EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr G N Wilks	Advance Housing and Support Ltd

PRELIMINARY HEARING

Heard at: Watford **On:** 19 December 2017

Before: Employment Judge Manley

Appearances
For the Claimant: In person
For the Respondent: Ms S Thompson, solicitor

RESERVED JUDGMENT

1. The tribunal does not have jurisdiction to hear the claimant's complaint of unfair dismissal as he did not have two years' continuous service before the effective date of termination.

2. The direct race discrimination and victimisation complaints are struck out as they have no reasonable prospect of success.

REASONS

Introduction and issues

1. This was a matter which became before an employment judge at a preliminary hearing on 7 September 2017. As is usual, this was the opportunity for matters to be clarified and it appeared that there were several preliminary issues. After considerable discussion as noted by the employment judge, the matter was listed for this hearing to deal with the following:-

    1.1 Questions of the claimant's contractual status and continuity of service for the purposes of the unfair dismissal claim;

1.2 The respondent's strike out application in relation to the race discrimination and victimisation claims on the footing that these claims;

(a) were out of time; and/or
(b) had no reasonable prospect of success; or had such little prospect of success that it was appropriate to make a deposit order.

2. Various orders were made so that this hearing would be effective and they were all complied with.

3. The respondent had prepared a detailed skeleton argument which it had sent to the claimant. This runs to 85 paragraphs. Although the claimant was not required to do so, he responded with his own detailed skeleton argument which was 16 pages long. I am pleased to say that those skeleton arguments dealt with the issues to be determined today.

4. Unfortunately, the hearing started a little late as I was dealing with another matter. When I came into the tribunal, I saw that there was a detailed witness statement for a witness for the respondent, Ms Bing. That ran to 26 pages and 56 paragraphs. There was also one for the claimant himself which ran to 22 pages. There was a very short statement in support from a former colleague which related to events in 2015. I expressed concern when I saw that the bundle of documents ran to well over 400 pages. I wondered whether the matter was capable of being resolved the matter within the one day allocated to it but we agreed that we would press on and do our best to complete the hearing. I heard the evidence and short oral submissions by 4.30 pm and then indicated that I needed to reserve judgment.

Facts

5. As this is a matter which had the possibility of continuing to a hearing, most of the facts that I deal with are largely undisputed or, where they are disputed, they relate directly to the issues which I must determine.

6. The claimant commenced employment in August 1999 with a predecessor of the respondent, Hackney Independent Living Team (HILT). The claimant was employed under something which is known as a "*sessional contract*" and a copy of it was in the bundle. The claimant was a support worker and worked in several different places providing support for vulnerable adults with learning disabilities and mental health conditions. For a short period between 2000 and 2001, the claimant was employed on a permanent contract a copy of which appears in the bundle but he then reverted to being what the respondent calls "*a sessional worker*". The claimant's employment was transferred to the respondent around 2011 and he stayed employed by it until the date of termination on 9 December 2016 following notice having been given to him in September 2016.

7. The sessional contract sets out some of the terms and conditions. Not all were necessarily applied precisely in practice. For instance, the rate of pay has increased since that contract was signed and there are several other minor matters for which there has been some updating, not all of which had been written into the document. Under the heading "*Hours of Work*", it says this:

> *"The hours of work for this post are a **minimum of 200 hours per year**. All hours worked will be on an "as and when required" basis.*
>
> *Hours of work will not exceed 45 hours in any one week.*
>
> *Failure to work the minimum hours or consistent cancellation of booked work may result in your removal from the sessional staff bank."*

8. It also states: "*You will be expected to accept work on the days that you have indicated that you will be available for work*". There is provision for paid holidays and reference to a disciplinary procedure; requirements with respect to termination of employment and so on. The claimant worked for the respondent at several of its schemes. For the years between 2014 and termination of employment, he worked primarily at scheme 2211 and scheme 2219 with very occasional work at scheme 2220. These schemes are based in Haringey, Newham and Hackney. The arrangement was that the claimant would be put onto a rota once he had indicated his availability to work. It was up to the claimant whether or not he put himself forward for work. From the table which the respondent prepared from January 2014, (between pages 171 and 181 of the bundle), it appears that the claimant was working most often at scheme 2211, occasionally at 2212. By the second half of 2016, he appeared to be working most at scheme 2219. The claimant's hours of work varied considerably over the whole of his employment. There were some weeks in 2014 when he exceeded 45 hours per week. He was working anything between 20 and 75 hours per week for the respondent in his last year.

