EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100123/2021 (V)

Preliminary Hearing Held by Cloud Video Platform on 17th May 2021

Employment Judge Jones

Mr A Jipur	**Claimant** **In Person**
Keasim Events Limited	**Respondent** **Represented by:** **Mr J Anderson** **of Counsel** **instructed by Markel Law**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not have jurisdiction to consider the claimant's claim of unfair dismissal. A final hearing is set down to consider the claimant's claim of race discrimination on 22nd and 23rd September 2021 before a full tribunal on the Cloud Video Platform.

Reasons and next steps

1. A preliminary hearing took place by way of CVP to determine the following issues:

The employment status of the claimant

> If the claimant was an employee, whether he had sufficient service for the Tribunal to have jurisdiction to consider a claim of unfair dismissal, and
>
> Whether the claimant's claim of race discrimination should be struck out for having limited prospects of success or whether the claimant should be required to lodge a deposit in order to proceed with this claim

2. At the commencement of the hearing Mr Anderson indicated that the respondent no longer sought any order in relation to the prospects of success of the claimant's race discrimination claim. The application had been made before the claimant had provided further particulars of his claim and the respondent now accepted that as particulars had been provided by the claimant of his claim, such an application was not likely to succeed.

3. After discussion, it was then agreed that the Tribunal would determine all issues in relation to the jurisdiction of the Tribunal to consider the claimant's claim of unfair dismissal. In particular, the Tribunal was to determine:

> Was the claimant an employee during his employment with the respondent?
>
> If so, did he have sufficient continuous service for the purposes of section 108(1) Employment Rights Act 1996 ('ERA') to give the Tribunal jurisdiction to consider a claim of unfair dismissal.

4. The Tribunal heard evidence from the claimant, who appeared in person, and Mr Keane a director of the respondent and Mr Bowie, who is a General Manager. The Tribunal also heard submissions from the parties. Mr Anderson had provided a skeleton argument in writing in advance. The respondent lodged a bundle of productions. The claimant indicated that he had sought to lodge documents but had not done so until the morning of the hearing. They

had not been received by the Tribunal. I explained to the claimant that the orders of the Tribunal had been clear, and that a joint bundle ought to have been provided 14 days before the hearing. The claimant said he had been of the view that it was for the respondent to provide documents to him and then for him to add to them. However, I indicated to the claimant that this had been a joint responsibility and such orders were made to ensure that the Tribunal had been provided with any documents on which the parties wished to rely in good time before the hearing. In any event, the documents the claimant had sought to provide only confirmed that he was a student and therefore were unlikely to be relevant to the matters the Tribunal was required to determine.

5. The claimant confirmed that he had a new address.

6. Having heard the evidence and considered the documents and submissions by the parties, the Tribunal found the following facts to have been established.

7. The claimant worked at the respondent's premises on an agency basis as a door supervisor during 2018.

8. The respondent operates a seasonal pop up bar at Waverly Mall in Edinburgh which was called Festival Village during the Edinburgh Festival period in 2018- 2019.

9. The claimant worked from middle of November 2018 until January 2019 for the respondent following a request that he be engaged directly by the respondent.

10. The claimant's hourly rate of pay when providing services to the respondent on an agency basis was less than the hourly rate of pay he received when providing services directly to the respondent.

11. From November 2018- January 2019, the claimant provided security services to the respondent in the capacity of door supervisor, for which he was paid

£13.50 per hour, and overnight security for which he was paid £10 per hour. The claimant worked on a full time basis during this period.

12. The claimant was not given any contractual documentation in relation to his employment with the respondent at this time.

13. The claimant studied in London between January 2019 and March 2019 and was not available for work with respondent during this period.

14. The respondent opened a new pop up bar in Waverly Mall in 2019, called Cask Smugglers.

15. The claimant started working at the Cask Smugglers venue at the beginning of August 2019. The claimant worked on an intermittent basis at these premises until March 2020 when the venue was required to close as a result of the pandemic.

16. The claimant was the only person engaged by the respondent on these arrangements at the Cask Smugglers premises.

17. Between August 2019, and March 2020, there were a number of weeks during which the claimant did no work for the respondent. For instance from 6 September until 4 October, the claimant only worked during one week and only worked 7 hours during that week. There were a number of other breaks of between one and three weeks where the claimant did no work for the respondent. The claimant's hours during this period were irregular and ranged from 7 hours to 68.5 hours. The claimant did not work regular hours between August 2019 and March 2020.

18. Between August 2019 and March 2020, the claimant was studying and was also working elsewhere.

19. The claimant contacted Mr Bowie around 30 March 2020 to ask whether there was any financial assistance he could provide him. The claimant made a number of further requests to the respondent to be placed on furlough.

20. The respondent placed a number of employees on furlough around March 2020.

21. The respondent did not at any time place the claimant on furlough leave.

Relevant law

22. S.230(1) Employment Rights Act 1996 provides that an employee is an individual who has entered into or works under or has worked under a contract of employment. S.230(2) provides that a contract of employment means a contract of service or apprenticeship, whether express or implied, whether oral or in writing.

23. To qualify for the right to claim unfair dismissal, employees must generally show that they have been continuously employed for at least two years — S.108(1) ERA) .

24. In order for an Employment Tribunal to have jurisdiction to consider a claim of unfair dismissal, a claimant must be an employee (subject to limited exceptions which do not apply in the present case) and have completed two years' continuous service (again subject to exceptions which are not appliable in this case).

25. There are limited circumstances in which periods during which an employee is not working for an employer can amount to continuous service.

26. Section 212 of ERA provides that:

> (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.

[...]1

(2) 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]2

(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, [...]3

[...]1 counts in computing the employee's period of employment.

