



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms N Aleksandrowicz

v

Leeds Beckett University

Heard at: Leeds On: 13 September 2019

Before: Employment Judge O'Neill

Representation:

Claimant: In person

Respondent: Ms Tattersall a Solicitor

RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. The claim under regulations 8&9 fails and is dismissed.
2. The claim of race discrimination is dismissed on withdrawal by consent.
3. The claim of detriment under regulation 6 survives.
4. I make a finding that in the period from 1 October 2018 to 31 December 2018 the claimant was employed under a fixed term contract of employment.
5. Regulation 3 - holiday pay. This claim also survives. I have made a finding that she has been employed under a series of fixed term contracts from 9 February 2015 to 31 December 2018

REASONS

Purpose of the preliminary hearing

1. The public preliminary hearing was listed to determine
 - a) in or about 13th of December 2018 was the claimant employed under a contract of employment
 - b) was the claimant so employed continuously from 14 December 2014 until 13 December 2018
 - c) Was the Claimant employed under a Fixed Term Contract as at 13 December 2018

Evidence

2. There was an agreed bundle of documents paginated and indexed.
3. The claimant and Mr Peter Coates (associate director of business for the respondent) gave evidence and were cross examined. They each produced a written statement which was taken as read.
4. The solicitor for the respondent made a submission and the claimant made further representations.
5. After discussing possible directions, I reserved my decision and the parties will deal with case management at a further hearing.

Claims

6. Race Discrimination – The claimant did not confirm by the 9 August 2019 that she wished to pursue a complaint of race discrimination and at the hearing today she confirmed that she did not intend to do so. The parties agree that this claim shall be dismissed on withdrawal.
7. The claims are made under the Fixed Term Employees (prevention of less favourable treatment) Regulations 2002
 - a) regulations 8&9 the claimant claims that on 19 December 2018 the respondent declined or refused to permit her right to a variation to her contract to the effect that she was a permanent employee. To make such a claim the claimant must show that she has four years continuous service to 13th of December 2018.
 - b) Regulation 6- the claimant claims that the respondent subjected her to a detriment in that it dismissed her, or provided her with no work always work of a lesser quality or duration because on 13 December 2018 she had asserted her right to permanence under regulations 8&9.

- c) Regulation 3 - the claimant claims that the respondent did not afford her paid holiday leave during her employment which was less favourable treatment than that afforded to a comparable permanent employee.

Law

- 8. Regulation 8 (2) provides '*Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—*
 - (a) *the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more* '
- 9. S45 (6) Employment Act 2002 (which is drafted in the same terms as S230 ERA 1996) provides '*In this section—*
 - (a) *“employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, and*
 - (b) *“contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
- 10. **S 212 ERA 1996 - Weeks counting in computing period**
 - (1) *Any week during the whole or 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.*
 - (2) *...*
 - (3) *Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—*
 - (a) *incapable of work in consequence of sickness or injury,*
 - (b) *absent from work on account of a temporary cessation of work, [or]*
 - (c) *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.'
- 11. The following cases were referred to me by the respondent

Cornwall County Council and Prater (CA) 2006 EWCA Civ 102
Drake and IPSOS MORI UK Ltd (EAT) 0604/11/ZT

Little and BM I Chiltern hospital UK EAT/ 0021/09
St Ives Plymouth Ltd and Mrs D Haggerty UK VAT/0107/08/MAA
Leatherby Christopher Ltd and bond 1988 ICR 480
Welton and Deluxe retail Ltd 2013 IRLR 166
Brain and others and the National Gallery (ET) to 201625/2018

Findings of Fact

12. Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.
13. I found the Claimant and Mr Coates to be credible witnesses. There was almost no dispute as to the factual matrix. The following findings are as agreed or unchallenged except where the differences are highlighted.
14. The respondent had established what it called a 'Job Shop'. Its purpose was to provide students and graduate alumni with work experience and to fill temporary and casual vacancies within the University.
15. From 2008 to 2018, the claimant, who was a graduate of the University, worked on various assignments through the job shop. The respondents have produced a list from their records of the dates of the assignments given to the claimant's and the gaps between each assignment. The claimant has agreed that list.
16. It was the evidence of Mr Coates who had overall charge of the job shop that when a person first registered they were issued with and signed a contract. The signature page was produced for one signed by the claimant in November 2011 but neither party was able to locate the other pages of that document. The claimant accepted that this was her signature. The Claimant was unable to say whether the contract she had signed was in the same terms as the sample contract in the bundle. Mr Coates gave evidence to the effect that although the sample was not the claimant's contract it was the version in circulation in November 2011 when she signed her contract. I find on the balance of probability that the sample contract was in the same terms as that signed by the claimant.
17. The claimant accepted that the contract document was a fair reflection of the terms applied to her in practice except that she asserts that the reality of her arrangements mean that she is an employee.
18. The contract dealt with sickness and maternity pay holiday pay, a confidentiality clause, a condition to accept directions supervision and instruction and follow the rules applicable to any particular assignment. Add paragraph 3 it provides 'for the

