EMPLOYMENT TRIBUNALS

Claimant: **Ms H Rawlins**

Respondent: **Multiple Sclerosis Society**

Heard at: **London Central** **On:** **19 July 2019**

Before: Employment Judge Quill (sitting alone)

Representation
Claimant: In Person
Respondent: Mr D Brown, counsel

RESERVED JUDGMENT

The Claimant had not been continuously employed by the Respondent for 2 years prior to the effective date of termination, and therefore Section 108(1) of the Employment Rights Act applies and the Claimant did not have qualifying service in order to bring a claim alleging unfair dismissal (as per Section 94 of the Employment Rights Act 1996). The claim for unfair dismissal is therefore dismissed.

This does not affect the other claims brought by the claimant which remain listed for final hearing.

REASONS

Preliminary Discussions at the Hearing

1. Both parties were in agreement that the only issue to be decided at today's hearing was whether the Claimant had been continuously employed by the Respondent for at least two years prior to dismissal. It was common ground that the disability issue did not have to be determined today. The Respondent does not concede that it had knowledge of the Claimant's disability, but has conceded that she was a disabled person.

2. Each party called one witness. The Claimant gave evidence herself and the

Respondent called senior business partner, Ms Maz Fellowes. The usual sequence of witnesses would have been for the Claimant to give evidence first. However, the Claimant indicated a preference for the Respondent's witness to give evidence first and I agreed that course of action.

3. Each witness had produced a written statement. Each statement had been prepared at an earlier stage in proceedings before disability had been conceded.

4. In light of the fact that today's hearing related only to length of service, the paragraphs in each statement which dealt with other issues were not taken into account by me and the opposing party was under no obligation to cross-examine in relation to the contents of those paragraphs.

5. In the case of Ms Fellowes, therefore, paragraphs 1 to 15 of her statement were taken into account, and paragraphs 16 to 21 were not relevant (for this hearing) and were ignored.

6. In the case of the Claimant, paragraphs 1 to 15 and paragraph 26 were taken into account and paragraphs 16 to 25 and 27 to 30 were not relevant (for this hearing) and were not taken into account.

7. In addition to the witness statements, I was provided with a written skeleton argument from the Respondent and a bundle of documents which ran to 56 pages. I was also provided with case reports from the Employment Appeal Tribunal and the Court of Appeal respectively in the matter of **James -v- London Borough of Greenwich**. Copies of all of these materials has been provided to the Claimant.

8. The Claimant did not provide me with any additional documents.

9. At the outset of the hearing. I indicated to the parties that it would be necessary for me to make a finding of fact about each of the Claimant's start date and the Claimant's end date. The Claimant had previously indicated that the termination date was 9 July 2018, but during these discussions she indicated that she was not sure about that and she thought that she might have had a letter from the Respondent which stated a different date. The Claimant indicated that she had been seeking handwritten notes of a meeting from August 2018, and that the Respondent had not supplied these to her. She confirmed, however, that she was not suggesting that that document contained relevant information either in relation to her start date or her end date.

10. The Claimant did not specify an exact date as the start of her employment. During the preliminary discussions at the outset she indicated that she accepted that she had not been an employee immediately, as of 12 May 2015, which was when she first began to work for the Respondent as an agency worker. She indicated to me during these discussions that her position was that she had become integrated into the Respondent's business and that she had therefore become an employee at some point prior to 30 September 2016. The Claimant indicated that when she had started work for the Respondent, there had been an Information Resources Manager named Jo Chapman and the Claimant's position was that the fact that Jo Chapman had left had caused the Claimant's role to change and that

led, in due course, to her becoming an employee. However, she was not necessarily asserting that the date on which her employment status became that of an employee was at the exact point at which Jo Chapman left.

11. At the outset of the hearing, the Respondent's position was that the Claimant's employment started on 30 September 2016 and ended on 9 July 2018. If the Respondent was right about those dates, the Claimant would not have the necessary two years' service required to bring a claim for unfair dismissal.

The Evidence

12. Ms Fellowes gave evidence first. There were no supplementary questions. She was questioned by the Claimant and I also asked some questions. Ms Fellowes was not sure of the date on which Jo Chapman left. Ms Fellowes commenced work for the Respondent in March 2016 and she believed that Jo Chapman left either before or very soon after she, Ms Fellowes, commenced work.