9. The claimant worked in most of the weeks over the past few years for the respondent but there are some breaks in that employment. There was evidence about breaks in work contained in the schedule of hours produced to me; some of these were breaks of about a week. The claimant does not accept that these were necessarily all breaks in employment as he believed he may well have been on holiday. He did produce some evidence in the form of a rota where he had written the word '*holiday*' to indicate that. It is not possible for me to say whether he was or was not on holiday in that week as the pay slips do not really help as sums of money are often received at a different time from when the holiday was actually taken. The claimant has also said he may well have swapped shifts but there is no direct evidence of that. I find that those breaks were not particularly significant.

10. What is more significant in terms of breaks in the claimant's record of work for the respondent, is a five-week break in August 2016 followed by a two-week break in October 2016. There is no evidence to the effect that the claimant was on holiday during these periods. What the claimant said about these periods when he did no work for the respondent, was that he believed that he was unwell. He agreed that he had carried out work for the other organisation he worked for during this time. He has presented medical evidence to show that he was referred to mental health services in August 2016 by his GP and he was seen on 24 August by the community mental health team. The claimant had previously sought medical assistance with respect to his mental health in 2015 when he had 11 sessions of CBT. He was discharged from that service on 6 August with the psychologist commenting: *"When I spoke to him on 5/08/15, he requested to be discharged from our service. He told me that he was feeling much better since starting the new job."* This would seem to be a reference to the fact that the claimant had found other work with another care agency. In order to take on that work, which he said was paying less per hour than the respondent, he had had to forego some work with the respondent to undertake training.

11. The claimant's evidence was that he looked for other work following some difficulties he had faced with a particular manager of the respondent in 2015. On 7 April, the claimant had lodged a grievance about difficulties that he had with this manager. Amongst his complaints was one that he had been less favourably treated than others in that he had not been allocated shifts because he was not Nigerian. Mr Gavin of the respondent investigated that grievance and Ms Bing set out the timetable and the outcome of the grievance in her witness statement. In summary, Mr Gavin upheld one of the claimant's allegations which related to the way in which the manager managed cover for one shift in March 2015. He did not uphold the other three matters which included the complaint of racial discrimination. In the grievance outcome letter, Mr Gavin referred to having spoken to Ade Oyeniyi. I accept that that was an error as the person who had been spoken to, as indicated in the documents, was an Ade Folarin who was a Nigerian worker who was spoken to. In any event, the claimant appealed the grievance outcome and the interim chief executive dealt with and sent an outcome letter on 3 June. She overturned part of Mr Gavin's findings with respect to the first allegation but also did not find that there had been any racial discrimination. The manager in question had by then left the respondent for several reasons.

12. The claimant referred to this grievance and his concerns about his treatment several times before me. However, he did not say anything more to the respondent about it after the outcome of the appeal up to the date he left. As indicated above, he had found some other work which he did alongside the work for the respondent.

13. Towards the beginning of 2016, the respondent decided to encourage casual and sessional workers to become permanent workers with a set number of hours. One of the reasons for this was because the respondent

had received feedback from commissioners in Newham and Haringey expressing concern about the high number of casual staff. Those commissioners had asked the respondent to increase levels of permanent staff for consistency of care.

14. Ms Bing, who is the assistant director of HR, undertook to take this forward and did so with the assistance of HR representatives, Ms Burke and Ms Weekes. Ms Bing therefore wrote to the 83 casual support workers (including the claimant) on 30 March 2016. In the bundle was the list of 83 people written to with their race and nationality. As is often the case in the South East of England in this industry, there are a many people (around 50) listed there who are Black/Black British and Black/Black British/Caribbean. A few people are recorded as *"not known/undisclosed*" and some are listed as "*White British*" or "*White Other*".