avoidance of doubt nothing in this contract requires the job shop to offer or provide casual work with any assignments or work of a particular kind or at all or creates any obligation on the casual worker to perform any work or accept any assignments'. Terms also included processes by which the contract might be ended or any assignment terminated by the job shop all the job shopper.

19. For the purposes of regulations 8&9 the tribunal is concerned with the period 14 December 2014 to 13 December 2018. In that period according to the agreed list of assignments the claimant was engaged on back to back assignments from 9 February 2015 to 31st of December 2018 with only three breaks; of 14 days in October 2015, 28 days in March 2018 and 70 days in May 2018. In the period immediately before 9 February 2015 there is a period of about three months when no assignment is recorded and according to the claimant's own evidence there was a period in the autumn of 2014 when she worked for the film school as a freelancer and this was not secured through the job shop.
20. Once given an assignment the claimant was put through an induction and underwent any required training she worked under the supervision and control of the line manager in the same way as if she had been an employee. Her work was monitored. She had no control over her hours of work she could she could not come and go as she pleased but had to work the hours the Department determined taking her breaks as directed. She was obliged to inform the Department and the job shop in the event of sickness or any other absence. She was subject to a dress code. She was not permitted to send a substitute. She was issued with personal logon details to access the computer system and a University email address. She was fully integrated into the work of the Department where she was assigned. She was a member of the pension fund. Her wages were paid through the payroll under PAYE wage slips were issued.
21. It was the claimant's unchallenged evidence that she was regarded by the job shop as a conscientious and reliable administrative worker and the assignments she was offered were relatively long assignments of responsible administrative work of 30 hours or more a week. As set out above the agreed list of assignments showed that she had been continuously working with very few breaks.
22. The job shop also had work on offer to students which may be regarded as characteristically casual. Undergraduate students were not able to take assignments of many hours a week and every week during term time because of their academic work. The work which may be more commonly characterised as casual such as a few hours here and there doing bar work or waitressing was not the kind of work undertaken by or offered to the claimant although it was available and offered to others who carried out such tasks.
23. The claimant was not obliged to accept any assignment and the respondent was not obliged to offer her an assignment. However, once an assignment had been offered and accepted the claimant worked under the close supervision and control of the respondents managers alongside the other employees and was as

subordinate to the respondent as any other employee. The case law referred to me by the respondent clearly shows that the absence of mutuality of obligation in respect of offering or accepting an assignment is not fatal to a finding of employment status during each or any assignment.

24. There are some differences of contractual terms between the claimant's position and a permanent employee in that
- a) she received only statutory sick pay
 - b) holiday pay was different for a permanent employee in that such an employee was entitled to 28 days paid holiday the payment being made as and when the holiday was taken. Whereas the claimant was not paid for holiday as and when it was taken but received a regular monthly allowance specified in the payslip and separate from her wages in respect of holiday pay commonly known as rolled up holiday pay. Both she and Mr Coates expected her to take holiday in between assignments and this is what she did.
 - c) Permanent employees would be formally dealt with under the University's policies in respect of conduct and performance by their line management. The claimant had never been disciplined or counselled about her conduct or performance. Mr Coates accepted that her conduct and performance would be managed but that the Department would refer any issues to the job shop staff who would deal with the job shopper in conformity with good practice and to safeguard the university's reputation as an equal opportunities employer.
 - d) The claimant had on a previous occasion raised a grievance and this had been dealt with under the respondent's grievance and equal opportunities policies and procedures.
 - e) The respondent deducted tax and National Insurance under the PAYE provisions through the payroll and issued wage slips typical of those issued by to employees.
 - f) She was a member of the Pension fund
25. For a number of years the claimant had volunteered in the film school which was part of the University and she was keen to develop employment opportunities within the school. At the end of 2014 from about September to about November she took up a position within the film school. This was offered to her outside of the scope of the job shop and on different terms and she accepted it not as an employee but as a freelance worker. In this respect she was not paid through the payroll but submitted an invoice.
26. At the start of each assignment the university issued a document headed job shop confirmation. That document in its first line reads 'you have been placed into a temporary contract'. The document goes on to list duties, hours, penny rates and

the person to whom the claimant reported. The document also included a specific start and finish date.