13. Her statement at paragraph 9, referred to a document at pages 36 and 37 in the bundle, described as a "business case" which had led to a decision to make the role of Information Resources Officer a "permanent position". The Claimant suggested to Ms Fellowes that the role of Information Resources Officer existed within the Respondent's organisation prior to 30 September 2016. Ms Fellowes, was unsure about the exact date in 2016 on which the document at pages 36 and 37 was created. However, she stated it must have been after Alex Morton (the author of the document) was appointed and prior to 30 September 2016.

14. Paragraph 4 of Ms Fellowes witness statement referred to pages 1 to 15 of the bundle which was stated to be an agency agreement in relation to the Claimant's work for the Respondent. Page 14 gave an assignment start date of 12 May 2015 and assignment end date 9 August 2015. It referred to a standard working commitment of 21 hours per week. It described the type of work as being "Interim Admin Assistant".

15. The Claimant suggested to Ms Fellowes that there had been a later version of the document and that this had, amongst other things, stated that the Claimant was acting in the capacity of Information Resources Officer. Ms Fellowes stated that she was aware of no such document and that the Respondent would have disclosed it if such a document had been uncovered during the document search which the Respondent had carried out.

16. Ms Fellowes indicated that in her experience of working for the Respondent, the job title that was stated on the documents with the agency would not necessarily be a close reflection of the actual duties performed by the agency worker. Furthermore, she also stated that in the HR Department, she and her colleagues would not necessarily know the exact duties of the agency worker as that was something which would be discussed directly between the local managers and the respective workers. Ms Fellowes stated, that during 2016, the Information Resources Manager decided to make a business case for creating a full-time information resources officer role. Her evidence was that she was sure that this was a new role and that

it was different to what the Claimant had previously been doing. She said that she based this opinion on discussions which she had had with the relevant manager at the time.

17. The post was advertised. Ms Fellowes' recollection was that this was an advert, which was placed on the Respondent's intranet service only, and not more widely advertised. However, it was not formally ring fenced so that only existing employees or agency workers could apply. She indicated that if any member of the public had become aware of the vacancy, they could have applied and they would have been considered for it. The Respondent has about 300 staff and, therefore, that is approximately the number of people who would have been able to, in first instance, view the advert on the intranet. In Ms Fellowes' opinion there would be have been nothing to prevent those individuals drawing the vacancy to the attention of friends and family.

18. The Claimant applied for post and it transpired that she was the only applicant. She was interviewed for the role. There was a panel of three.

19. Ms Fellowes was asked questions by me about the document at pages 28 to 35 of the bundle. She stated that this was the first statement written particulars given to the Claimant following the commencement of the Claimant's employment. The document stated that "*your employment with the MS Society began on 30 September 2016,*" the document had been signed by each of Ms Fellowes and the Claimant with signature dates of 11 January 2017. Ms Fellowes stated that in her opinion, there was nothing significant about the date of 11 January 2017, or the fact that it was more than three months after 30 September 2016. She suggested that it was normal in her experience for there be delays in creating documents of this nature.

20. Upon being questioned about the letter which terminated the Claimant's employment, Ms Fellowes confirmed that she wrote the letter and that she believes that if there was any confusion on the Claimant's part in relation to the end date, then it would be because of what the letter said about pay for notice. Ms Fellowes was unable to remember the exact words used in the letter. She indicated that she might be able to obtain a copy of the letter. I informed the parties that this might be a useful document for me to see notwithstanding its lateness, and there was no objection from the Claimant. I therefore invited Ms Fellowes to see if she was able to obtain a copy.

21. This was the end of Ms Fellowes' evidence and there was a break from just before 11:30 AM until shortly after 11:40 AM.

22. The Claimant was then cross-examined by Mr Brown in relation to her witness statement. The Claimant accepted that she was not a party to the document at pages 1-15 of the bundle, which was stated to be an agreement is between ninesharp Ltd (sic) [described as "the employment business" in the document] and Multiple Sclerosis Society National Centre [described in the document as "the hirer"].

23. It was put to the Claimant that Giant Professional Services Limited was the Claimant's personal company. The Claimant stated that she did not own it had never owned it. She had no financial gains from this company. It was

suggested that she must have stated that it was her personal company at the previous preliminary hearing in March 2019.

