EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104571/18 Held on 14 and 15 February and 7 May 2019

Employment Judge: N M Hosie

Ms Jelena Ganecka	Claimant Represented by: Ms L Campbell - Solicitor
Grampian Health Board	Respondent Represented by: Mr A Watson - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the unfair dismissal complaint is dismissed for want of jurisdiction; and

2. the Tribunal has jurisdiction to consider the race discrimination complaint.

REASONS

Introduction

1. The claim comprises complaints of constructive unfair dismissal and race discrimination (direct discrimination). The claim is denied in its entirety by the respondent. Further, in the response form, the respondent's solicitor raised the following preliminary points:-

   (i) that the claimant was not an employee in terms of the Employment Rights Act 1996;
   (ii) in any event, the claimant did not have the requisite two years' continuous service to bring an unfair dismissal complaint; and
   (iii) time-bar (in relation to both the unfair dismissal and race discrimination complaints).

2. This case came before me, therefore, by way of a Preliminary Hearing on 14 and 15 February 2019 to consider and determine these preliminary issues. Having heard the evidence and submissions by the parties' solicitors, I invited the solicitors to make further written submissions in respect of a point which had arisen in my deliberations in respect of which I had not been fully addressed. Once these further submissions were received, I was able to consider matters fully on 7 May and make a decision.

The Evidence

3. On behalf of the respondent, I heard evidence at the Preliminary Hearing from:-

   - Sheila Swanney, Assistant Human Resources Manager
   - Anne Morrison, Assistant Support Services Manager

- Shona Strachan, Supervisor of the domestic staff, including "bank workers", such as the claimant.

I then heard evidence from the claimant.

4. Each witness spoke to a written statement.

5. A joint bundle of documentary productions was also lodged ("P").

The Facts

6. Helpfully, the parties' solicitors also submitted an "Agreed Chronology", on the basis of which, along with the evidence which I heard and the documentary productions, I was able to make the following findings in fact, relevant to the issues with which I was concerned.

7. The claimant began working for the respondent as a *"Support Worker Domestic Assistant"* on **13 October 2014**. The Statement of her Terms and Conditions of Employment was produced (P.26-31). The claimant's contract states that her appointment was on a *"bank"* and an "*as and when required"* basis. The claimant mainly worked at Peterhead Community Hospital with occasional shifts at Ugie Hospital (also in Peterhead).

8. On **5 May 2017,** the claimant arrived for a shift that, according to the respondent, she was not scheduled to work.

9. On **30 May 2017,** the claimant wrote to Ian Buchan, Support Services Manager, raising a grievance (P.48-50). The letter noted that she felt her Supervisor (Shona Strachan) was treating her less favourably than others. The Grievance Notification Form, included with the letter, states the grievance being raised as victimisation and discrimination by her Supervisor, Shona Strachan (P.51).

10. The claimant's last day of work for the respondent was **4 June 2017**.

11. On **28 June 2017,** an informal meeting between the claimant, her partner, (attending as a companion), Shona Strachan, Anne Morrison, Assistant Support Services Manager, and Jane Lloyd, Assistant HR Manager, acting as a facilitator, was held to discuss the claimant's grievance.

12. On **30 June 2017,** Jane Lloyd wrote to the claimant documenting points from the informal facilitated meeting (P.53/54).

13. On **13 July 2017,** the claimant's solicitor wrote to Ian Buchan seeking to commence the formal grievance process (P.55-58).

14. On **3 August 2017,** the claimant's solicitor wrote to Jane Lloyd enclosing paperwork from the claimant (P.61-64).

15. On **15 September 2017,** Jane Lloyd wrote to the claimant inviting her to a formal grievance hearing (P.74/75).

16. On **4 October 2017,** the formal grievance hearing was held with Ian Buchan acting as Chair and Eleanor McDonald, Assistant HR Manager, now retired, supporting him. Anne Morrison presented the management case. The claimant's partner attended as her companion. The grievance dealt with matters including alleged race discrimination in (a) alleged unfairness and unreasonableness in the offer of bank hours (alleged favouritism by Shona Strachan) and (b) the claimant not being offered a substantive contract when others had been. Ian Buchan's hand-written note of that meeting was produced (P.76/77).

17. On **6 October 2017,** Ian Buchan notified the claimant of the outcome of the hearing (P.78/79). This included a review to take place concerning the management of bank staff and allocation of hours. The claimant was encouraged to access the respondent's "vacancy bulletin" regularly, as a

means of gaining awareness of work opportunities, including permanent posts. The grievance was not upheld.

