EMPLOYMENT TRIBUNALS

Claimant: **Mr B Sani**

Respondent: **Summerhill Properties Limited T/A Hilton Cardiff**

Heard at: **Cardiff** **On:** **24 July 2019**

Before: **Employment Judge Moore**

Representation
Claimant: In person
Respondent: Mr K Wilson, Counsel

RESERVED JUDGMENT

1. The correct name for the respondent is Summerhill Properties Limited t/a Hilton Cardiff. The respondent's name is so amended.
2. The claimant was a worker and not an employee within the meaning of S230 Employment Rights Act 1996. The claimant's claim for unfair dismissal does not succeed and is dismissed.
3. The claimant's claim for race discrimination was presented out of time and it would not be just and equitable to extend time. The claimant's claim for race discrimination is dismissed.
4. The claimant's claims for notice pay and wages do not succeed and are dismissed.

REASONS

Introduction

1. The ET1 was presented on 5 August 2018. The period of ACAS early conciliation was from 20 July 2018 to 1 August 2018. The claimant brought claims of unfair dismissal, race discrimination (the claimant is black, of West African origin), notice pay and wages. There was a telephone Preliminary hearing on 3 April 2019 conducted by Employment Judge Cadney who ordered a preliminary hearing to determine the following issues:

a. Employment status – the respondent contents that the claimant was employed under a zero hours contract which provided no obligation for either party to offer or accept any hours of work and the claimant was not an employee within the meaning of the Employment Rights Act 1996. The claimant accepts this but contends that prior to April 2016 he performed regular hours and had become an employee of the respondent.

b. If the claimant was an employee when was the effective date of termination of his employment.

c. Subject to the answer to (b) above was the claim for unfair dismissal brought in or out of time and if out of time will the discretion to extend time be exercised.

d. Were the claims of alleged race discrimination brought in time and if not will the discretion to extend time be exercised.

e. Should all or any of the claimant's claims be struck out as having no reasonable prospect of success and / or a deposit ordered on the basis that all or any have little reasonable prospect of success.

2. There was an agreed bundle before me of 215 pages. Following the hearing the claimant sent an additional document to the Tribunal namely a letter from The People's Pension dated 30 July 2019. This was sent to the respondent on 15 August 2019 to comment on whether it should be admitted as evidence post the hearing. I deal with this below.

3. I heard witness evidence from the claimant and from Ms A Knapman, Senior Human Resources Manager for the respondent. There was insufficient time to reach a decision and therefore the decision was reserved.

The Law

Employee Status

4. The respondent asserts the claimant is a worker but disputes he was an employee. The statutory definition of an employee is contained within S230 Employment Rights Act 1996 ("ERA").

5. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497**, the test for a contract of service was set out as follows (per Mackenna J):

> (i) The servant agrees that, in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

6. There must be an 'irreducible minimum' of obligation on each side to create a contract of service, personal performance and control (**Carmichael and another v National Power Plc [1999] ICR 1226**.

7. In **Autoclenz Ltd v Belcher & Others [2011] UKSC 41** it was held that in the context of employment relationships where the written documentation might not reflect the reality of the relationship that it was necessary to determine the parties actual agreement by examining all of the circumstances and identify the parties actual legal obligations.

8. I was also referred to the cases of:

9. **Stevedoring & Haulage Services Ltd v Fuller [2001] IRLR 627** for authority that where the contractual documentation expressly negates mutuality of obligation, there can be no global or over-arching contract of employment and implication of terms contrary to express terms so as to create mutuality of obligation impermissible and;

10. **Thomson v Fife Council [2005] UKEATS/0064/04** for authority that long or regular service will not render someone an employee where there is no mutuality of obligations.

Effective date of termination

11. S95 (1) (a) ERA 1996 sets out circumstances in which employees will be dismissed if the contract under which he is employed s terminated by the employer (whether with or without notice).

