EMPLOYMENT TRIBUNALS

Claimant: Mr A Thullah

Respondent: Sussex Partnership NHS Foundation Trust

Heard at: London South **On: Tuesday, 21 August 2018**

Before: Regional Employment Judge Hildebrand

Representation
Claimant: In Person
Respondent: Ms Catherine Rayner, Counsel

RESERVED JUDGMENT
ON PRELIMINARY HEARING

The Claimant's claim of unfair dismissal is dismissed on the grounds that the Claimant: -

1) Was not an employee of the Respondent and
2) In any event had insufficient service to present a claim of unfair dismissal.

REASONS

Issues

1. The application for this preliminary hearing was submitted with the Response. The Respondent contended that the Tribunal did not have jurisdiction to hear the Claimant's claim because the Claimant was not an employee of the Respondent and did not have sufficient continuity of service to bring in unfair dismissal claim.

2. I heard submissions from both parties and considered an extensive bundle of documents.

Facts

3. The facts about, which there are no disputes, are as follows.

4. The Claimant was engaged by the Respondent as a bank worker.

5. A conditional offer was sent to the Claimant and acknowledged by him and signed on 12 December 2014. The Claimant indicated in the document a preference to be paid at weekly intervals and a preference to work at Langley Green Hospital in Crawley. The Claimant also acknowledged receipt of the staff appointment form.

6. Further correspondence was sent to the Claimant on 8 April 2015 setting out under the heading *Nature of Work:* "As a Bank worker you are not an employee of the Trust and there is no entitlement to guaranteed or continuous assignments…. Similarly, you will not be under any obligation to accept an assignment." That letter expressly provided that if the Claimant did not undertake assignments for a period of 13 consecutive weeks the Respondent would write to ask if he wished to remain on the register. The registration would be terminated if the Claimant failed to respond.

7. The Respondent produced a comprehensive history of the individual engagements under which the Claimant had worked for the Respondent. There are gaps in excess of 7 days in January 2016, March 2017 and May – June 2017. There was also an extensive gap between 23 October 2016 to 26 January 2017, a period during which the Claimant was under review for disciplinary reasons.

8. A letter dated 23 December 2016 was produced. The Claimant denied that he had ever received this letter. It recorded that the Claimant had been spoken to by telephone on 19 November 2016.

9. It appeared that a patient had spoken to the CQC during an inspection and alleged that the Claimant had pushed a patient out of a room. The letter recorded that it had been decided that the Respondent was in a position to offer further work to the Claimant subject to a number of actions required of the Claimant. The Claimant cannot pinpoint a date but says that he heard nothing about his suspension until he approached the Respondent in January 2017 and was then informed that he was able to return to work. The first engagement after he returned to work was on 27 January 2017.

10. The Claimant was suspended on 18 September 2017 because of an allegation of sleeping on duty. The outcome was set out in a letter of 2 November 2017. It indicated that the Respondent had decided that it was no longer in a position to offer work in any of the services provided by the Trust in any capacity and that the Claimant would be removed from the bank register. The Claimant denied receipt of this letter until it was forwarded to him by e-mail on the date when he could not place in December 2017.

11. The Claimant approached ACAS on 22 January 2018 and a certificate was issued by ACAS on 15 February 2018. The claim was therefore presented in time in relation to a termination date of 2 November 2017 and for the present the Respondent does not take the point that the effective date of termination was the last day on which the Claimant worked in September

2017 rather than the outcome of the fact-finding investigation in November 2017.

The Respondent's Submission

12. The Respondent's submission identifies that the Claimant brought only one claim to the Tribunal, that is a claim of unfair dismissal. It appears in the grounds of resistance that the Respondent considered this a claim of constructive unfair dismissal but that does not appear to the borne out by the claim presented. The Respondent submitted that the relevant statutory provision was section 230 of the Employment Rights Act 1996. By subsection 1 it provides: "In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." Subsection 2 provides: ""contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

13. The Respondent referred to the leading case of ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** *[1968] 2 QB 497* which provides that a contract of service would exist if three conditions are fulfilled. These are agreement in consideration of wage or remuneration to provide work and skill in the performance of service for the master; agreement to be subject to the other's control in a sufficient degree to make that other master and that the other provisions of the contract are consistent with it being a contract of service.

14. The Supreme Court authority of ***Autoclenz v Belcher*** [2011] ICR 1157 was also considered. In the present case there is no suggestion that the terms of the relationship between the parties as recorded in writing do not accurately represent the bargain agreed.