24. During cross-examination, the Claimant stated that on 11 November 2015. The Respondent's HR team had written to her, saying that her job title was Information Resources Officer. She said that she had viewed a copy of this item by looking at her phone during the break. She accepted that she had not previously sent a copy of this document to the Respondent's solicitor in preparation for this hearing. Furthermore, she did not have any printed copies of it available. She accepted that the document did not state that she would now be regarded as an employee or as a permanent member of staff.

25. The Claimant stated that she now believed that it was from 12 November 2015 that she became fully integrated into the Respondent's organisation. She accepted that there were no documents before the tribunal which expressly stated that she had been regarded as an employee by the Respondent.

26. The Claimant indicated that she would have been able to bring witnesses, including Somanah Achadoo, who was a manager at the organisation, who would have been able to confirm that she was treated exactly the same as the Respondent's employees. However, she had not realised that it was necessary to do so.

27. The Claimant was taken to page 16 of the documents bundle. She was cross examined on the basis that this document helped to show that her hours had fluctuated. The Claimant's case was that this document was consistent with what she said in paragraph 5 of her witness statement, namely that she commenced working 21 hours a week and that then went up to 30 hours a week (with effect from 8 June 2015, based on the document) and that this further went up to what the Claimant described as full-time (based on the document, this was around 17 August 2015). The Claimant indicated that the fact that she had done 21 hours in the week of 13 July 2015 was simply because she had one day off that week and she assumed that she must have had some holiday or other time off in the week of 10 August 2015 (which showed 1.5 hours), but, she suggested, having time off in those weeks was not inconsistent with being full-time from 17 August 2015 onwards.

28. She was also taken to the documents at pages 25A and 25B, and it was put to her that these were a record of the amounts paid to ninesharp Ltd, and that this document also indicated that her hours had fluctuated. The Claimant maintained that she was full-time, and that any weeks in which the payments to the agency varied might have been explicable by time off for annual leave or sickness or some other reason. The Claimant accepted that throughout the period, she was always paid by ninesharp Ltd and never paid by the Respondent until after 30 September 2016. The Claimant also confirmed that she filled out timesheets for ninesharp Ltd, which she sent directly to them. The document at pages 25A and 25B was largely illegible due to the small type and was therefore of little or no assistance to me in relation to establishing what hours the Claimant may or may not have worked. However, the column which indicated that payments were being made to ninesharp Ltd was legible, and in any event, the Claimant accepted that that was the case.

29. In her statement at paragraph 10, Ms Fellowes referred to an introduction for a fee of £3993.90 plus VAT being paid to ninesharp as a result of the Claimant's becoming an employee on 30 September 2016. The Claimant was asked about this document (page 23 of bundle) and stated that she had no knowledge of any such arrangement.

30. At paragraph 11 of her witness statement, Ms Fellowes had stated that upon the commencement of the Claimant's employment the Claimant had been asked to comply with all of the Respondent's new starter processes including right to work checks, reference checks and the requirement to provide a copy of her P45. At paragraph 15 of Ms Fellowes' statement, she referred to pages 26 and 27 of the bundle which was a new starter form which the Claimant had signed and dated 27 September 2016.

31. Amongst other things, the document stated: "*I confirm that all the information given on this form is correct. As part of the recruitment process, I understand that my contact details and any additional needs will be passed to my line manager*."

32. Upon being questioned about this document, the Claimant stated that she did not raise any queries about the document with HR. She said that she had discussed the document with Alex Morton and he had told her that it was an HR requirement.

33. The Claimant was questioned about the document at pages 28 to 35, which Ms Fellowes had said was the first written statement of terms and particulars given to the Claimant. The Claimant did not suggest that there had been any earlier version. She admitted that she had signed it and that she did so in January 2017. She said that she had raised questions with her line manager about the start date in the document and her line manager informed her that it could not be backdated. She indicated that she did not believe this document created a change to her hours of work as she had in her opinion, already been full-time. She stated that she had previously received SSP from the agency, but she accepted that the occupational sick pay, at paragraph 6.2 of the document was a benefit which she had not previously received prior to 30 September 2016. In relation to disciplinary and grievance procedures, the Claimant did not necessarily accept that different procedures would have applied to her before 30 September 2016, as opposed to afterwards. She did, however, accept that the procedures might have been different.