18. On **29 November 2017,** Anne Morrison met the claimant, along with Sheila Swanney, Assistant HR Manager, to discuss bank work at Peterhead and Fraserburgh Community Hospital. The claimant's partner was also present at that meeting. The claimant was offered bank work at Peterhead and Fraserburgh Community Hospitals. The claimant advised that she did not wish to work at Peterhead Community Hospital and stated that she was unable to undertake shifts at Fraserburgh Community Hospital because of the travel distance.

19. On **21 December 2017,** a follow-up letter was sent from Anne Morrison to the claimant, outlining the matters covered in the meeting of 29 November 2017, reiterating the offer of bank shifts at Peterhead Hospital and noting that she would seek to make any shifts at Fraserburgh as long as possible to make it worth the claimant's while travelling for the shift, should she reconsider her position (P.80/81).

20. On **22 February 2018,** Anne Morrison called the claimant to check up on matters (including the offer of bank work).

21. On **27 February 2018,** ACAS received an Early Conciliation Notification: Reference Number R123254/18/09 (P.12).

22. On **28 February 2018,** Anne Morrison wrote to the claimant and again offered her shifts at Fraserburgh, further to the previous correspondence (P.82).

23. On **15 March 2018,** the claimant returned her uniform.

24. On **23 March 2018,** Anne Morrison wrote to the claimant asking if she had considered her offer to work bank shifts at Fraserburgh or Peterhead Hospital (P.83).

25. On **10 April 2018,** the ACAS Early Conciliation Certificate was issued: Reference Number R123254/18/09 (P.12).

26. On **12 April 2018,** the claimant e-mailed Anne Morrison "giving [her] written notice" (P.84).

27. On **13 April 2018,** Anne Morrison wrote to the claimant acknowledging her e-mail (P.85).

28. On **2 May 2018,** an ACAS Early Conciliation Certificate was issued Reference Number R246972/18/10.

Respondent's Submissions

29. The respondent's solicitor spoke to written submissions which are referred to for their terms.

30. He submitted that, *"that the claimant was a worker, without continuous service, that her claim was submitted out of time, that there are no grounds for an extension, and that accordingly her claim should be dismissed".*

31. He addressed the three preliminary issues, in turn.

Employment Status

32. In support of his submission that the claimant was engaged on the staff bank as a "worker", he referred to the following cases:-

Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2 QB 497
Stephenson v. Delphi Diesel Systems Ltd [2003] ICR 471
Carmichael v. National Power [2000] IRLR 43
Thomson v. Fife Council EAT 0064/04

Cotswold Developments Construction Ltd v. Williams [2006] IRLR 181
Bell v. Forth Valley Health Board S/102084/06.

33. He submitted that in the present case there was no mutuality of obligation between the parties which is required for an employment relationship.

34. In support of that particular submission he referred me to the following factors:-

- In terms of the claimant's contract, she was only required to work, *"as and when required and on a bank basis"* (P. 26).
- Neither party committed to a minimum amount of work being offered or accepted.
- There was no restriction on the claimant working for other employers and Shona Strachan's evidence was that she prioritised the work which she did as an interpreter.
- The claimant had an unfettered right to choose when she worked and where.
- If the claimant decided that she no longer wanted to work for the respondent she could simply stop submitting availability (*"as appeared to happen from June 2017").*
- There was no pattern to the work that the claimant did for the respondent. She worked a variety of different shifts, at different times, at different locations (different areas within Peterhead Hospital and also separately working at times at Ugie Hospital) and on different days of the week. Her working hours fluctuated considerably month-to-month (P.86).
- The work was organised in a casual way, the rota being subject to alteration.
- The claimant did not feel herself bound to accept all work available. There was evidence from Sheila Strachan that she declined work for a variety of reasons. "*That was not a problem for the respondent as it was the nature of the engagement".*

35. It was submitted that this lack of mutuality of obligation was, *"entirely inconsistent with employment status".*

36. The respondent's solicitor invited me to accept the evidence of Shona Strachan and Anne Morrison who explained how the *"bank"* operated. He submitted that they, *"were very clear in their evidence about the lack of mutuality of obligation"*, although they were unaware of the *"indicators"* for worker or employee status. They recognised that they had to accept that bank staff could turn down or cancel work.

