Case No: 1601717/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms B Jones

Respondent: Principle Care Agency Limited

Heard at: Cardiff, by video **On:** 19 July 2023

Before: Employment Judge Cawthray

Representation
Claimant: Mr Hanratty, Solicitor
Respondent: Mr Jones, Solicitor

RESERVED JUDGMENT

The Claimant was not employed by the Respondent for two years and does not have sufficient service to bring a claim of unfair dismissal.

The Claimant's claim is dismissed.

REASONS

The Issue

1. The issue for determination at the hearing today was whether the Claimant was employed for more than two years or whether there was a break in the continuity of employment.

Evidence/procedure

2. The parties had agreed a bundle of 77 pages.

3. The Claimant had provided a written witness statement and affirmed and gave oral evidence.

4. The Respondent called Mr Stephen Huckerby (owner and director of the Respondent) and Ms. Hannah Rice (Service Manager) as witnesses. Both had provided a written witness statement and both affirmed and gave oral evidence.

5. Mr. Jones had provided a written skeleton argument, and both Mr. Hanratty and Mr. Jones gave oral submissions.

6. No reasonable adjustments were required for this hearing.

Facts

7. I made the following finding of facts, based on the evidence provided. I have not repeated the full content of any documentary evidence within my findings.

8. The Claimant started working for the Respondent on 27 April 2020 as a Health Care Assistant.

9. There was no contact provided within the Bundle. The Claimant's evidence did not address the contractual documentation provided to her before she started working in April 2020.

10. The Claimant's evidence is that she was employed to work for approximately 16 hours per week, but that she would work more than this.

11. Mr. Huckerby's evidence is that the Claimant was engaged on the same terms as a period of engagement starting on 22 December 2020 and under terms that are included in an application form. The evidence of both Mr. Huckerby and Ms. Rice is that all staff are initially engaged on a zero hours casual basis. Considering the further findings of fact as set out below, I find that the Claimant would have been engaged on the same terms as those at page 51 of the Bundle.

12. In May 2020 the Respondent was in communication with Care Inspectorate Wales (CIW), and following a meeting on 5 May 2020, Care Inspectorate Wales wrote to the Respondent on 15 May 2020. An extract from the letter is copied below.

    "An Improvement and Enforcement panel meeting was held on 5/5/2020 and another on 14/5/2020 in accordance with our Securing Improvement and Enforcement Policy. The purpose of the panel meeting held on 5/5/2020 was to review the services provided."

    "Following the outcome of the review on 14/5/2020. CIW decided:

- CIW have serious concerns about the provision of services provided to children and young people following what was found during the site visit undertaken on 7/5/2020 and the recent engagement with the responsible individual, Stephen Huckerby - Principle Care Agency Ltd and Dal Dy Dir should cease operating the service provided at the above address from 5pm on 18/5/2020 until your application to register has been determined. Failure to do so may result in CIW considering enforcement action

You are requested to notify CIW in writing by 20/5/2020 that the service has ceased to be provided. "

13. The Respondent ceased operating the care home in accordance with the requirement of CIW.

14. On or around 15 May 2020 Mr. Huckerby contacted the care home staff, including the Claimant, by telephone. He informed the Claimant that the care home would be closing and explained the issues that had arisen and that there was no further work that he could give her. No assurances were given to the Claimant that the care home would reopen or that there would be any further work for her. Mr. Huckerby hoped that the care home would reopen but did not know if this would be the case, and gave no guarantee. Mr. Huckerby told the Claimant that if the care home reopened he would make contact.

15. Paragraph 4 of the Claimant's witness statement states: *However, during this period I was informed by Stephen Huckerby (the "Director") of the Respondent that they would begin offering their services in Kerry once again shortly, and when they do, I will receive further shifts as I was still employed by the Respondent".*

16. In response to cross examination the Claimant stated that Mr. Huckerby had not given her any assurances, and that she had considered she was still employed because she was not given any written notification of termination or a P45. The Claimant's oral evidence was not consistent with her witness statement. I find that Mr. Huckerby had clearly informed the Claimant that the care home was closing and she would not be offered work.