12. S97 ERA 1996 sets out the provisions for calculating the effective date of termination.

13. I was referred to the case of **Sandle v Adecco UK Ltd [2016] IRLR 941** as authority that dismissal can be inferred from the conduct of the parties.

14. Extension of time

15. The time limit for presenting a claim of unfair dismissal is set out in S111 ERA 1996 namely that a complaint must be presented before the end of the three months beginning with the effective date of termination unless it was not reasonably practicable.

16. The time limit for presenting a claim of race discrimination is set out in S123 Equality Act 2010 ("EA 2010"). A complaint may not be presented after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period the tribunal thinks just and equitable.

17. Strike out / deposit order

18. The power to strike out a claim is contained in Rule 37 of the Employment Tribunal Rules of Procedure 2013 and to order a deposit in Rule 39.

Findings of fact

19. I make the following findings of fact on the balance of probabilities.

20. The claimant commenced working at the Hilton Hotel Cardiff as a Kitchen Steward on 27 October 2014. He was line managed by Mr Clash who in turn reported to the Executive Head Chef Mr Freeman.

21. The respondent relies upon casual workers to cover peak periods of business activity or short-term absences of employees. The Hilton Hotel in Cardiff has approximately 130 "permanent" employees and 54 casual workers

22. Prior to commencing work the claimant completed an availability matrix form. This enabled the claimant to specify when he was available for work. The claimant specified he was available on Mondays, Tuesdays and Thursdays from 5pm – 2am.

23. On 24 October 2014 the claimant entered into a casual worker agreement ("the agreement") with the respondent. I set out the relevant terms as follows:

"Terms of the Agreement

The services you provide to the Company are on an ad hoc and casual basis.

You are defined as a 'Worker' under UK employment legislation.

For the avoidance of doubt, this agreement does not give rise to a relationship of employer and employee. There is no mutuality of obligation between you and the Company. This means that the Company is not obliged to give you work, nor are you obliged to accept any offer of work made by the Company.

Hours of work

There is no obligation on the company to offer work to you, or obligation on you to accept such work as is offered. Each period of work you perform is separate and you do not accrue continuous service by an aggregation of periods of work performed under this agreement for casual work. There shall be no relationship between the parties after the end of one assignment and before the start of any subsequent assignment.

The Company reserves the right to give or not give work to any person at any time and is under no obligation to give and reasons for such decisions.

…

In the event that your period of casual work does not have an ending date, you will be given 24 hours' notice of termination of the worker agreement. After this time, work will no longer be offered to you.

….

Notice

Yourself and the company can terminate this mutual agreement at any time by the giving of one day's verbal notice.

Should you not work any shifts for a period of 12 weeks, your details will be removed from the database.

Terms

This agreement is intended to fully reflect the intentions and expectations of both parties as to our future dealings and in the event of any dispute regarding your engagement as a casual worker by the Company it shall be regarded as a true and accurate and exhaustive record of the terms on which we have agreed to enter into a casual work relationship. Any variation to this agreement will only be valid where it is recorded in writing and signed by both parties and no additional or modified terms should be implied

by any other actions of you or the Company. You confirm you have read and understood the contents of this agreement."

24. The claimant signed the agreement but disputed under cross examination it was a casual agreement. The reason he disputed this was that once a rota had been drawn up by Mr Clash he was not able to say he was unable to work the shift.

25. The claimant was engaged under different terms and conditions as employees. Although I did not have sight of an employee contract, Ms Knapman gave evidence that was unchallenged that employees enjoyed additional benefits including dental plans, private medical insurance and life assurance, were paid on a different payroll monthly, were subject to performance management and other internal procedures such as disciplinary and probation, and took part in employee engagement surveys.