37. The respondent's solicitor also drew to my attention that the claimant had taken legal advice. She was, therefore, *"more aware, of what helps and what hinders her on this issue and it is submitted that this should be taken into account when assessing her evidence".*

38. It was accepted that the contract of employment (P.26-30), *"contains certain inaccuracies in relation to bank staff such as annual salary, provision for sick pay, notice provisions and references to 'employee' and 'employment".* However, it was submitted that, *"the respondent did not intend the contract to be an exclusive record of the terms of the agreement between the parties. The actions of the parties (including sentiments expressed at interview and reiterated during the engagement: that there was no obligation to offer or accept work) and documents such as the guidance from the respondent's intranet (P.111-114) therefore become relevant".*

Continuity of Employment

39. The respondent's solicitor submitted that even if the claimant was an employee she did not have the requisite two years' continuous service to pursue a claim of constructive unfair dismissal.

40. In support of his submission he referred to the following cases:-

Letheby V Christopher Ltd v. Bond [1988] ICR 480
Byrne v. Birmingham City District Council [1987] ICR 519
Hellyer Brothers Ltd v. McLeod and Ors [1987] ICR 526
Clark v. Oxfordshire Health Authorities [1998] IRLR 125
Carmichael
Quashie v. Stringfellow Restaurants Ltd [2013] IRLR 99.

41. He referred to the claimant's witness statement at paragraph 10 where she states: *"there was a break in my employment from May 2016 to August 2016";* and referring to June 2017 onwards and at paragraph 11: *"I accept there was a break in my employment".*

42. *He then referred to the relevant law: "As per s.210(4) of the Employment Rights Act 1996 a break of at least one week ending on a Saturday will, in the usual course of events, break continuity of employment, except where the claimant could establish that the reason for her absence was either sickness, there was a temporary cessation of work or where there was a custom and practice which would allow her to be absent (s.212(3)).*"

43. He accepted, with reference to ***Letheby*** and ***Byrne***, that, *"the mere fact that work was simply not offered to an individual is not sufficient to establish a cessation of work".* However, he submitted that the Tribunal had to consider, *"whether the obligation to provide and perform work, intrinsic to the employer/employee relationship, can be said to subsist during non-working periods (in relation to work that may arise). The issue to be determined is whether mutual promises as to future performance of work have been made".* In support of his submission in this regard, he referred to ***Hellyer***, ***Clark,*** ***Carmichael*** and ***Quashie***.

44. So far as the facts of the present case were concerned, the respondent's solicitor said this:-

"In relation to a temporary cessation of work, the claimant does not suggest that there was no work available for her to do during the periods that she did not work on the staff bank. Other staff were working at those times. There was no temporary cessation of work. When she was not working, it was because there was no obligation on either of the parties to offer work or to carry it out.

In relation to there being a custom and practice which would allow the claimant to be absent, no evidence has been provided to suggest that there was a definite arrangement guaranteeing or giving a commitment to future work.

The period in the summer of 2016 and the period from 4 June 2017, served to break continuity (even disregarding other breaks of a week or longer taken by the claimant). The claimant cannot establish the necessary two years' service for the purposes of a constructive dismissal claim.

An added complication is the ambiguity around her departure or termination dates. This could, the respondent would submit, fairly be viewed as her last day of work (4 June 2017) or 3 August 2017 (where she notes, in correspondence (at page 64): 'I give you Notice. I'm leaving this job under constructive dismissal'). Anne Morrison and Shona Strachan understood that this was the claimant leaving her role.

In terms of any "umbrella contract", Shona Strachan gave evidence that even during the shifts the claimant had to leave early on occasion and lose pay as a result, so the engagement is continually flexible. It is also clear there was a lack of mutuality of obligation during the periods between shifts. This is best demonstrated by a break of 7.5 weeks in the summer of 2016 and June 2017 onwards where it is apparent no umbrella contract exists given the claimant has, for all intents and purposes, left her role. No mutual promises as to future work were made at these times. There is also evidence of the claimant declining work offered and cancelling work accepted, with no adverse consequences."

Time-Bar

45. The respondent's solicitor submitted that the claimant last worked for the respondent on 4 June 2017. At the time she was raising allegations of discrimination and was taking legal advice. A period of nearly one year passed before her Tribunal claim was submitted. It was submitted that the claim is time-barred and that there were no grounds for an extension.

46. In support of his submissions in this regard, he referred to the following cases:-

Robertson v. Bexley Community Centre [2003] IRLR 434
British Coal Corporation v. Keeble & Others [1997] IRLR 336
Apelogun-Gabriels v. Lambeth London Borough Council and Another [2001] ICR 713
Sougrin v. Haringey Health Authority [1992] IRLR 416
Okoro and Another v. Taylor Woodrow Construction Ltd and Others [2012] EWCA Civ 1590
Wall's Meat v. Khan [1978] IRLR 499.