17. The Claimant was not given any notification in writing and no P45 was issued.

18. At the time, Covid had just started and the Respondent was dealing with challenges with its former Service Manager, who was dismissed around that time for misconduct.

19. Mr. Huckerby's evidence is that the Claimant's last shift was 18 May 2020. The Claimant's oral evidence was that she worked until 17 June 2020, and that she had a text message from a service user thanking her on this date. This text message had not been disclosed and was not in the Bundle. Having considered all of the evidence I find that the last shift was 18 May 2020.

20. On 23 July 2023 the Claimant messaged Mr. Huckerby asking where she should send timesheets. Mr. Huckerby provided the email address for the Respondent's payroll provider.

21. There is a further message from the Claimant to Mr. Huckerby from the Claimant on 25 July 2020 asking: *"Good afternoon Steve, which week do you want me to put in for? For wages? Thanks Beth."* Mr. Huckerby replied stating: *"Hi, Can you do it for the week after your last shift."*

22. The Claimant occasionally made contact with Mr. Huckerby following the closure of the care home.

23. The Respondent continued with its employment agency work, which was separate to the care home in Newtown. In early July 2020 the Claimant contacted Mr. Huckerby asking if there was any work available. Mr. Huckerby explained there was some work available in Hereford on an agency basis. The Claimant did not accept the work due to travel costs. The Respondent was not obliged to offer this work and the Claimant was not obliged to accept it.

24. On 31 July 2020 the Respondent made a payment of £117.27 to the Claimant. Mr. Huckerby's evidence is that this payment was for one night shift worked prior to closure and accrued holiday pay that was not paid at the time the care home closed. The Bundle contains a document produced by the Respondent's payroll provider that summarises the payment as *"DDD Sleep In NMW pay £8.72 12 106.65 – Holiday Pay 12.63".* The Claimant's evidence is that she was asked directly by Mr. Huckerby to not take up employment elsewhere and the payment was an incentive for her not to take on work elsewhere. The Claimant, in oral evidence, referred to the payroll provider sending an email querying the payment. The email has not been disclosed and is not in the Bundle. There is no corroborative evidence to support the Claimant's account. The payment is a precise sum, and in the context of a retainer payment would be very small. I do not accept the Claimant's evidence in this respect and find the sum was paid for a shift owed and holiday accrued.

25. Ms. Rice had started employment with the Respondent working just one day a week from 1 July 2020. Her aim was to obtain qualified status should the care home be able to re-open but she was also undertaking other duties.

26. Shortly after her appointment Ms. Rice conducted an investigation into a safeguarding allegation, and interviewed the Claimant on 20 July 2020. During the interview the Claimant asked about the care home reopening. Ms. Rice explained that if it was to ever reopen she would interview for all carer positions regardless of whether or not they had previously worked at the care home.

27. Mr. Huckerby was working with Care Inspectorate Wales and Powys County Council to try and secure the reopening of the care home. From September 2020 it seemed likely the Respondent would be permitted to reopen and steps were put in place to get ready. Approval for non-registered services to commence was given on 8 October 2020.

28. Ms. Rice was the new manager, and was responsible for all recruitment to the care home.

29. At paragraphs 9 and 10 of her witness statement the Claimant sets out her evidence and view that she *"simply went back to work when I was asked to do so by my employer"* and *"the only formality that needed to be completed before re-commencing work was to carry out a DBS check…".* I do not accept this to be the case.

