



EMPLOYMENT TRIBUNALS

Claimant: Ms N Were
Respondent: NHS Professionals Limited

By CVP
On: 7 April 2022

Before: Employment Judge Martin

Representation
Claimant: In person
Respondent: Ms Robertson- Counsel

JUDGMENT AT PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Claimant did not have two years service to bring a claim for unfair dismissal and this claim is struck out.
2. The Claimant's claim for breach of contract is not well founded and is struck out.
3. The Claimant's claim for disability discrimination has not reasonable prospects of success and is struck out.

REASONS

1. Oral reasons were given at the end of the hearing. These reasons are prepared at the request of the Claimant. These reasons are confined to those matters that are relevant to the issues and necessary to explain the decision reached.

2. This hearing was listed to consider whether the Claimant had been sufficient service (2 years continuous employment) to bring a claim for unfair dismissal, whether her claims for breach of contract (notice) and disability discrimination had no reasonable prospect of success for the purposes of a strike out application or little reasonable prospect of success for the purposes of a deposit order application.
3. The hearing was heard in two parts. First the question of whether the Claimant had sufficient service for an unfair dismissal claim was considered, and then the Respondent's application for a strike out or deposit in relation to the Claimant's claims of disability discrimination and breach of contract.
4. The Respondent's grounds of resistance describe its organisation as "an employment business specialising in the provision of healthcare professionals ("flexible workers") to NHS Trust organisations that are its clients. Flexible workers provide services for the Respondent directly by working shifts or assignments at the premises of Trust clients. Assignments are booked through the Respondent's automated online booking system. There are over 150,000 flexible workers who are registered on the Respondent's staff bank. The vast majority of those who work for the Respondent are flexible workers undertaking casual assignments."
5. The Claimant was engaged under an agreement called the Flexible Worker Registration Document. The Respondent's grounds of resistance describe this document as "an overarching document which sets out the terms and conditions that apply to the flexible workers when engaged on assignments."
6. The relevant clauses in this document are:

a. **"Introduction**

The purpose of this contract is to provide short-term temporary cover for NHS Trusts or other NHS employers, as and when necessary. You may therefore be asked from time to time to carry out specific time limited Assignments at Trusts. In this contract of engagement This document sets out your terms of engagement as an NHS Professionals flexible worker and forms the terms of your contract of employment with NHS Professionals for the period of any Assignment. It is the intention of NHS Professionals and you that outside any agreed Assignment there is no contract between the parties."

b. *Date continuous employment commenced:*

From the start of any single Assignment worked: employment is continuous only for the duration of that Assignment, subject to any breaks occurring.

c. *A minimum of one Assignment must be undertaken in each period of 12 months. This applies unless you are unable to work for specified reasons notified to and agreed by NHS Professionals. Otherwise you may be required to reapply for a further contract of engagement.*

d. **Identity of Employer and Nature of Relationship**

As a flexible worker with NHS Professionals you may be offered an Assignment or series of Assignments. NHS Professionals acknowledges that you wish to retain the choice whether or not to accept any Assignment offered to you, and you acknowledge that NHS Professionals is not obliged to offer any Assignment of work to you.

NHS Professionals will be your employer during and only for the period of any Assignment offered to you by NHS Professionals and accepted by you.

It is agreed between NHS Professionals and you that each Assignment is a self contained offer of work, and once the Assignment is over you are not obliged to undertake any further Assignments and nor is NHS Professionals obliged to offer you any, and that on completion of any Assignment you will no longer be an employee of NHS Professionals.

e. Term of your Engagement

Provided you are not carrying out an Assignment, you or NHS Professionals may decide at any time without notice to end your availability to work with NHS Professionals under this contract of engagement and in accordance with any relevant procedures. However such notification must be given in writing.

f. Continuous Employment

Your continuous employment with NHS Professionals as a flexible worker commenced on the date identified at (E) and ends with the completion of each continuous Assignment. Any gap of 1 week or more between or during Assignments will not count for the purpose of continuous employment as provided for under the Employment Rights Act 1996 as amended from time to time.