Discrimination Complaint

47. The respondent's solicitor referred to s.123(1) of the Equality Act 2010 ("the 2010 Act"), which requires a discrimination complaint to be presented to a Tribunal at the end of, *"the period of three months starting with the date of the Act to which the complaint relates".* He submitted that as the claimant last worked for the respondent on 4 June 2017, the discrimination complaint was out of time. The issue for the Tribunal was whether it should exercise its discretion to extend the time limit to such period as it considers just and equitable in terms of s.123(1)(b).

48. He drew to my attention, with reference to ***Robertson***, that, *"the exercise of discretion is the exception rather than the rule".*

49. He also referred to the suggested *"checklist"* of factors which a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit.

50. He submitted there was not a "continuing act" that would make the claim in time in terms of s.123(3). He submitted that:-

"The discrimination claim relates to alleged direct discrimination: the failure to offer the claimant a permanent contract, compared to bank colleague comparators who became employees. That is the only discrimination claim

*that can be gleaned from the claim form (page 10). In terms of the factors identified in **British Coal Corporation**:*

(a) The last discriminatory act took place on 1 April 2017. The claim was submitted over a year later. The claimant has provided no reasons for the delay.
(b) I submit that inevitably there may be difficulties for both parties in terms of recollection of events dating so far back (the acts of discrimination date back to May 2015). We have seen already in this Preliminary Hearing various individuals involved in matters have now left the respondent.
(c) The claimant did not make any substantial request for information from the respondent prior to lodging her claim. The claimant cannot argue that her claim form was lodged out of time because the respondent did not co-operate with any request for information.
(d) There is no indication that the claimant was at any point unaware of the relevant facts. She had experienced the alleged events herself.
(e) The claimant took advice from CAB, and then later Masson Glennie Solicitors. This was all prior to July 2017. There was then considerable delay in initiating the claim."

Constructive Unfair Dismissal Complaint

51. The respondent's solicitor referred to s.111 of the 1996 Act and the requirement that complaints of this nature require to be presented to the Tribunal within three months of the effective date of termination. That period is extended by ACAS Early Conciliation and the Tribunal can also extend the time for bringing a claim where it is satisfied that it was not *"reasonably practicable"* to bring the claim in time as long as the claim was brought within such further period as the Tribunal considers reasonable (s.111(2)(b) of the 1996 Act).

52. In support of his submissions in this regard the respondent's solicitor referred to the following passage in the Judgment of Lord Denning in ***Wall's Meat*** at paragraph 15:-

"It is simply to ask this question: Had (the claimant) just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

53. So far as the present case was concerned, the respondent's solicitor said this:-

"The claimant wrote to the respondent on 3 August 2017 (P.64) noting, "I give you a Notice. I'm leaving this job under Constructive Dismissal". The claimant resigned at that point and knew of the right to claim constructive dismissal. Yet it took nearly 7 months, until 27 February 2018 (P.12), to initiate ACAS Early Conciliation.

The respondent would submit that the claim is time-barred in its entirety and there are no grounds to extend the time period."

Claimant's Submissions

54. In support of her submissions, the claimant's solicitor referred to the following cases:-

Market Investigations Ltd v. Minister of Social Security [1969] 2 W.L.R.1
St. Ives Plymouth Ltd v. Haggerty UKEAT/0107/08/MAA
Hale v. Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA
Commissioner of Police of the Metropolis v. Hendricks [2003] ICR 530
Amarasnighe v. Chase Farm Hospitals NHS Trust [1997] 6 WLUK228.

55. The claimant's solicitor submitted that I should, *"look at the overall picture".* She emphasised that there was a contract of employment and a requirement for the claimant to work personally. She also submitted, with reference to ***Market Investigations***, that there was a degree of control, a "*consistent pattern"* and a number of aspects which pointed to the employer/employee relationship.

56. She referred, in particular, to paras. 4 and 9 of the Judgment of the Employment Appeal Tribunal in ***St. Ives***, the facts of which she submitted were similar to the present case. The following is an excerpt from para 4: -

"There was evidence to the effect that:

this was an arrangement whereby she could choose which days to work and that this arrangement suited her personal circumstances. The Claimant did not at any stage in her evidence claim that she only took time off work for holiday or sickness; and her general practice was to give the [appellant] prior

notice of any days during the following week on which she did not wish to work; that, as a result, she would not be offered work on these days 9even if work was available)".