30. The Claimant attended an interview on 25 September 2020. The Claimant was interviewed by Ms. Rice and another employee. Other candidates were also interviewed, including some who had previously worked at the care home prior to closure. Shortly after the interview the Claimant was offered a position, after consideration of all the candidates. The Respondent's recruitment practice, which Ms. Rice admitted was back to front, is that after interview candidates are then sent an application form to complete and the form contains terms and conditions. It is this document that is treated as the written contract between the parties. Ms. Rice sent the form and a letter detailing evidence required for DBS checks to the Claimant on 1 October 2020. The cover emails states that the form must be completed even if already registered with the Respondent. The Claimant signed the form on 4 October 2020.

31. The document attached to the application form is headed "Terms & Conditions of Employment – Zero Hours". There is reference within the terms to "employment". Clauses 2 and 3 state:

    "You agree to be available for work, should PCA offer you work. However. PCA has no obligation to offer you work at any time, and you are not entitled to a minimum number of hours of work per day, week or year."

    " If PCA does offer you work, you are required to accept and complete it to the organisation's satisfaction. Where PCA offers work to you, it does not give rise to a presumption that it will offer you any further work."

32. The care home reopened and the first residential stay was around 24 – 26 October 2020.

33. On 8 December 2020 the Claimant contacted Mr. Huckerby asking what was happening in relation to the job offer. Mr. Huckerby directed the Claimant to Ms. Rice. The Claimant also contacted Ms. Rice on the same day. Ms. Rice replied the following day and explained she was awaiting the Claimant's DBS documents.

34. On 19 December 2020 Ms. Rice contacted the Claimant to discuss her availability to undertake work.

35. The Claimant undertook her first shift following interview with Ms. Rice on 22 December 2020. From the end of October 2020, other workers were used to staff bookings.

36. In December 2020/January 2021 the Claimant worked on a flexible and casual basis. The texts message in the Bundle indicate that if a user did not stay, the Claimant would not be offered work and/or work offered would be cancelled and that there was opportunity for additional shifts. In January 2021 the Claimant contacted Ms. Rice to ask if any work was available. Ms. Rice was responsible for choosing who and when to offer work to.

37. In summer 2022 the Claimant commenced a full-time role as a Health Care Assistant at the Respondent.

Law

38. To qualify for many employment rights, employees must show that they have been continuously employed for a minimum length of time.

39. An ordinary unfair dismissal claim requires a claimant to have been employed continuously for two years'. Only a former employee who has been employed for two years' can bring a claim for unfair dismissal. A worker does not have standing to bring an unfair dismissal claim. Section 108(1) of the Employment Rights Act 1996 states:

> ***108 Qualifying period of employment.***
>
> *(1) Section 94 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.*

40. The Employment Rights Act 1996 sets out the definition of employee and worker.

> ***230 Employees, workers etc.***
>
> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or*

perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

(6)This section has effect subject to sections 43K, 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, " worker ", " worker's contract " and, in relation to a worker, " employer ", " employment " and " employed " have the extended meaning given by section 43K.

(7)This section has effect subject to section 75K(3) and (5).

41. There is also a significant body of established case law giving guidance on legal status, which is only summarised in brief from below.

42. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, McKenna J set out the conditions required for a contract of service, namely that:"(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."

43. The importance of the test set out in *Ready Mixed Concrete* was affirmed by the Supreme Court in *Autoclenz Ltd v Belcher and others [2011] ICR 1157.* The 'irreducible minimum' for a contract of employment comprises:

    a. Control;
    b. Personal performance; and
    c. Mutuality of obligation.

44. The key factors to be taken into account in determining whether an individual is an employee are:-

    -The degree of control that the employer has over the way in which the work is performed;

    -Whether there is mutuality of obligation between the parties – i.e. was the employer obliged to provide work and was the individual required to work if required;

    -Whether the employee has to do the work personally.

    However, even if the irreducible minimum is met, that is not definitive. It is necessary to then look at all the other relevant circumstances which must be consistent with there being an employment relationship. Those relevant circumstances, factors, will vary from case to case but can include:

    -The intention of the parties;
    -Custom and practice in the industry;
    -The degree to which the individual is integrated into the employer's business;
    -The arrangements for tax and national insurance;
    -Whether benefits are provided; and
    -The degree of financial risk taken by the individual.