Any previous employment with NHS Professionals or with any other employer will not count as continuous service for the purposes of this contract of engagement.”

g. Rehabilitation of Offenders

20.1. You are required to inform NHSP of any conditional cautions, criminal investigations, prosecutions, convictions, or Judgments against you while you remain registered as a flexible worker.

20.2. You are advised that the roles you may carry out during an Assignment are exempt from the provisions of Section 4(2) of the Rehabilitation of Offenders Act 1974. You are not entitled to withhold information about any criminal convictions which for other purposes are "spent" under the provisions of that Act. Any failure to disclose such convictions may result in disciplinary action or termination of your Assignment and the terms of your registration.

.....

20.5. NHSP reserves the right to refuse to offer any Assignments to you or to cancel any Assignment that has been offered to you if you do not comply with the above requirements regarding your DBS check.

7. The Claimant was first engaged under this agreement on 6 November 2009 as an Admin & Clerical worker. She worked shifts from then until March 2015. There was then a long period of time when the Claimant did not work, and she reapplied for registration with the Respondent as an administrator on 6 February 2020. The same terms and conditions applied as with her previous agreement with the Respondent. The Claimant started work before the pre-employment checks were completed in accordance with the Respondent's policies as her completed registration form did not on the face of it show matters which caused the Respondent any concern about her suitability to work for it.

This “recruitment route” was varied to take account of the Covid-19 pandemic to help with the demand for NHS workers.

8. As part of the application process the Claimant had to declare whether she had any spent or unspent convictions, cautions, reprimands, or final warnings. The Respondent provided her with the necessary information regarding this process. She did not declare any convictions. However, her DBS certificate showed several criminal convictions including theft, robbery, and common assault. This resulted in the Respondent putting a stop on the Claimant booking any further shifts. The last shift the Claimant worked was on 19 June 2020.
9. The Respondent has a Risk Assessment Panel which considers this type of matter. The Panel decided that it did not want to continue with the Claimant’s registration both because she did not declare her convictions and also because of the nature of them. The Claimant was notified of this by email on 22 July 2020. The Claimant appealed this decision with a statement and after consideration the Respondent emailed the Claimant on 12 August 2020 dismissing her appeal.
10. The Respondent relies (amongst other matters set out in its skeleton argument) on **Clark v Oxfordshire Health Authority [1998] IRLR 125, CA**. In this case it was held that there was no global employment contract between Ms Clark and the Health Authority. In this contract there was no mutuality of obligation as there was no obligation on the part of the health authority to offer work and there was no obligation upon Ms Clark to accept the work. When she was not engaged in work for the Authority there was no ongoing mutuality of obligation covering those periods. In this case it was held that the question of employment status involved a consideration of a combination of many factors including the written documentation.
11. The relevant parts of section 212 Employment Rights Act provides:
 - (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 ss (4), any week (not within ss (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.
 - (4) Not more than 26 weeks count under ss(3)(a)... between any periods falling under ss (1)
11. The Claimant stopped working under her first agreement as she was attending her four-week trial at the Crown Court. Although she has mentioned she

stopped for ill health I agree with the Respondent that a reasonable inference it that she stopped because of this trial. I note that during these proceedings the Claimant has given various reasons for stopping work including that she spent a year in residential rehabilitation for drink and drugs problems.

