimant accepts that he continued to work for the agency until May 2015 and that he did not complete any assignments for the respondent Trust in the period January 2015 to May 2015. There is no satisfactory evidence that the claimant worked for the respondent Trust from May 2015 onwards.
19. The claimant completed his first assignment on 29 August 2015.

[On this the tribunal accepts the evidence of the respondent's witness. The claimant's evidence that he started work at an earlier date, May 2015, is unsatisfactory as it is wholly unsupported by any documentary evidence. The claimant has failed to provide pay slips or bank statements

to support his evidence that he was working for, and being paid by, the respondent from May 2015.]

20. The claimant had completed his mandatory training by that date. It is not clear when. On balance the tribunal finds that the claimant had completed his mandatory training on or around 28 August 2015.

21. By letter dated 12 August 2015 (page 35) the respondent advised the claimant:

Welcome to the Temporary Staffing Bank of Lancashire Care NHS Foundation trust

This letter sets out the terms and conditions on which we engage you as a member of our Temporary Staffing Bank... If you wish to accept our offer of appointment to the Temporary Staffing Bank, please sign and return one copy of this letter....

2. Induction and Mandatory training

Appointment to our Temporary Staffing Bank is conditional upon you:

- a. Reading and signing off the temporary staffing induction booklet before commencing your first assignment

You should not commence work in an Assignment until you have returned your signed Induction Declaration to the Temporary Staffing office and have been informed by them that you can start work.

Failure to comply with this will result in you not being allocated any Assignments....

- b. Attending and completing any mandatory training as directed by the Trust

The Temporary Staffing department will facilitate access for bank workers to all required mandatory training. This includes face-to-face and online training. You must be compliant with all the required mandatory training before you commence Assignments.

3. Start of engagement on the Temporary Staffing Bank

Your engagement as a member of the Temporary Staffing Bank will start on the date of your first Assignment. You must not commence bank work prior to receiving notification from the Temporary Staffing team that you are fully recruited and have completed all the required mandatory training.

22. On the 21 August 2015 the claimant signed and returned a copy of the letter dated 12 August 2015 confirming:

"I have read, understood and accept the terms of my engagement on the Trust's Temporary Staffing Bank as set out in this letter and agree to abide by them."

23. By letter wrongly dated 9 January 2016 (page 65) (written and sent on 9 January 2017) the claimant was advised “ a decision has now been made to disengage you from working shifts for LCFT” (the respondent)
24. By letter dated the 17 February 2017 (page 68) the claimant tendered his resignation from the Trust with immediate effect.

Law

25. s108 Employment Rights Act 1996 (“ERA 1996”) provides that the right not to be unfairly dismissed does not apply to an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
26. s211 ERA 1996 states that an employee’s period of continuous employment begins with the day on which the employee starts work.
27. **General of the Salvation Army v Dewsbury** [1984] IRLR 222 states that “starts work” was not intended to refer to the undertaking of full-time duties of employment but was intended to refer to the beginning of employment under the contract of employment.
28. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

29. In determining the claimant’s continuous length of employment, the first question is from what date did any employment begin.
30. Applying the law as clarified in the case of **General of the Salvation Army v Dewsbury** the question is not when duties started but when any contract of employment began.
31. The claimant argues that the letter dated 12 January 2015 amounts to an offer of a contract of employment starting from 16 February 2015. However, the letter does not refer to the start date of a contract of employment; the letter confirms the claimant’s appointment to the post of Bank Health Care Support worker starting from 16 February 2015. That is not, by itself, an offer of employment to commence on a specified date. There is reference in that letter to a Temporary Staffing Induction pack, which has not been copied, but also to a requirement to attend training on

16 February 2015, to register on to an online Training tool and to complete mandatory training before starting work. It was a clear condition of the offer of engagement that the claimant complete all mandatory training before the claimant could commence work. A start date for commencement of employment was not identified because it could not be so identified at that stage; the claimant was required to complete the mandatory training before that start date could be ascertained.

32. The claimant attended, and was paid for attendance at, that training on 16 February 2015. However, that was only part of the mandatory training. It is not clear when the claimant completed the further mandatory training. There has been some confusion as to what steps the claimant had to take before starting work, but it is his clear evidence that he was unable to register online, and he could not start working, until he had completed that registration. The documentary evidence is clear that the further mandatory training was on-line training. There was a delay in the claimant being able to register on-line. There was clearly a delay in the completion of the mandatory training. Eventually the claimant did start working on various assignments. There is a conflict of evidence as to when the claimant actually started working. On balance the tribunal accepts the evidence of the respondent's witness that the claimant completed his first assignment, started working, on 29 August 2015.
33. The start date for assignments being in August 2015 is consistent with the documentary evidence, namely the agreement signed by the claimant on 21 August 2015. In that document the claimant confirmed that he had read understood and accepted the terms of his engagement on the Trust's Temporary staffing bank. That is the contract upon which the claimant was engaged.
34. The tribunal acknowledges that the signed agreement is not conclusive evidence of the start date of any employment. It is for the tribunal to consider from what date the relationship between the claimant and the respondent was one of employer and employee.
35. The claimant could not commence work under the terms of agreement signed by the claimant on 21 August 2015, or the terms described in the letter dated 12 January 2015, unless and until he had completed the mandatory training. Neither contract could commence until the claimant had satisfied that condition. There is no satisfactory evidence as to the precise date upon which the claimant completed that mandatory training, when he satisfied that condition. It is clear that he must have satisfied the condition by the date of his first assignment, 29 August 2015. There is no satisfactory evidence that the claimant completed the mandatory training, one of the conditions of engagement, before that date. On balance the tribunal finds that the claimant satisfied the condition, completed his

- mandatory training, on 28 August 2015. The tribunal agrees with counsel for the respondent that the contract between the claimant and the respondent did not commence until the claimant had completed the mandatory training, the conditions of employment, and started his first assignment. That date is 29 August 2015.
36. In the alternative, the tribunal agrees with counsel for the respondent that the earliest date for commencement of the contract is 21 August 2015, the date the claimant signed the terms of engagement. .
37. In the further alternative, the contract of employment began when the claimant satisfied the conditions of employment, namely, completed his mandatory training, on 28 August 2015.
38. It follows that, whether the commencement date of employment was 21, 28 or 29 August 2015, the claimant was not continuously employed for a period of 2 years, whether the termination date was 9 January 2017 or 17 February 2017.
39. The tribunal does not have jurisdiction to hear this claim.

Employment Judge Porter

Date: 22 August 2017

REASONS SENT TO THE PARTIES ON

31 August 2017

FOR THE TRIBUNAL OFFICE