57. Further, the claimant in ***Amarasnighe*** was a bank nurse, like the claimant in the present case, and it was decided that she was an employee as the following factors were consistent with a contract of employment: -

"(1) the mutuality of obligation in that A (the claimant) *remained available for work at the end of her shift in consideration of payment for that work;*

(2) she was paid weekly in arrears and was entitled to annual increments;

(3) she was subject to a medical examination on appointment and could be called for another thereafter;

(4) she was entitled to join the pension scheme, required to wear a uniform and was subject to the health and safety policy, and

(5) she owed a duty of confidentiality and could avail herself of the disciplinary and grievance procedure and was in fact suspended, dismissed and offered a review hearing.

However, factors weighing against the finding were:

(1) no notice was required to terminate employment;

(2) there was no guarantee of regular employment;

(3) she was not entitled to sick or holiday pay, and

(4) there was no obligation on R to provide work for A and it was solely for A to decide whether she worked or not."

58. The claimant's solicitor submitted that the present case was similar: the claimant was required to give advance notice if she wished to decline work; there was also a *"predictable routine".*

Continuity of Service

59. It was submitted that the claimant was removed from the work rota, *"through no fault of her own",* and when she complained about her removal, she was reinstated.

60. Although there were periods of absence, she gave prior notice and remained available for work. It was submitted that she did have continuity in that the *"working arrangements remained in place"* and she believed that she continued to have a working relationship with the respondent.

61. It was only on *"rare occasions"* that she was unable to do a shift which was offered to her. It was submitted, that *"in reality there was mutuality of obligations".*

Time-Bar

62. It was submitted that as there was a *"continuing act",* the discrimination complaint was in time. In support of her submission, in this regard, the claimant's solicitor referred to ***Hendricks***.

63. In the alternative, it was submitted that were I to find that the claim was out of time, I should exercise my discretion and allow the complaint to proceed on the basis that it is just and equitable to do so.

64. In this regard, the claimant's solicitor referred to ***Hale*** and reminded me that the claimant did not have experience of Employment Tribunals.

65. She had also raised a grievance within the 3-month period.

66. So far as the constructive unfair dismissal complaint was concerned, the claimant's solicitor submitted that the effective date of termination was 12 April 2018 when she resigned (P.84) and that it was in time.

Discussion and Decision

Employee Status

Constructive Unfair Dismissal Complaint

67. The right not to be unfairly dismissed, in terms of s.94 of the Employment Rights Act 1996 ("the 1996 Act") was given to "an employee". Unless the claimant is either admitted to be, or can be found in law to be, "an employee" at the point of termination of her employment, the complaint of unfair dismissal cannot proceed.

68. In terms of s.230 of the 1996 Act, an "employee" is defined as being an individual who has entered into or works under a contract of employment. By sub-section (2), a *"contract of employment"* is stated to mean, *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".* For that, there must in the first place be a contract of some kind – i.e. an intention to create legal obligations and that was the case here.

69. As to the test to be applied, according to Harvey on Industrial Relations and Employment Law (A1 [38]):

> "*The general approach is denied at any one test or feature is conclusive. All the so-called test should be regarded as useful general approaches, but in every case it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an "employee".*

70. The definition in s.230 does not provide much in the way of assistance in determining whether or not in any particular case the individual bringing the complaint is an employee or not. Determination of a person's status,

therefore, is a question of fact for the Tribunal, to be ascertained by examining the particular circumstances of each case.

71. The modern approach to ascertain which category a worker (using that as a neutral term for present purposes) might belong, is to weigh up all the factors characterising their relationship in what is described as a "multiple test". This is said to have its origins in ***Ready Mixed Concrete***, to which I was referred. In that case, McKenna J posed three questions which required to be answered:

(a) Did the servant, in consideration of a wage or other remuneration, provide his own work and skill in the performance of some service?
(b) Was it agreed, expressly or impliedly that in the performance of that service the worker would be subject to ? control to a sufficient degree to make that other master?
(c) Were the other provisions of the contract consistent with it being a contract of service?

However, while the Tribunal must have regard to all the factors characterising the relationship, there are certain elements which must be present before it can be said that a contract of employment, as distinct from say that of independent contracting exists. These are:

- A contract between the person carrying out the work and the person said to be the employer.
- A mutuality of obligation between these two parties.
- The exercise of control by the latter over the former.
- A requirement for the work to be carried out personally.

72. In order to determine the issue, it is necessary for the Tribunal to examine the evidence bearing upon the characteristics of the relationship and from that to form a view of the overall picture.