45. A check list approach should not be adopted in relation to other factors and the tribunal must stand back from the accumulated detail and consider the overall picture.

46. When deciding questions of employment status, a Tribunal can look beyond what is written in the contract between the parties and consider how the relationship worked in practice (*Autoclenz*).

47. Weeks at any time during which there is a contract of employment in existence count as weeks of continuous employment (section 212(1) of the Employment Rights Act 1996 (ERA)).

48. However, weeks during which there is no contract of employment generally break continuity.

49. However, there are a number of exceptions to the latter rule. These are contained in section 212(3).

50. Section 212 is set out in full below.

    212 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, . . .

(d). . . . .

counts in computing the employee's period of employment.

(4)Not more than twenty-six weeks count under subsection (3)(a) between any periods falling under subsection (1).

51. It must be noted that the provisions contained in section 212(3) do not come into play if a contract of employment remains in existence during the break in work. The provisions only apply to the interval between the termination of one contract and re-employment under a new contract — *Ford v Warwickshire County Council 1983 ICR 273, HL*.

52. If the contract subsists because neither of the parties has got round to terminating it, then the provisions of section 212(3) do not apply, even if they seem to be relevant. The provisions of section 212(3) cover situations where, after a contract of employment has been terminated, there is a period of time where no contract subsists that is followed by employment under a new contract with the same employer.

53. Care needs to be taken to not confuse the statutory provisions for establishing continuity of employment with the test for establishing a 'global', or overarching, contract of employment.

54. Generally speaking, the provisions of section 212(3) are the only ones that can be relied on to bridge gaps in employment where there is no contract. Where there is a break in the employment relationship of more than a week that is not governed by a contract of employment, continuity will be broken unless it can be established that those weeks are covered by one of the statutory exceptions set out in section 212(3).

55. I was referred to the following cases by the parties' representatives as set out below.

56. Mr. Jones, on behalf of the Respondent cited:

    Cheng Yuen v Royal Hong Kong Golf Club [1998] ICR 131
    Mr S Hussain v Acorn Independent College Ltd UKEAT/0199/10/SM
    Byrne v Birmingham City District Council [1987] ICR 519

57. Mr. Hanratty, on behalf of the Claimant cited:

    Fitzgerald v Hall, Russell & Co Limited 1970 AC 984
    Bentley Engineering Co Ltf v Crown 1976 ICT 228
    Hussain v Acorn Independent College Limited 2011 RLR 463
    Welton v Deluxe Retail Ltd t/a Madhouse 2013 IRLR 166

Conclusion

58. I have set out below a very brief summary of submissions.

59. Mr. Jones' primary submission is that in April and May 2020 the Claimant was not an employee, that there was no mutuality of employment that is required in an employment relationship, that she was engaged on a zero hours/casual worker basis and therefore the Claimant did not have two years' continuous service by her dismissal on 12 September 2022. He submits that it was only sometime in the summer of 2022 that the Claimant actually became an employee, and at that time worked on a full time basis.

60. In the alternative, Mr. Jones submits that if I determine that there was a contract of employment in April and May 2020, that continuity was broken in accordance with section 210(5) of the Employment Rights Act 1996. He submits there was a seven month period in which there was no contract of employment, that during this period there was no obligation to provide work and the Claimant had been told no work would be offered.

61. Mr. Jones submits that none of the exceptions in section 212(3) of the Employment Rights Act 1996 apply to preserve the gap between two contracts of employment. In particular, he argues there was no temporary cessation of work and the absence from work was not such where there was an agreement that the employment was continuing.