15. The claimant's letter appears in the bundle at page 254. The letter began:

> *"We have recently reviewed the sessional bank staffing arrangements and would like to consult with you and other staff on a new way of working, whereby you are part of a scheme rather than part of the sessional bank.*
>
> *We would also like to encourage sessional workers to join Advance as permanent support workers with a new contract of employment.*
>
> *From 1 April 2016, we proposed that instead of being line managed by Pat Weekes, your line manager and main scheme are as below."*

16. The claimant's line manager was then to be the manager responsible for scheme 2219 (Wilderton Road) as the respondent believed that there was where he was predominantly working in March of 2016. The claimant agrees that he was predominantly working there at that point in time but does not agree that that reflected the whole of his employment. The letter went on to mention that there would be permanent hours although it did not say what hours these would amount to. It also said that other shifts might be offered. There was a section on the letter at the end for the claimant to complete. This gave an option for him to state that he was interested in becoming a permanent support worker with the hours and days blank for him to complete. There was also a second option which allowed him to give reasons for not being interested in this offer. The claimant did not reply to this letter. 26 casual bank staff signed up as permanent workers at this point.

17. On 11 May, the claimant was sent another letter which set out the consultation arrangements, listed people who were to be the representatives with their contact details and mentioned the drop-in sessions to deal with the casual agreement. It set out details of the casual agreement which was the alternative to the permanent role. Again, the claimant did not respond to that and another letter was sent to him on 2 June which indicated a change in the date for the sessional drop in and

asked him to sign the casual agreement if he is "*happy*" to do so. It then stated:

> *"If we have not heard from you or received a signed casual agreement by Monday 13 June 2016 then we will write to invite you to an individual meeting. Please note an item of that meeting may be to terminate your sessional contract."*

18. The claimant was informed about the "*employee assistance programme*" and given numbers of two HR people who he could ring. It also included a consultation briefing.

19. The claimant did not reply to any of those letters but he did write an email to Ms Bing on 15 August. For reasons which I am not able to determine, the claimant had not attended any individual sessions and one was therefore arranged. In the email of 15 August, the claimant complained about losing some shifts and said that he lost some shifts from Patricia Alexander because she had given those hours to somebody who had signed the new contract. The claimant said that he didn't recall getting a copy of the proposed contract.

20. An individual session was arranged with the claimant on 19 August and Ms Burke then sent an email to Ms Bing about what had happened with the claimant. In summary, she said that the claimant had said he could not attend the sessions. He had also said that he was upset at not being offered a shift because he had not signed either agreement. He was asked whether he wanted the hours on a permanent contract but he was obviously upset and refused. Ms Burke mentioned rather rude comments the claimant had made.

21. Later in August, Ms Bing wrote to the claimant to offer him a permanent contract. This was a permanent contract for 24 hours; 18 hours were to be at Rotheley House (which was not one of the schemes he had most recently worked at) and 6 hours at Wilderton Road. He was also told that there may be additional hours. A copy of the contract was enclosed. The claimant said that he wanted to look at Rotheley House but was concerned because it would include weekend work. He asked various questions about it but did not sign the contract which he believed he should not sign until he was sure about being able to do the work. The respondent was using some agency staff at this time to cover some of the shifts.

22. By letter of 16 September, the claimant was told that his contract was terminated with 12 weeks' notice. He was again offered the chance to sign the permanent contract. The claimant requested an induction at Rotheley House to help him decide on whether to accept the new contract. That was arranged for 28 September and the manager there then reported to Ms Bing that the claimant had raised concerns about his claustrophobia and the proximity to a customer who had made complaints some years earlier. The claimant informed Ms Bing that he declined to work at Rotheley House for these reasons and she suggested some alternative hours in Newham.

23. Eventually, the claimant declined these offers for several reasons set out in an email of 16 October. He did not say that any of this treatment had anything to do with his race or indeed with the grievance that he had put in in 2015. Further correspondence ensued and, as indicated above, there was a two-week break in him attending for work with the respondent. Towards the end of the working relationship the claimant was offered a "*Bank Support Worker Agreement*", which was, in essence, similar to the sessional contract, but he did not sign it and he did no work beyond December.