73. While I was satisfied there was a requirement for the work to be carried out personally by the claimant (once she had been allocated to work a certain day, there was never any question of her advising the respondent that she would arrange a substitute) and that when she was working the respondent exercised control over her, I was not persuaded there was a mutuality of obligation between the parties.

74. This has been said to be an aspect of the "irreducible minimum" necessary to create a contract of employment (per Lord Irvine of Lairg in ***Carmichael***).

75. In this regard, I found the evidence of the respondent's witnesses to be persuasive. They presented as credible and reliable and it was clear that, while there was a pattern to the claimant's work, there was no obligation on her to accept work offered to her. It was the respondent's evidence that if the claimant advised that she would not be able to work on certain days that would have to be accepted and they would have to arrange for someone else to do the work. Nor was there any obligation on the respondent to offer the claimant work.

76. That was in accordance with the claimant's contract of employment, *"on a bank basis….. as and when required"* (P.26).

77. **C*armichael*** established that somewhere a line has to be drawn to show that a work relationship is too "casual" to qualify as employment. In that case lack of mutuality (there was no obligation on the employer to offer work and none on the individual to take it), was held to be fatal. ***Carmichael*** shows that there are limits as to how far the statutory definition of "employee" can be pushed. The Court of Appeal had heard that a *"casual as required"* contract could be regarded as an *"umbrella"* contract of employment, but the House of Lords ruled that the relationship, on its facts, did not have the minimum of mutual of obligation, necessary to create a contract of service which subsisted when the applicants were not working (regardless of their status

when they were actually at work). The overall picture was one of an arrangement whereby the applicants would work when they wished to do so. In my view, that was the position in the present case.

78. Accordingly, I have come to the view that there cannot be said to have been a contract of employment and the claimant was not an "employee" in terms of the 1996 Act.

Race Discrimination Complaint

79. The equivalent qualification required to bring this complaint is wider in scope. S.83(2)(a) of the 2010 Act extends the definition of employment to:-

"*Employment under a contract of employment, a contract of apprenticeship or a* ***contract personally to do work****"* (my emphasis)

80. After the Preliminary Hearing, as I recorded above, I invited the parties' solicitors to make further written submissions in this regard.

Respondent's Submissions

81. In support of his submissions that the claimant was not in "employment" in terms of s.83(2)(a), the respondent's solicitor referred to the following cases:-

Jivraj v. Hashwani [2011] UKSC40
Bates van Winkelhoff v. Clyde & Co. LLP [2014] UKSC32
Halaw v. WFG Ltd (t/a World Duty Free) [2014] EWCA Civ1387
Windle & Another v. Secretary of State for Justice [2016] EWCA Civ459
Quashie

He submitted that: -

"*There is a distinction between those who are, in substance, employed (an employee in the extended sense) and those who are independent providers of services. In order to be an employee in the extended sense:*

- *the contract must explicitly be one of 'employment'. The nature of the contractual relationship is relevant;*
- *there must be a degree of subordination in that employment relationship, which must be greater than mere economic dependency;*
- *there must be a degree of mutuality of obligation; and*
- *the contractor must be bound to do work personally.*"

82. He referred to his previous submissions and went on to say this:-

"*There was no mutuality of obligation. The claimant was able to choose, if, when and where she worked. No minimum hours were offered or accepted.*

Moreover, the claimant was able to and did decline work. She was not bound to accept shifts. The absence of mutuality of obligation between the claimant and respondent outside indicates a sufficient degree of independence which was incompatible with employee status even in the extended sense. She was not subordinate to the respondent in any substantive sense for these purposes. Indeed, she worked for our employers over the relevant period of time doing other work, as an interpreter. As per the Court of Appeal in ***Windle***, *the fact that she supplied the respondent with services on an assignment-by-assignment basis, "is incompatible with employee status even in the extended sense".*

83. Accordingly, it was submitted that the claimant was not an employee in terms of s.83(2).

Claimant's Submissions

84. In support of her submissions the claimant's solicitor referred to the following cases:-

James v. Redcats (Brands) Ltd [2007] ICR 1006
Windle

85. It was submitted that the claimant was employed, *"personally to do work".* While "*the presence of mutuality of obligation can be relevant to determine the nature of the employment contract, it is not a pre-condition for employment status under the definition at section 83(2)(a) of the 2010 Act."*

86. The claimant was employed by the respondent in her role as part of the organisation. The claimant was obliged to carry out the work personally and could not send in a substitute to carry out a shift on her behalf. Where arrangements were required to be made, on the odd occasion where the claimant was not able to carry out a shift, then the respondent would arrange for another worker to be put on the rota. Taking into consideration the circumstances surrounding the employment relationship and including the present subordinate relationship whereby the respondent exercised control over the work undertaken by the claimant and when, it is clear that the claimant was employed personally to carry out work.