62. Mr. Hanratty submits that the Claimant was in continuous employment from April 2020, and she was committed to work 16 hours per week. He says the nature of engagement in April and May 2020 is a red herring and any difference in contract is not relevant. He says there was an expectation that the Claimant would return to work. He submits that employment never ceased, but the Claimant was denied opportunity to work.

63. In considering the legal question before me, it is necessary to reach a number of conclusions considering my findings of fact and the relevant law. It worth repeating the issue for determination at the hearing today was whether the

Claimant was employed for more than two years or whether there was a break in the continuity of employment.

Employment status of the Claimant

64. The burden of proving employment status is upon the Claimant.

65. I am considering firstly the nature of the relationship in April and May 2020.

66. *Control -* When looking at the control exercised it is necessary to look at whether the ultimate authority over the Claimant rested with the Respondent.

67. The Respondent operated a care home, and the Claimant cared for vulnerable persons. Mr Jones accepted there was control over the Claimant.

68. *Personal Service* - In considering personal service, an employee must be obliged to perform the work personally, subject to a limited power of delegation.

69. There was little put forward in either evidence or submissions in this respect, but noting the Claimant was required to provide a DBS, in consideration of the nature of the caring work and the service provided by the Respondent and the seemingly lack of dispute on this area, I conclude that the Claimant was obliged to give personal service.

70. *Mutuality of obligation -* When assessing the mutuality of obligation between the parties I must consider if there was an obligation on the employer to provide work and on the employee to accept and perform the work offered.

71. Little evidence was put forward in this respect by the Claimant. As set out in my findings of fact above, the Claimant was engaged under the terms appended to the application form, in which she was required to undertake any work offered.

72. The terms are appended to an application form which is sent to an applicant for completion after an interview and job being offered appears and as Ms. Rice put it this appears back to front. However, it nonetheless records in writing arrangements between the parties.

73. The terms stipulate that the Respondent is not required to offer any work to the Claimant, and does not guarantee any minimum number of hours. I considered the evidence in relation to the period in December 2020 and January 2021 to be helpful in giving an insight into the working relationship before it. On the evidence available, I have found the Claimant to be engaged on the same terms in April and May 2020 as she was in December 2020 and January 2021. I have concluded that there was significant flexibility in the relationship, that in reality the Claimant would only be offered work if a child was booked in to stay at the care home. Any work offered to her was dependent on bookings, and she may be cancelled – in other words the offer of work withdrawn – at short notice. Considering this, and the contractual

provisions, I do not consider there was any obligation on the Respondent to provide work.

74. The fact the Claimant did not work at any other organisation does not provide evidence that she was an employee of the Respondent.

75. I have considered the case of *Cheng*, as directed by Mr. Jones.

76. I also note further that the requirement is *mutuality* of obligation, and therefore a one-sided commitment is insufficient.

77. I have also kept in mind that there is a wide range of casual and informal working situation. Where a working arrangement settles into an informal but regular pattern over a period of time, it may be possible for an individual to argue that a contract of service exists. In this case, there has been no evidence provided (and no submission by Mr. Hanratty) that this was the case in either April/May 2020 or December 2020/January 2021. Indeed, it appears it is accepted by the Respondent that the Claimant became an employee in the summer of 2022 and moved to a full time and set working pattern. The Claimant presented no evidence of a global or umbrella contract of employment before that time.

78. Applying the law, as set out above, to the facts I do not consider the Claimant was an employee in accordance with section 230 of the Employment Rights Act 1996 in April and May 2020 due to the fact there was not the requisite mutuality of obligation on both parties.

79. From December/January 2021 onwards, until the position where the Claimant moved to a full time working pattern in summer 2022 there is no evidence that would allow me to conclude that the Claimant was an employee when she worked in December 2020. Even if she were an employee in December 2020, which I do not consider to be the case, this would only give her service of approximately 19 months by the time her employment with the Respondent ended on 12 September 2022. Accordingly, she does not have the requisite two years' continuous service to bring an ordinary unfair dismissal claim.