34. There was nothing in the Claimant's written witness statement in relation to her querying either the start date in her contract of employment or the requirement for her to complete the new starter form. The Claimant said that this was because she was not an experienced litigant and she had not been sure what she needed to put down. She said that she was not suggesting that she had raised any queries by way of email with her managers. She was also not suggesting that she had contacted HR at all.

35. The Claimant stated that she was treated more like an employee than an agency worker. She suggested that other agency workers did not have the means to access their work emails remotely, but this was something which had been given to her. She confirmed she was not asserting that no other

agency workers within the Respondent's organisation had such remote access, but she was suggesting that she had spoken to a number of other agency workers who did not have this access.

36. The Claimant also stated that her managers had ensured that she had all that she attended all team meetings. Furthermore, other staff had to report their absences to her. She said that when she wanted time off, she had to request this. She made this request directly to managers within the Respondent's organisation and not to her agency. In response to further questions, she accepted that the Respondent's employees could use a software system called Select HR to directly book their annual leave and that she had not had access to this system prior to 30 September 2016.

37. The Claimant accepted that she had been interviewed by a panel of three prior to 30 September 2016. She stated that she had been told that this was a formality.

38. Near the end of the Claimant's evidence. I sought clarification from her in relation to what she had said in paragraphs 3 and 4 of her statement in relation to Giant Professional Ltd. From this exchange, it appears that the Claimant did not have a very clear recollection of her precise dealings with Giant Professional Ltd, but she did accept that she had not had prior dealings with the Respondent before being referred to them, probably by Giant Professional Ltd, shortly before 12 May 2015.

Submissions

39. The evidence finished shortly after 12:45 PM. Given the fact that the hearing was due to end at 1 PM. It was agreed that I would hear submissions from each party and then reserve my judgement. Both parties confirmed that they were aware that the new date for exchange of witness statements in relation to the final hearing was 6 August 2019 and I therefore indicated that I would attempt to get the judgement to them as quickly as possible.

40. In addition to the points made in his skeleton argument, Mr Brown pointed out that the burden of proof was on the Claimant. He indicated that the Claimant's evidence had been largely directed to demonstrating that she had met, what might be called the integration test. However, he indicated that that test might apply when there are two parties to a contract and it is necessary to decide whether the individual is a worker or an employee. However, he suggested that was not an appropriate test when it was a tripartite contract and he referred in particular to **James -v- Greenwich.**

Where it was stated in the EAT

> 54. In the casual worker cases, where the issue is whether there is an umbrella or global contract in the non-work periods, the relevant question for the Tribunal to pose is whether the irreducible minimum of mutual obligations exists. It is not particularly helpful to focus on the same question when the issue is whether a contract can be implied between the worker and end user. The issue then is whether the way in which the contract is in fact performed is consistent with the agency arrangements or whether it is

only consistent with an implied contract between the worker and the end user and would be inconsistent with there being no such contract. Of course, if there is no contract then there will be no mutuality of obligation. But whereas in the casual worker cases the quest for mutual obligations determines whether or not there is a contract, in the agency cases the quest for a contract determines whether there are mutual obligations.

55. If there were no agency relationship regulating the position of these parties then the implication of a contract between the worker and the end user would be inevitable. Work is being carried out for payment received, but the agency relationship alters matters in a fundamental way. There is no longer a simple wage-work bargain between worker and end user.

56. In Dacas, Munby J was surely right when he observed that in a tripartite relationship of this kind the end user is not paying directly for the work done by the worker, but rather for the services supplied by the agency in accordance with its specification and the other contractual documents. Similarly, the money paid by the end user to the agency is not merely the payment of wages, but also includes the other elements, such as expenses and profit. Indeed, the end user frequently has no idea what sums the worker is receiving.

57. The key feature is not just the fact that the end user is not paying the wages, but that he cannot insist on the agency providing the particular worker at all. Provided the arrangements are genuine and the actual relationship is consistent with them, it is not then necessary to explain the provision of the worker's services or the fact of payment to the worker by some contract between the end user and the worker, even if such a contract would also not be inconsistent with the relationship. The express contracts themselves both explain and are consistent with the nature of the relationship and no further implied contract is justified.

58. When the arrangements are genuine and when implemented accurately represented the actual relationship between the parties — as is likely to be the case where there was no pre-existing contract between worker and end user — then we suspect that it will be a rare case where there will be evidence entitling the Tribunal to imply a contract between the worker and the end user. If any such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the Tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end user which are incompatible with those arrangements.