87. The claimant's solicitor also referred in her submissions to the following passage from the Judgment of Elias P in ***James***:-

"*…..In my view the fact that there is a lack of any mutual obligations when no work is being performed is of little, if any, significance when determining the status of the individual when work is performed. At most it is merely one of the characteristics of the relationship which may be taken into account when considering the contract in context. It does not preclude a finding that the individual was a worker, or indeed an employee, when actually at work.*"

88. It was also submitted that ***Windle***, *"determines that the question to be answered is what is the nature of the relationship during the period that the work is being done".*

89. It was submitted, therefore, that, *"the claimant in the present case should be afforded the protection under the 2010 Act".*

Respondent's Response

90. The respondent's solicitor responded to the claimant's further submissions. He maintained that ***James***, was *"of little relevance".* The case concerned the definition of a worker under the National Minimum Wage Act 1998 and that definition is different from the one contained in s.83(2) of the 2010 Act.

91. He also submitted once again that:

"*The absence of mutuality of obligation is indicative of the individual not meeting the threshold……*

The claimant's relationship with the respondent was on an assignment-by-assignment basis. There was no ongoing mutuality of obligation, and she was not subordinate to the respondent in any substantive sense in deciding if or when to work. The claimant was not at any time engaged under a contract of employment."

Conclusion

92. The definition of "employment" is to be found in s.83(2)(a) of the 2010 Act and is significantly broader than the 1996 Act.

93. The issue for me was whether, in the particular circumstances of the present case, the claimant was employed in the so-called "extended sense".

94. As she was not engaged under a contract of employment or of apprenticeship, I had to decide whether she was engaged, *"under a contract personally to do work".*

95. While the definition in the 2010 Act is wider, I did not find this issue easy to determine, particularly as in 2016 the Court of Appeal in ***Windle*** gave a more restrictive meaning to the concept of "employment".

96. In a recent line of cases, the Courts have considered how to interpret the definition of employment in s.83(2) in accordance with the relevant EU Directives and Treaties.

97. In ***Allonby v. Accrington & Rossendale College & Others*** [2004] IRLR 224, the ECJ considered the meaning of the term *"worker"* and held that a worker is, *"a person who, for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration".* Workers, it explained, can be distinguished from, *"independent providers of services who are not in a relationship of subordination with the person who receives the services".*

98. While this was an equal pay claim and the term "worker" is not used in s.83(2), the Supreme Court in ***Jivraj*** confirmed that the approach in ***Allonby*** was the correct one. Lord Clarke, who gave the lead Judgment, was of the view that the ECJ in ***Allonby*** identified the essential question for determining whether a person is in "employment" for the purposes of the discrimination legislation.

99. However, as I recorded above, in ***Windle*** the Court of Appeal gave a more restrictive meaning to the concept of "employment". The claimants were professional foreign language interpreters who were engaged by the respondent on an *ad hoc* basis to provide interpreting services in Courts. They were booked, as and when needed. They were not obliged to accept work and there was no requirement that they be offered work. In other words, there was no "mutuality of obligation" between assignments. They were paid for work done but received no employment-related benefits such as holiday pay. For tax purposes, they considered themselves self-employed.

100. They brought discrimination claims alleging that British Sign Language interpreters received better terms. They claimed they were employed under *"a contract personally to do work"*. The respondent's primary argument was that, the absence of any mutuality of obligation between assignments (sometimes referred to as an 'umbrella contract') should be a factor militating

against a finding of employment under the 2010 Act. It relied on the Judgment in ***Quashie***, although that case was solely concerned with the more limited definition of employment in s. 230 (1) of the 1996 Act.

101. Giving the Judgment of the Court, Underhill LJ observed that the test for, *"a contract personally to work"* is the same as the test for *"workers"* – an intermediate state between employment and true self-employment which gives rise to certain rights under the Working Time Regulations 1998 and went on to say this:-

> *"It does not follow that the absence of mutuality of obligation outside that period (of the assignment) may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with the employee status even in the extended sense."*

102. However, so far as the present case is concerned, Underhill LJ in ***Windle*** did not say that mutuality of obligation between assignments is a mandatory component of the s.83(2) definition and while it should not be excluded altogether, it will vary from case to case. Further, in my view, the facts in ***Windle*** can be distinguished from the present case. While there was no *"umbrella contract"* and no mutuality of obligation in the present case, as Underhill LJ stated in ***Windle***, the issue hinged on the *"nature of the relationship during the period that the work is done".* In the present case, when the claimant was at work she was in a subordinate position and there was no *"degree of independence".* She was controlled by the respondent and directed as to how she carried out her work.

