



EMPLOYMENT TRIBUNALS

Claimant: Ms F Sillah
Respondent: Certitude Support Limited

Heard at: London South **On:** 1 February 2018

Before: EMPLOYMENT JUDGE CORRIGAN
Sitting Alone

Representation

Claimant: In Person
Respondents: Ms C Jennings, Counsel

JUDGMENT having been sent to the parties on 12 April 2018 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

1. By her claim received 2 September 2017 the Claimant brings a complaint of unfair dismissal.
2. The Respondent is a charitable organisation which provides support to individuals with learning disabilities, autism and mental health needs. The Respondent employs approximately 755 people over 92 sites. The Claimant worked as a support worker.
3. The preliminary hearing was listed to consider whether the Claimant has sufficient service to bring an unfair dismissal claim.

4. The Claimant had worked under a zero hours contract from at least 25 January 2013 but was only employed on a permanent contract of employment from 24 March 2017. She was dismissed from that position on 9 May 2017.
5. The question at the preliminary hearing was whether the Claimant's time on the zero hours contract could count towards the two year continuous service requirement to claim unfair dismissal (s108 Employment Rights Act 1996). There is a dispute as to the precise start date of the zero hours contract but it was agreed with the parties that the main issue was whether there was sufficient mutuality of obligation between the parties during the zero hours contract.
6. The Claimant gave oral evidence. The Respondent had prepared a bundle of documents including the contractual documentation. During the hearing the Respondent obtained a list of the number of shifts the Claimant worked each month from January 2015 until her permanent contract commenced, as follows:

Jan 2015	10	Jan 2016	0	Jan 2017	0
Feb 2015	0	Feb 2016	0	Feb 2017	2
March 2015	0	March 2016	5		
April 2015	0	April 2016	4		
May 2015	7	May 2016	11		
June 2015	12	June 2016	19		
July 2015	9	July 2016	12		
August 2015	0	August 2016	5		
September 2015	2	September 2016	12		
October 2015	6	October 2016	10		
November 2015	4	November 2016	5		
December 2015	0	December 2016	0		

Conclusions

7. I accept there was insufficient mutuality of obligation for a global employment contract.
8. The Claimant's employment documentation, as summarised in the Response, was clear that there was no intention to create mutuality of obligation or an employment contract whilst she worked on the zero hours contract.

9. The Claimant agreed that in practice the Respondent did not have to offer her work and there were long periods when they did not do so, for example when they employed a permanent worker and had no need for the Claimant at a particular location. The Claimant also did not always accept work. There were lengthy periods when she did not accept work that was offered, for example when she was on holiday for as long as two months, and in the weeks leading up to the commencement of her new position.
10. The Claimant agreed that she was a bank worker with ad hoc shifts and that she wanted a permanent job in order to have more stability.
11. The fact that there was no global contract is supported by the dates the Claimant worked. She initially implied that she worked every week unless she was on holiday. In reality, although some months do suggest this, there are other months when she worked substantially less for example 0 or 2 days a month, as can be seen from the list at paragraph 6 above.
12. Due to the length of the relationship I considered whether the Claimant had a series of contracts of employment when she was actually present and whether these were sufficiently frequent to create continuity of service, by virtue of s 212 (1) Employment Rights Act 1996, which provides that any week during part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
13. I considered whether when the Claimant was actually in attendance she had an employment contract. She had to complete the shift and worked under the Respondent's control. In limited circumstances the Respondent could cancel a booked shift but then they had to pay the Claimant for 2 hours. There was therefore some mutuality of obligation during the shifts the Claimant agreed to work and I find on the balance of probability this was sufficient for the Claimant to be an employee when actually present at work. The Respondent accepted that if there was such a shift in every week in the two years prior to the Claimant's dismissal then this could build up two years' continuity of service. However this was clearly not the case on the figures provided at paragraph 6 above.
14. I also had consideration of s212 (3) (c) Employment Rights Act 1996 which provides that any other week (not within subsection (1)) during the whole or part of which an employee is absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, counts in computing the employee's period of employment. I considered whether there was any such arrangement or custom that could contribute to building up two years continuous service in weeks when the Claimant was not present at work.
15. I considered this arrangement or custom must be more than the zero hours agreement itself.

16. The Claimant put forward the obligation to keep training up to date but accepted that training days were included in the shift days listed at paragraph 6. There were therefore still periods when she did not work for three months (for example December 2015 – February 2016) and was not required to attend any training.
17. She also put forward the fact that her name stayed on the rota even when she was not offered work. However she also gave evidence that the reason she was not offered work for at least one lengthy period was because permanent staff were appointed to a particular home and she then moved to another location. It is likely that on that occasion she did not stay on the rota.
18. To conclude, I was not able to find that there was continuity of employment for two years prior to the Claimant's dismissal.

Employment Judge Corrigan
6 June 2018