Submissions

27. The respondent submitted that in relation to the question of employment status, this was a straightforward case. The respondent submitted that there was simply no mutuality of obligation between the respondent and claimant. Reference was made to the judgment of the House of Lords in the House of Lords in Carmichael v National Power [2000] IRLR 43. The respondent's position was that the claimant was a worker and that therefore there was no obligation to provide the claimant with a statement of terms and conditions of employment in terms of section 1 ERA until 6 April 2020 by which time the claimant was no longer engaged by the respondent.

28. The respondent pointed to the claimant having enrolled on a course after January 2019 and having been engaged in other employment during this period. Therefore, it the Tribunal found that the claimant was an employee, there was a clear gap in his employment between January 2019 and August

2019 which could not be bridged by the provisions of section 212 ERA. The respondent said that the gap in employment was too long to amount to a 'temporary' cessation of work and that in any event, the cause of the gap, was the claimant's decision to undertake study, travel and alternative employment during this period.

29. The claimant's position was that the respondent's business was seasonal and that when he was not working it was because there was no work for him to do. The claimant said that when he returned to Edinburgh, he was available to provide services and had not missed any of the seasons during which the respondent operated.

30. The claimant also said that the fact that no P45 had been issued to him either in January 2019 or subsequent to March 2020 pointed towards him being an employee and having continuous service during this period. The claimant said that his service came to an end in December 2020 when the claimant intimated his resignation to the respondent. The claimant said that the communications between him and the respondent (Mr Keane and Mr Bowie) between March 2020 and December 2020 were consistent with him being an employee and still being employed during that time.

Discussion and decision

31. Was the claimant an employee of the respondent?

32. The claimant was an employee of the respondent during the first period of his employment with them. Prior to that time, he contacted the respondent and asked if he could be employed directly. Although he did not receive any contract of employment or other documentation, he worked regularly for the respondent on a full time basis from around 14th November to 8th January. The Tribunal formed the view that during this initial period of the claimant's employment, he worked regular hours every week, both in his role as door supervisor but also in his role as night time security. The Tribunal concluded

that there was mutuality of obligation between the parties during this period and that a contract of employment was in existence.

33. However, the Tribunal formed the view that the second period of the claimant's employment was substantially different in nature from the first. The claimant was provided services in a difference pop up bar. He had originally worked in the Festival Village. His second period of employment was in the Cask Smugglers, which although in a similar location to Festival Village was a different enterprise.

34. Moreover, the claimant's hours in the second period of his employment varied dramatically. This period covered thirty three weeks. The claimant did not work at all in ten of those weeks. He only worked full time hours in twelve of those weeks. The Tribunal formed the view that in this period there was no mutuality of obligation in that the claimant regularly indicated that he did not want to work in particular weeks. The claimant was also studying and working elsewhere during this period, which also contributed to the Tribunal's conclusion that during this period the claimant was a worker, but not an employee for the purposes of s.230(1) of ERA.

Did the claimant have continuous service?

35. As the Tribunal determined that the claimant was an employee only until January 2019, it follows that the claimant did not have sufficient continuous service for the Tribunal to have jurisdiction to consider a claim of unfair dismissal.

36. However, the Tribunal went on to consider whether if the claimant had been an employee from the period of August 2019, whether it could be said that the claimant had continuous service over the period January 2019 to August 2019. The Tribunal concluded that he did not. The Tribunal considered the deeming provisions set out in section 212. In particular, the Tribunal considered whether it could be said that the period between January and August 2019 was a temporary cessation of work. The Tribunal agreed with

the respondent's argument that the period was too long to be temporary in nature. In any event, the Tribunal concluded that it was the claimant who advised the respondent that he was not available for work from January 2019, as he was going to London to study for a period and was going travelling. The Tribunal bore in mind that the respondent did have other operations at which the claimant could have worked during that period (in particular Malone's bar, albeit that this operated under the control of a different company).

37. Therefore, even if it could be said that the claimant was an employee in the second period for which he worked for the respondent, that period was a new period of continuous employment and so the claimant did not have sufficient service to bring a claim of unfair dismissal.

38. Therefore, the Tribunal concludes that the claimant had the status of worker of the respondent from August 2019 and until he informed the respondent that he could no longer wait to be offered any other work from them in December 2020.

39. In these circumstances, the Tribunal does not have jurisdiction to consider the claimant's claim of unfair dismissal.

Next steps

40. The Tribunal then discussed with the parties what next steps should occur in order to bring this case to a final hearing. In that regard, the Tribunal issued the following orders:

> The claimant would, if appropriate, seek to amend his claim of race discrimination within 14 days of the date on which this decision is issued. In particular, the claimant intimated that he would provide further particulars of an appropriate comparator.

The claimant would send to the respondent a schedule of loss within 14 days of the date on which this decision is issued.

The respondent would have a further 14 days in which to seek to amend their response to the claimant's claim, if so advised.

A final hearing would be listed to take place before a full Tribunal on 22nd and 23rd September, on the Cloud Video Platform.

Parties would exchange written witness statements, which would form the evidence in chief of any witness who is to give evidence at a final hearing at least 14 days prior to 22nd September.

The respondent would provide the Tribunal and the claimant with a bundle of documents for use at the final hearing at least 28 days prior to 22nd September. Parties should liaise to ensure that a joint bundle of documents can be provided by that date. The respondent should send a searchable electronic PDF version of the bundle of documents and three hard copies of the bundle to the Tribunal office at least 28 days in advance of the final hearing.

Employment Judge: Amanda Jones
Date of Judgment: 26 May 2021
Entered in register: 07 June 2021
and copied to parties