12. Section 108 Employment Rights Act 1996 states that the right not to be unfairly dismissed does not apply to the dismissal of an employee unless he or she has been continuously employed for more than two years ending with the effective date of termination. The exceptions to this rule do not apply to this case.
13. As in **Clark v Oxfordshire Health Authority** I do not find that there was a global contract affecting the Claimant's employment. She was an employee only for the period of an assignment. She had a period of over one year with no work (in fact this was a period of about 4.5 years) and thus the agreement with the Respondent automatically terminated. The Claimant has impliedly accepted this as she applied for re-registration in March 2020.
14. As the Claimant's registration was not accepted on 22 July 2020, she had only been continuously employed under the second agreement for some three months. The Claimant did not therefore have the necessary period of continuous employment to bring a claim for unfair dismissal and this part of her claim is dismissed.
15. The Claimant's employment ended on 22 July 2020. She started the ACAS conciliation process on 8 September 2020 with a certificate being issued on 8 October 2020. Therefore, the last date to present her claim was 20 November 2020. Her claim was presented on 14 December 2020. For both her unfair dismissal claim, and breach of contract claim I have a discretion to extend time if it was not reasonably practicable to have presented the claim in time. The Claimant has not provided me with sufficient information on which I can base a decision to extend time. The Claimant has not, for example, provided medical evidence which had been ordered at a previous preliminary hearing.
16. The Claimant was able to engage with the ACAS conciliation process within time and as the Respondent has pointed out in its skeleton argument, the particulars set out for the claims of unfair dismissal and breach of contract is very brief: *"I have worked with NHS since November 2009 as Administration and Clerical Staff. However, I went through trauma in 2013. I continued to work but eventually things got worse with my PTSD and I left work in March 2015. I was not notified of my termination of contract so when I went to return to work with a job role starting on 2nd march 2020, I was asked to apply again. I did not declare what was on my DBS from 5 years previous, as I thought time had passed. My application went to panel and was rejected. I appealed and it was rejected again. Both reasons were different and to my understanding, lacked reasoning. The first reason was the panel's question of my character, and the second reason was to do with the Rehabilitation Act 1974. A third reason given by a member of their team was to find a more substantive role. (this was outside of panel communication)."* (stet)
17. I therefore find that both the Claimant's claims of unfair dismissal and breach of contract are out of time. Had I not dismissed the unfair dismissal claim for lack of qualifying service, I would have dismissed it as being out of time. It was reasonably practicable for the Claimant to have brought it in time.

18. The second part of the hearing concerned the Respondent's applications for the Claimant's claims to be struck out on the basis they have no reasonable prospect of success. This part of the Claimant's claim is also out of time. The test for extending time is different to that applied to claims of unfair dismissal and breach of contract. The test is whether it is just and equitable to extend time.
19. The Respondent referred me to **Tayside Public Transport Company (t/a Travel Dundee) v Reilly**, SCS 30 May 2012. In this case it was held that the power given in the rules to strike out a case was draconian and was to be used in exceptional cases only. In the Tayside case it was held that there were several issues of fact yet to be determined and which might affect the result and the Employment Tribunal Judge had been wrong to reach a conclusion on yet untested and unadmitted allegations.
20. I was also referred to **Ezsias v N Glamorgan NHS Trust** [2007] IRLR 603, CA, by the Respondent which submitted that "*it may be appropriate to strike out a claim where the facts are totally and inexplicably inconsistent with undisputed contemporaneous documentation*" and **A v B and C** [2010] EWCA Civ 1378, where the Respondent submitted: "*the CA put the test slightly differently at para 11 – 'If no live evidence is heard on a ... strike-out application, the facts pleaded in the claim or response should, except in exceptional cases, be taken to be true 'unless the opposite can be shown by clear evidence which is not seriously disputable'. In that case the CA held the ET had been wrong to strike out the claims as 'there remained a prospect which was more than fanciful that the employer might not succeed in discharging the reverse burden of proof....'*"
21. The Claimant's claims in relation to her claim of disability discrimination were set out in the case management order following preliminary hearing before Employment Judge Street on 19 November 2021. There is an issue as to whether the Claimant was a disabled person as defined by section 6 of the Equality Act 2010 at the time of the events the claim is about. For the purposes of this decision and judgment I have approached it on the basis that the Claimant was a disabled person as defined. However, no formal judgment is made in this regard. The issues relating to the Claimant's discrimination claim are set out as follows:

Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the Respondent treat the Claimant unfavourably by:

Withdrawing the offer of engagement in July 2020 having received the DBS certificate?

5.2 Did the following things arise in consequence of the Claimant's disability?

The Claimant's case is that it was the PTSD that led to her criminal convictions. The adverse DBS certificate arose from the PTSD.

5.3 Was the unfavourable treatment because of that thing?

The Claimant says the Respondent withdrew the offer or terminated the engagement because of the criminal convictions, which arose from the PTSD.

The Respondent says that the convictions themselves and her failure to disclose the convictions were the reason.