24. This was the end of his working relationship with the respondent. The claim form was presented on 14 February and included a claim for race discrimination and victimisation under Equality Act 2010. The claimant accepts this was the first time these claims had been mentioned as being connected to the end of his employment.

Law and submissions

25. The jurisdictional question which arises with respect to the complaint of unfair dismissal relates to the right to bring such a complaint which relies upon the claimant having two years' continuous employment under section 108 of the Employment Rights Act 1996 (ERA).

26. The claimant must also satisfy the tribunal, if there is an issue about it, that he was an employee under the definition contained in section 230 ERA. Section 230 says that an employee is "*an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment*" and section 230(2) says: "*contract of employment means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

27. There is also the definition of worker set out at section 230(3). The main difference here is the provision for situations where there is not a contract of employment but where an individual "*undertakes to do or perform work personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual."* In layperson's language, the individuals likely to be excluded from being employees or workers as defined are the genuinely self-employed.

28. The first question is whether there was a contract of employment as workers cannot claim unfair dismissal. Several cases have dealt with this question over many years. For example, the case of Carmichael and another v National Power PLC [2000] IRLR 43 makes it clear that the documentary evidence should be considered alongside oral evidence of what happened in practice. That case is authority for the need for claimants to show mutuality of obligation for an employment contract to exist. Also of relevance, the case of Autoclenz Ltd v Belcher [2011] UKSC 41 made it clear that, in some circumstances, the tribunal might also need

to look outside the written terms of the agreement and consider how the parties conducted themselves. This is particularly where the written terms are inconsistent with the reality of the situation.

29. The respondent does not contend here that the claimant was self-employed. It accepts that the claimant was employed during the times he was attending work for the respondent. I was referred to Thomson v Fife Council [2005] EATS64/04 where the position of a "bank" social care worker was considered. This case looked at the possibility of a "global contract" existing to cover the times when that individual was not working for the respondent. This case paid particular attention to the concept of mutuality of obligation which it is generally agreed must be present for a contract of employment to exist. This requires the tribunal to look at the levels of commitment and the possibility or otherwise of the claimant refusing work (or, at least, not putting themselves forward as available) and the respondent not offering work.

30. The other issue which arises relates to continuity of service as set out in section 108 ERA. ERA also contains specific provision with respect to breaks in employment under section 212. These include circumstances when the employee is incapable of working in consequence of sickness or injury; absence because of temporary cessation of work or by arrangement or custom. I was referred to Byrne v City of Birmingham District Council [1987] IRLR 191 where the court of appeal made it clear that a temporary cessation of work could only be found where a "quantum of work" had ceased to exist and was no longer available to the employer to give to the employee.

31. The claimant asked me to consider the cases of North Wales Probation Board v Edwards UKEAT 68/07 and Cornwall County Council v Prater [2006] IRLR 362. These cases concern similar working arrangements where people carried out work but with some gaps in their working pattern. They confirm that the question of whether there was mutuality of obligation must be answered first to ascertain whether there was a contract of employment and then consideration given to whether the gaps can be bridged under section 212 ERA.

32. The claimant also brings complaints of direct race discrimination and victimisation under Equality Act 2010 (EQA). The respondent's case is that these complaints should be struck out because they have no reasonable prospects of success or that a deposit be ordered as they have little reasonable prospect of success. The provisions for such considerations arise under rules 37 and 39 Employment Tribunal Rules of Procedure 2013. I am aware of the case of Anyanwu v South Bank Students Union and South Bank University [2001] IRLR 305 which makes it clear that discrimination cases should not be struck out except in the "*most obvious and plainest cases*". Putting the claimant's case at its highest at this early stage of the proceedings, I must ask whether it has no reasonable prospects.