15. In relation to continuity of service the Respondent referred to section 212 of the Employment Rights Act 1996 and that by section 212(3) a week will count if it is covered by a contract of employment or is one in which the employee is either incapable of work due to sickness or is absent because of temporary cessation of work or is absent from work in circumstances where by arrangement or custom he is regarded as continuing in employment.

16. By section 210 a week which does not count in computing the length of a period of continuous employment breaks continuity. In order to present a complaint of unfair dismissal an employee must by section 108 of the 1996 Act had been continuously employed for a period of not less than 2 years ending with the effective date of termination.

17. The Respondent's submission was that the Claimant was not an employee and, in any event, did not have sufficient service to present a complaint having had in the 2 years before November 2017 had breaks in January 2016, October 2016, March 2017 and May 2017.

18. The Respondent also provided an Employment Appeal Tribunal authority ***Hafal Ltd v Miss K Lane-Angell*** UKEAT/0107/17 The Honourable Mr Justice Choudhury (sitting alone). That case involved a consideration of a charity providing Appropriate Adults which had engaged an individual on a bank basis. The work was described as one where availability was notified to the charity to allow a rota to be prepared from which individuals were called up when required. The Tribunal found that earnings fluctuated and the individual undertook other fixed term engagements for the Respondent which lasted for a few months or weeks. The individual was removed from the rota for failing to respond to call out requests on 3 occasions. This provision appears to replicate the 13-week rule operated by the Respondent in the present case. The Tribunal concluded that Ms Hafal was an employee notwithstanding the express term of her engagement negating any mutuality of obligation. Faced with those express terms of appointment it was argued on appeal that it was impossible for the Tribunal to find an umbrella contract with mutuality of obligation by implication or otherwise.

19. After a comprehensive review of the authorities the EAT judgment had particular regard to the fact that the written terms produced were unambiguous. There were no guaranteed hours and no obligation to offer any minimum quantity of work. There was no obligation on the individual to be available. The terms of the appointment indicate that there was no mutuality of obligation. The EAT considered that an expectation that an individual would provide work was not the same as an obligation to do so. The case was disposed of on the basis that the EAT considered it could substitute its decision for that of the Tribunal. The terms of the letter were clear. They negated mutuality of obligation in respect of work being offered or performed. There was nothing to suggest that the terms were a sham. The EAT ruled that far from indicating an overarching contract the findings of the Tribunal supported mutual obligation only during a period when the Claimant was on a rota. The only possible conclusion was that there was no overarching contract of employment for the duration of the relationship.

20. The Respondent argued that the same considerations required a finding of no contract of employment here

The Claimant's Submission

21. The Claimant's submission focussed on his criticism of the process by which the Respondent decided that the engagement should not continue. The Claimant accepted that the days recorded by the Respondent as worked were accurately recorded. He said without specific evidence that the gaps normally covered periods when he had offered to work and had been cancelled by the Respondent. He contended that he had been an employee throughout the engagement and that he continued to be employed even when there was a suspension or cancellation of shifts. He relied on section 212(3) to cover his absences arguing that these were absences by arrangement or custom where he was regarded as continuing in employment.

Conclusion

22. Considering the facts of the present case about, which there is no real dispute, and clear contractual documentation provided supported by detailed analysis of the way in which the relationship worked the contractual position is clear. There was no obligation to offer work and no obligation to undertake work. There was a complete absence of mutuality, both in the contractual arrangements and in the way in which they operated.

23. The Claimant was a bank worker and the Respondent was free to use his services as and when required. There is no basis for a finding in a present case that the Claimant was an employee subject to an umbrella contract covering the period between individual engagements. Further breaks in the engagement in excess of a week provide periods within the statutory provision which operated to break any possible continuity that might have been created.

24. The Claimant argues that his suspension pending consideration of allegations made against him as a matter of custom operated to provide continuity of employment.

25. My conclusion is that the Respondent's freedom to refuse work in those circumstances is entirely consistent with the lack of obligation which it enjoyed under the arrangement. Had the Claimant been an employee suspended for disciplinary reasons, normal expectation would be that payment would continue until the disciplinary outcome was known. The arrangement here operated in accordance with the parties' expectation in precisely the opposite sense.

26. For these reasons I conclude that the Claimant's claim that he was an employee of the Respondent despite being a bank worker and had 2 years continuity of service is unsupported by the facts or law. He was not an employed and did not have the service required. The claim is therefore dismissed.

Regional Employment Judge Hildebrand

Date 28 August 2018