26. The claimant was required to provide personal service and was unable to send a substitute. The respondent provided his uniform and work equipment, pension and paid him holiday pay and deducted tax and national insurance

27. The bundle contained the claimant's rotas and a full record of the hours he had worked. It was common ground that his last shift was 31 March 2016. It can be seen from the rotas that he worked on a regular basis with the pattern Monday Tuesdays and Thursdays. There were however periods when he did not work for a number of reasons and also periods where he worked additional hours. For example in January 2015 for a two-week period he did not work any shifts, this being a quiet period in the hotel. There was evidence that when he requested to change shifts or was unable to work shifts this was not refused. There was another period between 28 December 2015 – 1 February 2016 where the claimant worked no shifts at all, as he decided to spend Christmas away from Cardiff.

28. In February 2016 the claimant only worked six shifts during the whole month and then none in March until 14 March 2016.

29. In March 2016 the claimant secured an additional role as a Porter with a local NHS Trust. He was offered the position on 8 March 2016 which was to work 20 hours over a variety of shifts over 5 – 7 days. The claimant intended to work shifts in the days so it would not have affected his ability to continue working for the respondent.

30. On 17 March 2016 the claimant emailed Mr Clash as follows:

"Just to let you know, I would not leave the company, I will carry on doing Monday normal and maybe someday after 8pm if possible or I am available.

Sorry I cannot do or work Monday 21/3/16 as got urgent appointment outside Cardiff, but if you need, I can work Friday 25/3/16 from 8pm. Thanks."

31. Mr Clash replied that the rota had already been done and the claimant was working on the Monday (21st) and asked him to call if he had a problem.

32. The claimant did not call but replied by email that he could not work the Monday but could work the Friday if it started at 8pm. Mr Clash asked him to call but the claimant replied with a further email to say he also could not start at 5pm on the Thursday but could start at 7pm.

33. It was put to the claimant that he was not seeking permission from Mr Clash not to work on the Monday or at his usual start times of 5pm, rather he was telling him he could not and that was evidence there was no mutuality. The claimant explained that the reason it read as if he was informing Mr Clash he could not work rather than seeking permission was that his written English was not as good as it could have been. I do not accept this explanation as the wording of the emails is quite clear. I find the claimant was setting out what he could and could not do and was not seeking permission but informing Mr Clash of what he could and could not do.

34. Mr Clash replied in a further email on 18 March 2016 that the shift started at 17.00pm and he would cover it. In other words the claimant was not required, which was unsurprising given that the claimant had not been able to commit to a 17.00pm start time and could only say he may be able to start at 7pm or 8pm depending on his children's sport club.

35. At some point after this email exchange on 18 March 2016 there was a phone call between the claimant and Mr Clash. The claimant followed up the call with an email on 19 March 2016 in which he complained about the way Mr Clash had spoken to him, cut his shifts and or refused to swap his shifts around and threatened to give him a bad reference. The claimant stated:

"Is not right, not wise move, for cutting someone days of work just someone getting offer for new job, that is picking."

36. This reflected what the claimant had pleaded in his ET1 about the reason his shifts had been cut. He stated in his ET1 (section 15):

"During this time I had a meeting with Deputy Chef, Head Chef, Operational Manager for they refused to give shifts only because I got job with the NHS".

37. This was at odds with his case that the reason his shifts were cut was because of his race. The claimant at this point is suggesting the reason his shifts have been cut was that he had found another job.

38. In his witness statement the claimant also alleged Mr Clash called him "fucking black" during this call. This allegation was not contained in the claimant's ET1 nor was it mentioned in the claimant's email dated 19 March 2016 which followed the call. I make no findings about whether that comment was made as this preliminary hearing was not called to determine these issues and Mr Clash has not been called to give evidence other than to say it is questionable why the claimant would fail to mention such a serious allegation until he wrote his witness statement for this preliminary hearing.

39. The claimant subsequently worked two further shifts on 28 and 31 March 2016 following which he was not given any shifts by the respondent. On 4 April 2016 the claimant emailed Mr Freeman to ask why he had not been

given any shifts, requesting a reference and a meeting. This was followed up with a further email on 13 May 2016 and Mr Freeman responded advising Mr Clash would be in contact regarding shifts.