27. On a number of occasions, the claimant's assignment was extended to cover a consecutive period in the same role. Mr Coates confirmed that it would be a normal practice to continue with the job shopper who was already in post, knew the role and was competent.
28. In the claimant's case she had remained in a couple of roles for over three months and in her role in the IT department for example she had remained for more than a year.
29. The respondents produced a Casual Worker Policy which I find was not strictly applied to the claimant in that among other things she had had consecutive assignments exceeding three months in the role, she had covered the long-term sickness absence and also interim periods where a vacancy was waiting to be filled which in some cases took many weeks and sometimes months. In the circumstances I find the Casual Worker policy was not strictly applied to the claimant and is of little assistance in determining the issues before us today.
30. Although many assignments simply rolled over from one to the next without a gap there were a number of clear breaks as set out in the agreed list of assignments.
31. In respect of those where there was a clear break the claimant gave no evidence of any specific agreement or arrangement being made in advance about the next assignment.
32. The claimant was a reliable, efficient and committed person and this was recognised by the job shop staff with whom she had reached an understanding that they would provide her with responsible administrative work within the University of 30 hours or more a week. Usually by the end of one assignment the job shop had another lined up for her. On some occasions there was a short period between assignments when no work was available. It is clear from the tone and content of the emails produced from the job shop staff that the job shop was actively looking for suitable work to assign to the claimant and it was their intention to find her work as soon as it became available. The claimant expected the break to be only temporary and I infer from the tone and content of the job shop emails that the staff there expected the break to be only temporary.
33. Mr Coates and the claimant both confirmed that it was expected that she would not take holiday leave during an assignment but would take her leave during the breaks in between assignments.
34. The last assignment on the agreed list of assignments ended on 31 December 2018.

35. The claimant complains that following her application under regulation 8 made on 13 December 2018 for the contract to be declared permanent, she was subjected to a detriment when her existing assignment came to an end on 31 December 2018. That less favourable treatment was that after this date she was dismissed and/or provided with no work and/or provided only with work of lesser quality or duration and that was brought about because she had attempted to exercise her statutory rights under the Regulations. I make no findings about that which will be determined at the substantive hearing save for my findings of the existence of a Fixed Term Contract of employment.

Conclusions

Umbrella Contract

36. Notwithstanding the contract signed by the claimant in November 2011 I find that there was no single contract of service of a global, umbrella or overarching character from November 2011 to December 2018 or at all.

Continuity

37. If there is no global contract then I find there may be a succession of fixed term contracts commensurate with each assignment as described in each job shop work confirmation sheet and listed in the agreed list of inside assignments.
38. Assuming that each such assignment does constitute a separate period of employment the claimant is required to show continuity in the period identified by Judge Wade in her order of 27 June 2019 i.e. from December 2014 to December 2018.
39. For the most part I find there is continuity in that a new assignment began as the old assignment came to an end or the assignment was extended. However, there are a number of clear gaps in the agreed list between assignments.
40. The claimant has brought no evidence to show that her assignment began on or before the 14 December 2014. On the agreed list there is a clear gap from 2 November 2014 to 9 February 2015 a period of over three months. The claimant was asked about this gap and had been given the list before the hearing but could not explain this period. From September 2014 to November 2014 the claimant told us that she was not working for the job shop at all but in that period was working as a freelancer at the film school. By freelancer I understand her to mean as a self-employed person and that is consistent with the documentation in the bundle which shows that she invoiced for her work at the film school and this was not paid through the University payroll in the ordinary way. She entered into this arrangement outside of the terms of the shop job shop having been a volunteer for some years.