33. There is also a jurisdictional question with respect to the time limits which apply to all claims but particularly discrimination claims under section 123 EQA. The relevant part reads as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates,or
(b) such other period as the employment tribunal thinks just and equitable

(2) -

(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of that period;"

34. Part of the claimant's complaint relates to a grievance in 2015 when his employment came to an end in December 2016. The claimant seeks to argue that is conduct extending over a period under section 123(3) EQA. The claimant argues that there was direct race discrimination under section 13 and 39 EQA in 2015, details of which were in his grievance. He also asks for a just and equitable extension on the grounds that he was "*mentally dysfunctional".*

35. As far as the victimisation complaint is concerned, the relevant provision is section 27 ERA. This provides that a person victimises another if they subject that person to a detriment because they have done *"a protected act".* This would include, as in this case, complaining of discrimination because of a protected characteristic under EQA.

Conclusions

36. I considered first the question of the employment status of the claimant and whether it can be said that there was a contract of employment which subsisted throughout the time the claimant was working for the respondent and when he was not. The respondent has accepted that there was employment under the definition in section 230 ERA when the claimant attended work. I do not accept that the contract amounted to a global contract. There was mutuality of obligation during the periods the claimant was attending work but it was not present when he was not carrying out work for the respondent. He had work elsewhere, and times when he was not at work. The provisions of section 212 ERA do not apply in this case. The claimant was not prevented form working because of ill health and there was no temporary cessation of work.

37. The claimant's complaint of unfair dismissal cannot proceed as the tribunal has no jurisdiction to hear it. That is because the claimant cannot show

that he had two years' continuous employment at the date of termination. He has failed to explain to me the significant break in August and the shorter one in October. I find that that has broken continuity. Whilst the claimant may well have had ill health issues, he agreed that he had continued to work for the other agency that he worked for during this time. He is therefore not covered by section 212(3)(a) ERA with respect to being incapable of working in consequence of sickness or injury and he has provided no other credible reason for that absence. That means that he does not have two years' continuous employment and his claim of unfair dismissal cannot therefore proceed.

38. I turn to the race discrimination complaint. First, I cannot find that there is conduct extending over a period with respect to the grievance in 2015 through to termination. There is no connection between that grievance and what happened in 2016. Different people dealt with the grievance from those that dealt with the process to encourage people to sign permanent contracts. That complaint is therefore out of time. The only submission I heard with respect to a just and equitable extension related to the claimant's mental health problems. However, the medical evidence did not suggest any difficulties with bringing claims and the claimant worked throughout. He was not "*mentally dysfunctional*". It is not just and equitable to extend time with respect to that matter and the tribunal has no jurisdiction to hear it.

39. The claimant also argues that the steps the respondent took to regularise contracts into permanent and casual employment contracts starting in March 2016 was also race discrimination. This would amount to conduct extending over a period from March 2016 until the end of employment.

40. However, such a complaint has no reasonable prospect of success. I accept that it is only in exceptional cases that discrimination complaints can be found to have no reasonable prospects at this early stage. I find that this is one of those cases. In considering this, I have taken the claimant's complaint at its highest. That is, that he believes there is some connection between his race and the steps the respondent took with respect to trying to get more permanent staff on board. The claimant has no chance of showing that this is connected to his race. The respondent carried out the same exercise for all 83 sessional workers. As indicated, those workers were of all races and many nationalities. The claimant raised no issues of less favourable treatment because of race and there is still no evidence of such treatment. The exercise was carried out for valid reasons and the claimant will not be able to shift the burden of proof to the respondent. The race discrimination complaint has no reasonable prospect of success and it is struck out.

41. As far as the victimisation complaint is concerned, I also strike out that claim. The claimant has no evidence whatsoever that there was any connection between the grievance which he presented in 2015 and the decisions taken by the respondent. The respondent is going to be able to show why it proceeded on this exercise with considerable documentary

evidence to support its case. It is extremely unlikely that an organisation would begin a complicated process involving 83 people, write letters, talk to representatives and hold meetings simply to cause detriment to someone who had put in a grievance almost a year earlier. Whilst it is accepted that the grievance amounted to a protected act, putting the claimant's case at its highest, there is no chance that he can show any link at all between that grievance which was dealt with by different people and the actions which were taken in 2016 which eventually led to the termination of his employment.

42. The claim is dismissed.

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Employment Judge Manley

Date: …23 January 2018……..

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office