40. On 28 May 2016 Mr Javier Rodriguez, Director of Operations contacted the claimant by email and offered to meet with him. He stated he had been made aware of some "issues / misunderstandings with regards to your rotas and availability". It was not clear why there was a further delay but by 17 June 2016 Mr Rodriguez emails again to offer a phone call acknowledging there had been difficulty to match agendas. It was also not clear whether there was an actual meeting but by 25 June 2016 the claimant emailed Mr Rodriguez advising he could do Mondays from 6pm but may be able to start at 5pm on some days and it also might be possible to do different days if he was off. Mr Rodriguez confirmed by email dated 28 June 2016 that he had informed Mr Clash if his availability and he would be in touch "with any available shifts".

41. Mr Clash subsequently emailed the claimant on 1 September 2016 to request his availability for the next 2 weeks. The claimant did not reply until 15 September 2016 explaining he had been on holiday and offered to work Mondays and Tuesdays from 5pm as permanent shifts.

42. The last correspondence or contact between the claimant and respondent was on 28 September 2016. Mr Rodriguez emailed the claimant to advise Mr Clash had his availability "so of this is suitable for the business he will contact you directly". Ms Knapman was unable to say why the claimant was not offered any further shifts.

43. I find that it must have been obvious to the claimant by a point in time that he was not going to be given any more shifts, he had raised complaints with two senior managers and was advised in my view definitively as of 28 September 2016 by Mr Rodriguez that if his availability was suitable Mr Clash would be in contact. I do not think it is credible to say that the claimant only realised he would not be receiving any further shifts once he received his P45 in July 2018, almost two years later. The casual worker agreement he had signed also stated that if he had not worked shifts for a period of 12 weeks, he would be removed from the database.

44. The respondent did not, as per the casual worker agreement, terminate the agreement by giving one day's verbal notice. It was not clear why they did not take this course of action which would have negated any confusion.

45. In March 2018 the respondent undertook a cleanse of its casual worker database. Ms Knapman explained that this would have been done by the head of department who would complete a leaver form and send to HR which would then have generated a P45. The claimant's P45 was dated 30 April 2018. It was sent to the hotel to be sent onto the claimant by the local management team.

46. The claimant did not then receive his P45 until he received it in the post on 10 July 2018. The claimant's case is that this is when he understood he had been dismissed. He then sought legal advice and was told to contact ACAS which he did on 20 July 2018.

47. The claimant had produced a pension statement from the People's Pension covering the period 18 November 2015 to 1 April 2019. It did not specify from whom the contributions were made but the respondent was a contributor as the claimant's pay slips recorded contributions to the People's Pension by the respondent.

48. The number of contributions varied in some months there were 2 separate payments in others up to 6. The claimant relied upon the payments after March 2016 as evidence that the respondent had continued to make pension contributions and therefore that he remained as an employee. The problem was there was no evidence that only the respondent was contributing and the number of contributions at least suggested there could be another contributor. Furthermore, it was common ground that the claimant did not receive any pay after he was paid for his last shift on 31 March 2016 so it is difficult to see without speculating why the respondent would have continued to make contributions. The amounts were very low from as little as 18 pence.

49. The claimant produced a letter after the hearing from the People's Pension dated 30 July 2019 and it was sent to the respondent for comment. The respondent objected as it had not been before the Tribunal and they had not had the opportunity to challenge the letter. In my view the letter takes us no further forward, it confirms that the respondent was the claimant's employer (for the purpose of payments into the pension) and their records show he left the respondent on 30 April 2018, which was the date of the P45.

Conclusions

Employee Status

50. I agree with the respondent that the claimant was a worker rather than an employee for the following reasons.

51. The nature of worker status is that they will provide personal service as the claimant did in this case. That does not mean in itself they will be deemed to be an employee. That distinction is recognised by the different definitions of worker and employee in S230 ERA 1996. The claimant's status as worker also explains the payment of a pension, holiday pay and tax and national insurance arrangements.