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent says that its aims were that:

It is a minimum requirement for their staff that they have a satisfactory criminal record given that they may work with vulnerable or sick individuals and in a position of trust – the aim is a trustworthy staff team

The Claimant says that the DBS certificate does not disclose anything that impacts on her ability to do administrative work and an individual approach should have been taken.

5.5 The Tribunal will decide in particular:

5.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 Could something less discriminatory have been done instead;

5.5.3 How should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

The Claimant says the Respondent should have known from 2015.

22. The issues clearly set out the basis of the Claimant's claims. That the reason for her criminal convictions were because of her PTSD. The Respondent submitted that the something arising has to link to the disability in some way. It was submitted that there had to be something neutral, something applied irrespective of a disability of particular disability. It was submitted that here the withdrawal of the registration was because of a failure to disclose convictions and the nature of the dishonesty convictions. It was submitted that the Claimant had to show a causal link between this and her disability.

23. The Claimant had been addicted to class A drugs which gave rise to her convictions. I accept the Respondent's submissions that there is case law dealing with PTSD and a tendency to steal. There were two cases I was referred to. **Edmund Nuttall Ltd v Butterfield** [2005] IRLR 751, and **Wood v Durham County Council** UKEAT/0099/18. In both these cases it was accepted that the tendency to steal was a manifestation of PTSD, however the tendency to steal was an excluded condition under the Equality Act 2010.

24. The relevant law is found in The Equality Act 2010 (Disability) Regulations 2010

Addictions

3.—(1) Subject to paragraph (2) below, addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the Act.

(2) Paragraph (1) above does not apply to addiction which was originally the result of administration of medically prescribed drugs or other medical treatment.

Other conditions not to be treated as impairments

4.— (1) For the purposes of the Act the following conditions are to be treated as not amounting to impairments: —

- (a) a tendency to set fires,
- (b) a tendency to steal,
- (c) a tendency to physical or sexual abuse of other persons,
- (d) exhibitionism, and
- (e) voyeurism.

My conclusions

25. The remaining claim is of disability discrimination. The disability the Claimant relies on are her mental health conditions. I am not able to determine disability status as I have not got any medical records. For purposes of this hearing, I am assuming the Claimant does meet the definition of a disabled person.
26. I am considering the Respondent's application for a strike out on the basis that there is no reasonable prospects of success r37(1(a). I am conscious that it is the exception not the norm to strike out a claim for discrimination and that I should not strike out a claim if there are factual disputes. I have considered the case law referred to above.
27. The 'something arising' is the Claimant's failure to disclose convictions and the nature of the convictions namely dishonesty. I accept the Respondent's submission that reason for dismissal was that the Claimant did not declare convictions and that the offences were of dishonesty. The Claimant would have to show link between those acts and disability.
28. I considered Regulations 3 and 4 which are set out above. I note that matters due to addiction and a tendency to steal are outside the definition of disability. I can not evaluate properly as no medical records.
29. There are inconsistencies between the Claim form and the contemporaneous evidence. There is no doubt that she did not declare her convictions. The non-disclosure of convictions and nature of conviction (dishonesty) were genuine issues for the Respondent. I accept that the legitimate aim is the safety of patients and staff both physically and in relation to their data. This is why I find that having a DBS check and disclosing convictions is a proportionate means by any argument of achieving this legitimate aim.
30. I have read and noted the case of Wood v Durham County Council. Here the effective cause of the dismissal was theft. This is excluded so the Claimant could not rely on it.

31. I primarily looked at the issue of causation, i.e., what was the reason for the less favourable treatment? The reason was because the Claimant did not disclose her criminal record when applying for re-registration, and the nature of the convictions themselves. The sole reason for not continuing with the registration was the excluded conditions not the Claimant's mental health issues. This is not disputed. The Claimant's argument is that the reason she stole and committed the other offences was because of her mental issues. This argument is not sustainable for the reasons set out above. This is one of the exceptional cases where there is no reasonable prospect of success and the Claimant's claim of disability discrimination is dismissed.
32. Had I not dismissed the claim of unfair dismissal earlier, I would have found that this claim had no reasonable prospect of success and would have dismissed it on this basis.

Employment Judge Martin

Date: 03 May 2022