59. Typically the mere passage of time does not justify any such implication to be made as a matter of necessity, and we respectfully disagree with Sedley LJ's analysis in Dacas on this point. It will no doubt frequently be convenient for the agency to send the same worker to the end user, who in turn would prefer someone who has proved to be able and understands and has experience of the systems in operation. Many workers would also find it advantageous to work in the same environment regularly, at least if they have found it convivial. So the mere fact that the arrangements carry on for a long time may

be wholly explicable by considerations of convenience for all parties; it is not necessary to imply a contract to explain the fact that the relationship has continued perhaps for a very extensive period of time. Effluxion of time does not of itself establish any mutual undertaking of legal obligations between the worker and end user. This is so even where the arrangement was initially expected to be temporary only but has in fact continued longer than expected. Something more is required to establish that the tripartite agency analysis no longer holds good.

And in the Court of Appeal

In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user

41. Mr Brown suggested that the manner in which the Claimant was treated by the Respondent's managers was not inconsistent with her being an agency worker. The fact that she was treated well, did not make it necessary to imply a contract between the Claimant and the Respondent in order to explain the work which she did for the Respondent or the way in which she was treated. Mere passage of time alone should not be taken as something which implied that a contract between the parties had arisen, especially as there may be advantages to both sides of a longer term agency worker relationship.

42. It was suggested that the Claimant's evidence should be treated with caution in relation to her comments about querying the start date, given that these were not matters which were raised in her witness statement. Furthermore, it would have been possible for her to raise the matter in an email if she disagreed with the start date.

43. It was suggested that nothing at all turned on whether the Claimant happened to have remote access to her emails. The annual leave arrangements were said to be more consistent with the Respondent's case than with the Claimant's.

44. Furthermore, the most important issue was that the Claimant had continued to submit timesheets to the agency throughout and there was no need to imply a contract of employment and no basis for suggesting that there was a sham. Mr Brown suggested that the fact that the Claimant's hours fluctuated did support his case, but that it was not an important point upon which he relied and he accepted that employees also could have hours which fluctuate.

45. Mr Brown indicated that the dismissal letter had now been obtained and he had had the opportunity to view it on his device, although there was no hard copy. He showed the screen to the Claimant, who agreed that it was her dismissal letter. Mr Brown stated that the dismissal letter was dated 9 July 2018, but that it was giving notice of four weeks until 6 August 2018 and was stating that the Claimant was not required to attend work during the notice period. On that basis the Respondent was prepared to amend its position slightly so that the Claimant's dates of employment were alleged to

be 30 September 2016 to 6 August 2018. In other words, she still had less than two years' service.

46. In closing submissions, the Claimant stated that work for Respondent commenced 12 May 2015. She suggested that she had been given written confirmation of an increase of hours which she believed might have been around 17 September 2015, and this was in addition to what she believed was a formal change in her job title around about 11 November 2015.

47. She said that it was round about 11 November 2015 that she believed that there was a change in how her managers viewed her. She believed that there was no ambiguity about becoming a permanent member of staff at around that point in time.

48. She suggested that she had virtually no contact with the agency. She said she dealt directly with managers such as Patrick, Somanah and Alex.

49. She disputed the Respondent's submission that anything in her statement or her oral evidence should be treated as unreliable. She indicated that in her opinion, the HR team was saying one thing but her managers were saying something else. She said that she did not think it would have been appropriate for her to have attempted to lodge a grievance in relation to the start date in her contract. She stated that her managers regarded her as being an integral part of the organisation and that if they had been at the tribunal today, they would have confirmed that.

50. She said she was not able to comment specifically on all of the agency staff within the Respondent's organisation but that she believes that, in relation to those of whom she was aware, she was treated less like an agency member of staff and more like an employee. She suggested that it had been her inexperience in dealing with litigation that may have led her to miss out some details from her witness statement. However, in her opinion, Kate Hudson was in post prior to 2015 and that was the same role, which she, the Claimant, ended up doing. The Claimant suggested that there would be documentary evidence which indicated that her job title changed from Interim Admin to Information Resources Officer, although she did not have that with her.