52. In respect of the control test, the claimant's evidence was that the respondent provided uniform and equipment and controlled what he would do in his working environment. I accepted this evidence. However this was more to do with the nature of the role, as kitchen steward it would be surprising if kitchen stewards could wear what they wanted or undertake duties how they wanted.

53. There were two factors that were in my judgment fatal to the claimant's claim of employee status.

54. The first was the agreement he entered into at the start of the relationship. I am not prevented from considering circumstances outside of the written agreement if there was evidence that the agreement did not reflect the reality of the relationship (Autoclenz). The claimant relied upon his assertion that once the rota was drawn up he could not turn down a shift as circumstances that did not reflect the reality of the agreement. This did not in my view mean that the agreement did not reflect the reality of the situation. It is a different issue to be offered and accept work and then withdraw. The agreement provided the claimant was not obliged to accept work once offered. It was silent on what would happen if once an offer was accepted, the claimant would then fail to turn up or say he could no longer work that shift.

55. An inability to withdraw from work, once accepted does not in my view amount to an irreducible minimum of an obligation. The claimant was able to specify in advance what dates he could work on the availability matrix. If he needed to change even those dates there was evidence he had been able to do so, prior to the events in March 2016. For example the periods where he was either not offered work or was able to say he did not wish to work as set out at paragraph 27 above.

56. The fact that the claimant worked regularly for the respondent between October 2014 and March 2016 does not contribute to an overall factual matrix that the claimant was an employee, given my conclusions on mutuality of obligations.

57. Therefore, the claimant is unable to bring a claim for unfair dismissal. As such, it is not necessary to determine the claimant's effective date of termination and the time points including the reasonably practicable issue.

<u>Race discrimination – time point</u>

<u>Date of the act to which the complaint relates.</u>

58. The less favourable treatment relied upon for the claimant's race discrimination claim was set out in his ET1 and clarified in the record of the preliminary hearing on 3 April 2019 as the failure to give him shifts after March 2016. The claimant asserted this was because of his race but there was another reason that Mr Clash was unhappy he had secured alternative employment.

59. I agree with the respondent's submission that this was a one off decision with lasting effects rather than a continuing state of discriminatory affairs.

60. I have concluded that the date of the act to which the complaint relates to was on or around 31 March 2016, the last date the claimant was offered work. It was apparent and obvious that the claimant understood this from the continued complaints he raised thereafter between April – September 2016.

61. The race discrimination claim was therefore presented out of time.

62. Turning now to whether it would be just and equitable to extend time. The claimant's case in this regard was far from clear and he did not make any

clear submissions or any evidence as to why it would just and equitable to extend time. His evidence , as a litigant in person, was understandably combined with evidence about when he understood he had been dismissed, which he argued to be on receipt of his P45.

63. It is a different test in terms of limitation for discrimination claims. The date of dismissal is not the date of the act to which the claim relates. I have found that the claimant must have understood, at the very latest on 28 September 2016 that he was not going to be offered any more shifts by the respondent. Even taking this date as the point in time in which, on the claimant's case, he understood there was finality to the alleged discriminatory act (the decision to not provide him with any more shifts) the claim was lodged 23 months later.

64. The same conclusion must be reached for the alleged racist comment made by Mr Clash on 18 March 2016.

65. I therefore do not consider it would be just and equitable to extend time.

Notice pay claim

66. As I have found the claimant is not an employee he was not entitled to notice pay.

Wages claim

67. The claimant did not work after 31 March 2016 and has not performed work for which he would be entitled to be paid. He is not entitled to any payment in respect of wages.

68. The claimant's claims are therefore dismissed.

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Employment Judge Moore

Date: 22 August 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
23 August 2019
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FOR EMPLOYMENT TRIBUNALS