103. Also, there was a lengthy analysis of the meaning of the word "worker" by the EAT in ***James***, to which I was referred by the claimant's solicitor. Although the decision is in the context of the minimum wage legislation, it has ramifications for other areas of employment law. From para 75 onwards,

Elias P. considered issues relating to mutuality of obligation and said this at para 93: *"Accordingly, in my view the fact that there is a lack of any mutual obligations when no work is being performed is of little, if any, significance when determining the status of the individual when work is performed. At most it is merely one of the characteristics of the relationship which may be taken into account when considering the contract in context. It does not preclude a finding that the individual was a worker, or indeed an employee, when actually at work".*

104. While I was satisfied that the claimant, in the present case was in a subordinate position when at work, subject to the control and direction of the respondent, I was also mindful of the Judgment of Lady Hale in ***Bates*** that subordination is not a *"free standing or universal"* requirement for a worker under s.230 of the 1996 Act. In that case Lady Hale *"fine-tuned"* the need for subordination:- "*An individual could be a professional person with a high degree of autonomy regarding how the work was transformed with more than one string to his bow but so closely integrated into the business to fall within the definition.*"

105. It also seemed to me, with reference to the relevant statutes, that the test for employees looks at the nature of the contract while, in contrast, the test for workers looks at how the work is performed.

106. I arrived at the view, therefore, that the claimant in the present case was in "employment" in terms of s.83(2)(a) of the 2010 Act, for the purposes of bringing her race discrimination complaint. I was satisfied that the test in ***Allonby***: *"a person who, for a certain period of time performs services for an under the direction of another person in return for which he receives remuneration"* – was satisfied.

Continuity of Employment

Unfair Dismissal Complaint

107. Although I decided that the Tribunal did not have jurisdiction to consider the claimant's unfair dismissal complaint as she was not an employee in terms of s.230 of the 1996 Act, for the sake of completeness I record that I was also satisfied that the claimant did not have the requisite two years' continuous service to bring her unfair dismissal complaint. I was satisfied that the submissions by the respondent's solicitor in this regard were well-founded.

108. It is clear, with reference to s.210(4) of the 1996 Act that there was a break of at least one week in her employment and with reference to s.212(3) these absences were not *"in consequence of sickness or injury", "on account of a temporary cessation of work"* or by way of *"an arrangement or custom"* which would allow her to be absent.

109. As the respondent's solicitor submitted, in her witness statement at paragraph 10 the claimant said: "*There was a break in my employment from May 2016 to August 2016;* and referring to June 2016 onwards at paragraph 11: "*I accept that there was a break in my employment.*"

110. Further, the respondent's witness Shona Strachan presented as credible and reliable (as did the respondent's other witnesses) and at para 8 of her witness statement she gave details of the claimant's absences which I was satisfied was reasonably accurate.

Time Bar

Discrimination Complaint

111. I had to consider first of all what was the effective date of termination. This was not straightforward given the nature of the claimant's employment and the fact that on 3 August 2017 she advised the respondent in writing: "…*I give*

you a Notice. I'm leaving this job under Constructive Dismissal" (P.64). However, the claimant remained available for work and it was not until 12 April 2018 that she gave written notice and significantly the following day this was accepted in writing by the respondent (P.84/85). I arrived at the view, therefore, that the effective date of termination was 12 April 2018.

112. I was also of the view, having regard to the guidance in ***Hendricks***, that the allegation of discrimination was an ongoing, *"continuing act".* Focusing on the substance of the claimant's allegations, I was satisfied that there were acts extending over a period right up to the time the claimant's employment ended, as distinct from a succession of unconnected or isolated acts for which time would begin to run from the date each specific act was committed. This meant that the three-month time limit started to run from the effective date of termination of the claimant's employment on 12 April 2018.

113. As the EC Notification was made on 27 February 2018, and the ACAS Certificate was issued on 10 April 2018 and the claim form was presented on 4 May 2018 (P.1-12) it was in time.

114. Accordingly, I arrived at the view the Tribunal does not have jurisdiction to consider the constructive unfair dismissal complaint and it requires to be dismissed. However, I am of the view that the Tribunal does have jurisdiction to consider the discrimination complaint.

Employment Judge: **Nicol Hosie**
Date of Judgment: **20 May 2019**
Entered in the Register: **21 May 2019**
And Copied to Parties