51. The Claimant indicated that her duties were very specific to the role of Information Resources Officer. Patrick had been very satisfied with her work and he had indicated to her that he wanted to wait until Jo's replacement was in place before any permanent recruitment. The Claimant suggested that the fact that the permanent recruitment took place circa September 2016, was due perhaps to some inefficiencies on the Respondent's part and that it ought to have taken place several months earlier.

Discussion and conclusions.

52. I accept the Claimant's account that her hours had gone from 21 to 30 and then to full-time and that she had been effectively full-time from around August 2015 onwards. That is not to say that she would have worked 35 hours every single week. However, and in any event, the number of hours worked by the Claimant was not something which was crucial to the matters which I had to decide.

53. It was not necessary for me to reach a final decision in relation to the Claimant's contention that a specific document existed, by which, in the latter part of 2015, the agency had been formally notified that the Claimant's role was changing from Admin Assistant to Information Resources Officer. That being said, I note that the final invoice, dated 2 October 2016 (page 24 of bundle) did refer to Claimant as "Contractor Information Resources Officer" and so the agency had become aware at some stage that her role had changed.

54. I accept that each of the Claimant and Ms Fellowes were attempting to give me accurate information on the point. However, assuming, in the Claimant's favour, that the agency was notified in 2015 about her change in role, then that would not necessarily support her case that she became an employee in 2015. On the contrary, the very fact that the Respondent had felt it necessary to contact the agency in relation to any change of role would be at least as consistent with the Respondent's position as with the Claimant's. Furthermore, had the agency been of the opinion that the Claimant had become an employee in 2015, then it is likely that they would have asked for the Introduction Fee then.

55. I accepted that the document at pages 36 and 37 (which was undated) was a genuine document which contained a business case indicating that Alex Morton wished to appoint a permanent employee into the post of Information Resources Officer. Referring to the post, the document stated that "*This role is integral to the running of the information resources team. It has been filled as a temporary position for the last year, and there is a need for the position to continue going forward. Therefore, it would be more cost-effective to make position permanent and would offer the person filling the role better security and staff benefits.*"

56. The document went on to say "*A member of staff is currently working in the role on a temporary contract. I want to make this role, permanent as it is crucial in supporting the information resources team. An agency fee would have to be paid if the current post holder were to apply and get the permanent role.*"

57. Further down the document - next to the box which stated "*risks and consequences of not recruiting?*" - it stated "*loss in capacity for the resources team. No one to manage the smooth running of the online shop facility … No one to deal with queries regarding information, resources, …*".

58. My finding is that the Respondent accepted the business case and decided to undertake an exercise to recruit an employee for the role. I also accepted that the references to a person filling the role were referring to the Claimant, and that the Respondent believed that an agency fee would be payable if the Claimant was appointed.

59. I accepted Ms Fellowes' evidence that, in theory at least, other people could have applied for the post.

60. The document at pages 36 and 37 was undated but I accepted Ms Fellowes evidence that it was from around 2016. In the Claimant's witness statement at paragraph 11 the Claimant suggested that Alex Morton was appointed in

at 9 May 2016 and I have no reason to doubt that. Therefore the document must have been created after 9 May 2016. This is also consistent with the references to the post having been filled on a temporary basis for about a year, assuming that is a reference to the Claimant.

61. My finding is that this document related to the process which later saw the Claimant apply for the post and be interviewed by a panel of three. In turn, that led to the Claimant being asked to complete the new starter form and - in due course - to be issued with a written statement of terms and particulars which was signed in January 2017. From 30 September 2016 onwards, the Claimant was paid directly by the Respondent and the Respondent ceased to pay ninesharp Ltd. Ninesharp Ltd had been paid for supplying the Claimant from May 2015 until September 2016 (see invoice at page 24 of bundle). There was also an introduction fee payable to ninesharp Ltd by Respondent (see page 23 of bundle).

62. Based on the Claimant's account, I do think it was likely that the Claimant had had earlier discussions with the Respondent about the possibility of becoming permanent. In particular, I accept her account that she may have had discussions with Patrick on this subject, and he may have suggested to the Claimant that he wanted to wait until Jo's replacement was in place. However, these conversations would not be consistent with the Claimant's argument that she was, in fact, already an employee.

63. On the contrary, the existence of these conversations indicates that the Claimant was aware that she was not an employee and that a change in status from agency worker to employee was something which was desirable from her point of view. The conversations informed the Claimant that the possibility of her becoming an employee was something which the Respondent was potentially willing to consider in due course, but it was not a foregone conclusion.