41. Therefore, the claimant has shown only that she was engaged under assignment through the job shop from 9 February 2015 at the earliest. As a consequence has failed to show on the balance of probability that she had four years continuity of employment from December 2014 to December 2018.
42. Despite the breaks between the assignments continuity may be preserved under the provisions of section 212 ERA 1996.
43. In that respect I find that there was no prior arrangement made in advance of the assignment that the assignments would be linked nor any evidence of a wider custom or practice to that effect. In the circumstances the claimant can only rely on 212 (3)(b), temporary cessation of work and cannot rely on subparagraph (a).
44. The Authorities before me confirm that it is appropriate to consider the matter under subsection 3(b) retrospectively. Looking at the agreed list the claimant worked continuously from 9 February 2015 with hardly a break. There was a short break of about 14 days in October 2015 and another of 28 days in March 2018.
45. I find these periods to be a temporary cessation of work under S212, that is work provided by the respondent to the claimant personally. The fact that the business of the University and the fact that other job shoppers may have been offered and may have accepted work at that time is irrelevant (see Welton paragraph 34). The tone and content of the emails between the claimant and the job shops staff underlines a mutual intention to secure the claimant another assignment as soon as possible and that the intervals between assignments were expected to be only temporary. Further such short periods are also commensurate with periods of statutory holiday entitlement which both the Claimant and Mr Coates expected to be taken in the intervals between assignments.
46. However, at the end of May 2018 there is a substantial break between assignments amounting to 70 days. This cannot be explained by holiday arrangements and the claimant has given no other explanation for the break in service. This break is atypical of the claimant's pattern of working. In the circumstances I find that 70 days is too long a period to be classed as a temporary cessation of work when compared the length of assignments that came before or after it and when compared to the pattern of assignment and breaks generally.
47. In the circumstances I conclude that this period of 70 days also breaks the continuity of employment.
48. The claim under regulations 8&9 cannot succeed as the Claimant has failed to show four years continuity of employment.

Contract of Employment

49. The respondent has argued that the individual assignments are not contracts of employment and that the claimant was merely a casual worker.

50. I find the claimant was employed under a succession of individual contracts of employment each for a fixed term as set down in the job shop Work Confirmation sheet and listed in the agreed list of assignments.
51. The claimant's working pattern can be distinguished from those Job Shoppers who undertook short and irregular or ad hoc shifts doing bar work or catering or short spells at peak times such as admissions 'clearing'.
52. The claimant as set out above was given long assignments for over 30 hours a week on responsible administrative work.
53. Notwithstanding that there was no obligation on the respondent to provide work or on the claimant to accept any particular assignment once an assignment was underway there was a mutual obligation between the parties to perform it under the direction and control of the respondent and for the respondent to pay for it.
54. During an assignment the claimant was integrated into the department to which she was assigned and worked as directed, she was not permitted to send a substitute, hours were governed by the needs of the Department, her work was monitored, there was a dress code, she was issued with a personal computer login and an email address. Although she may not have been dealt with under the disciplinary procedure in exactly the same way as a permanent member of staff her work and conduct was monitored and she could expect to be counselled or otherwise dealt with by the job shop staff in accordance with good industrial practice, paid through the pay role and part of the pension scheme.
55. In the circumstances I find that the claimant was an employee employed under a succession of individual contracts of employment each for a fixed term.
56. In particular I find that in or about 13th of December 2018 the claimant was employed under a contract of employment.

Fixed Term

57. I find that in or about 13th of December 2018 the claimant was employed under fixed term contract of employment which according to the agreed list of assignments began on 1 October 2018 and ended on 31 December 2018.

Summary of Claims

58. The claim under regulations 8&9 fails because the claimant has not shown that she has had continuity of employment from 14 December 2014 to 13 December 2018 and is dismissed.
59. The claim of race discrimination is dismissed on withdrawal by consent.
60. The claim of detriment under regulation 6 survives in that it does not require the claimant to show a minimum period of service. I have found that in the period

from 1 October 2018 to 31 December 2018 the claimant was employed under a fixed term contract of employment.

61. Regulation 3 - holiday pay. This claim also survives in that it does not require the claimant to show a minimum period of service. I have found that in the period from 1 October 2018 to 31 December 2018 the claimant was employed under a fixed term contract of employment. I find that she has been employed under a series of fixed term contracts from 9 February 2015 to 31 December 2018 although continuity was broken in May 2018.

18 September 2019

Employment Judge O'Neill

Sent to the parties on:

25 September 2019