



EMPLOYMENT TRIBUNALS

Claimant: Ms H Winstanley

Respondent: Isand Limited

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ON: 1 November 2022

BEFORE: Employment Judge Shulman

REPRESENTATION

Claimant: In person

Respondent: Mr J Anderson, Counsel

JUDGMENT

The claimant does not satisfy section 108(1) of the Employment Rights Act 1996(ERA) her claim for unfair dismissal does not give the Tribunal jurisdiction to hear the claim and it is therefore hereby dismissed.

REASONS

1. Claim

1.1. The sole claim in this case is unfair dismissal.

2. Issue

2.1. A preliminary issue in this case is whether or not the claimant is able to bring a claim for unfair dismissal by reason of the fact that she has the qualifying service as specified in section 108(1) ERA.

3. The law

3.1. The Tribunal has to have regard to the following provision of the law: Section 108(1) ERA, which provides that Section 94 [of the ERA] 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. Section 94 gives an employee the right not to be unfairly dismissed.

- 3.2. Also I was referred in this case by Mr Anderson to the case of **Carmichael and anor v National Power plc** [1999] ICR 1226 House of Lords (Carmichael) in which it was decided that for a contract of employment to exist at all, all the parties must be under some obligation towards each other.

4. Facts

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts proved on the balance of probabilities:

- 4.1. The claimant commenced employment with the respondent as a support worker on 7 March 2018. The claimant resigned from her employment until a day between 29 January 2019 and 19 February 2019, when the claimant went on holiday.
- 4.2. The claimant then entered into what is known as a bank contract. She was not initially sure when this was but she accepted that it was on 7 March 2019.
- 4.3. On 18 March 2020 the claimant commenced employment again and remained so until her dismissal on or about 30 December 2021.
- 4.4. Arising out of that dismissal the claimant claims that she was unfairly dismissed.
- 4.5. On 7 March 2019 the claimant signed the bank contract. The contract makes it clear that the respondent was not obliged to offer the claimant work and the claimant was not obliged to accept the offer of work. The Tribunal finds that the claimant was in no doubt as to the effect of this contract. Indeed the claimant herself turned work down, as she says, on one occasion. The effect of the contract is and was that the claimant chose to work when she wanted to.
- 4.6. Whatever the status of the bank contract the claimant did not work in April, May or July 2019 at the very least. The respondent's records show that she did not receive pay in the months of August or September either.
- 4.7. When the claimant recommenced employment on 18 March 2020 her new contract obliged her to work set hours, in fact 42 per week.

5. Determination of the issue (after listening to the factual and legal submissions made by and on behalf of the parties):

- 5.1. Was the claimant continuously employed for a period of not less than two years ending with the effective date of termination?
- 5.2. In some shape or form the claimant worked for the respondent over a period of three years and nine months with breaks as mentioned above. Is that enough to give the claimant continuity of employment within the meaning of section 108(1) ERA?
- 5.3. The lynch pin here is the period when the claimant was working on the bank contract. As I have said that contract made it clear and left the claimant in no doubt that the respondent was not obliged to offer the claimant work and the claimant was not obliged to accept it.
- 5.4. Having regard to the case of Carmichael the House of Lords decided that for a contract to exist at all, all the parties must be under some

obligation to each other. In other words there must be mutuality of obligation.

- 5.5. This has the effect on the claimant's contract of employment of making the period for consideration of continuity the 18 March 2020 to 30 December 2021. This of course is less than the two years required by section 108(1) ERA.
- 5.6. In effect the existence of the bank contract knocks out any period of continuity before 18 March 2020.
- 5.7. I have found facts relating to a substantial break from the claimant's work in summer 2019. On reflection those facts do not take the parties any further in establishing whether the Tribunal has jurisdiction to hear the claimant's claim for unfair dismissal.
- 5.8. Put simply however the Tribunal is not permitted by Parliament to hear the claimant's claim. This is unfortunate for the claimant.
- 5.9. In all the circumstances for want of jurisdiction by reason of the lack of continuity the claimant's claim for unfair dismissal is hereby dismissed.

Employment Judge Shulman

Date: 15 November 2022