64. The Claimant suggested that she was told that the interview was just a formality. That may well be true. She was the only applicant and it may well be that the Respondent's managers expected her to do well enough at the interview to be offered a post.

65. I did not necessarily take the Claimant's submissions to be that this appointment process in general, or the interview in particular, was some sort of sham exercise, which was intended to dishonestly conceal the fact that the Respondent really believed that secretly she had been regarded as an employee from some time in 2015. In any event and for the avoidance of doubt my finding is that it was not a sham. The Respondent genuinely came to the decision that it would like to recruit a permanent employee and it genuinely went through a recruitment and an interview process.

66. At the time, around September 2016, I am satisfied that the Respondent's managers and HR department all regarded this as a genuine transition in which somebody who had formerly been working as an agency worker became instead a directly contracted employee. It may well be the case that the Claimant had pressed the Respondent for it to happen earlier and/or that she made enquiries in relation to whether her contract could be backdated. However, my finding is that the Claimant was aware at the time that this was a change in status from agency worker to employee, and she

did not regard the recruitment process as a sham.

67. I therefore find that there was no actual contract agreed directly between the Claimant and Respondent, starting any sooner than 30 September 2016.

68. However, it is also necessary for me to consider whether I should find that there was an implied contract between the Claimant and Respondent, starting any sooner than 30 September 2016.

69. The Respondent submitted, and the Claimant accepted in evidence, that there was an actual contract between the Respondent and ninesharp Ltd (see, for example, pages 1 to 15 of the bundle, though I note that the Claimant's position was that there were more recent versions in existence, and not in the bundle).

70. I was shown no separate written contracts between the Claimant and either Giant Professional Ltd and/or ninesharp Ltd. However, my finding is that – whether in writing or not – such contracts existed.

71. Based on the wording of the contract between the Respondent and ninesharp, technically ninesharp was supplying Giant Professional Ltd to the Respondent and acting as an "Intermediary" (the definition being in the contract). The Intermediary was in turn supplying the Claimant to the Respondent.

72. The Claimant stated that she submitted her time sheets directly to ninesharp, and that she accepted that the Respondent paid ninesharp, rather than her.

73. Regardless of whether it was ninesharp or Giant Professional Ltd who paid the Claimant, the Claimant made clear that she was not suggesting that the Respondent paid her directly prior to 30 September 2016.

74. There was no evidence showing to me that there were any features of the arrangements between the parties that could not be adequately and fully explained by a combination of (a) the contract between the Respondent and ninesharp (which was in the bundle) and (b) contracts between the Claimant and either Giant or ninesharp and (c) a contract between ninesharp and Giant.

75. The manner in which the Claimant was treated by the Respondent and its managers, the work which the Claimant did for the Respondent, the hours which the Claimant worked, and the Claimant's remote access to emails were all fully consistent with the contracts just mentioned.

76. In summary, there was no evidence before me, and I found that there were no facts or circumstances, which made it necessary to imply an employment contract (or any other contract) between the Claimant and the Respondent in order to give business reality to the situation.

77. No implied contract was created during 2015 or 2016.

78. My finding, therefore, was that the Claimant became an employee of the Respondent starting from 30 September 2016, as the result of an express agreement between the parties, entered into around 27 September 2016, that she should start work as an employee with effect from 30 September 2016.

79. The Claimant confirmed that she was not seeking to argue that her employment continued any later than 6 August 2018, which was the date which the Respondent had now conceded.

80. Therefore, my finding was that the Claimant was continuously employed between 30 September 2016 and 6 August 2018. The Claimant therefore did not have two years continuous service as of the date of her dismissal.

81. Section 108(1) of the Employment Rights Act 1996 states,

> Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

82. It is not alleged that any of subsections to 2 to 5 of section 108 apply.

83. Therefore, the Claimant does not have the necessary qualifying service in order to bring a claim for unfair dismissal and her claim for unfair dismissal is dismissed.

84. This does not affect any of the other claims which remain listed for a final hearing in September 2019, save to the extent that it is now common ground between the parties that her employment terminated upon the expiry of notice with effect from 6 August 2018.

Employment Judge Quill

Date 19th July 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31st July 2019

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FOR EMPLOYMENT TRIBUNALS