Closure of care home – impact on contractual relationship

80. If I am wrong on the above, and the Claimant was an employee from April 2020, the next matter for consideration would be to look what happened to the employment relationship in the context of the Respondent's care home closing on 18 May 2020.

81. This turns on whether or not the employment contract ended on or abouts 18 May 2020 or not.

82. If any employment did not end, then the Claimant would have reached over two years' service by 12 September 2022.

83. If there was a period when the relationship was not governed by a contract of employment, it is then necessary to consider the provisions in section 212(3) of the Employment Rights Act 1996.

84. I have made findings of fact on what happened regarding the closure of the care home and the information given to the Claimant.

85. I note that the Claimant was not given any written termination letter, and that no P45 was sent to her and that in some situations this potentially could have caused some confusion. However, I have found that the Claimant was clearly told that the care home would close, there was no work for her and no assurance given that the situation would change.

86. In view of this, I consider the Claimant should reasonably have understood that any employment had ended.

87. As set out above, I do not consider the payment of £117.27 amounted to any form of retainer payment. The agency work offered to her did not form any part of the contractual arrangement between the parties, and did not relate to the work she undertook at the care home.

88. I note the Claimant kept in contact and sought updates, but in my view that is not indicative of the fact she considered herself to remain employed, especially in the context of the information given to her by both Ms. Huckerby and Ms. Rice and the process of interviewing and applying for work following the reopening of the care home in October 2020. Indeed, it is notable that the Claimant did not make any enquiries until 8 December 2020 following an interview on 25 September 2020 and a job offer made shortly after. Had she genuinely considered herself to have remained an employee throughout I would have expected the Claimant, or a person in such a situation, to have followed up on a return to work much sooner than 8 October 2020, especially when not being paid.

89. Accordingly, I conclude that any employment relationship ended on or arounds 18 May 2020.

The provisions in section 212(3) of the Employment Rights Act 1996

90. Where a contract of employment ends, and is not in operation, it is necessary to consider the three situations in sub-section (3) to ascertain whether or not they operate to bridge the gap in employment.

91. I have gone on to reach conclusions in case I am wrong about the Claimant not being an employee in April/May 2020.

92. We know in this case the Claimant started working again for the Respondent on 22 December 2020, as per my conclusion above, I do not consider should would have been an employee at that time.

93. However, for the purposes of considering the provisions, the submissions were made on the basis of the break in service being from 18 May 2020 until 22 December 2020, some 7 months.

94. Section 212(3)(a) relates to situation where a person is incapable of work in consequence of sickness or injury. The provision does not apply in this case.

95. Section 212(3)(b) relates to absence from work on account of a temporary cessation of work.

96. It is accepted that there was a cessation of work in this case. The care home shut and the Claimant did not work. The care home closed on 18 May 2020 and reopened with its first residential stay around 24 October 2020, although formal approval for reopening appears to have been given on 8 October 2020.

97. At the time the care home was closed by the CIW, although Mr. Huckerby hoped it would reopen and was taking action to seek to secure this, it was not guaranteed.

98. Mr. Hanratty submits that there was a temporary cessation that resulted in the Claimant being absent from work.

99. Mr. Jones submits that although there was a cessation, it cannot be considered temporary.

100. The concept of temporary is not defined in the legislation and the parties directed me to various case law authority. I must consider the position with hindsight, from the point of view at the end of the second contract. The fact that the work for which an employee was first engaged ceases permanently is not fatal to a claim that section 212 (3)(b) preserves continuity, provided the cessation in that employee's work turns out to have been temporary when looking back from the point in time at which the question of continuity arises.

101. I have had to decide whether in all the circumstances of the case the original dismissal can properly be described as due to a temporary cessation of work (*Fitzgerald).* It is important to note that *all relevant factors* must be taken into account. If both parties expected a cessation to be short-lived, that would be a relevant factor but it may not be decisive. How long the cessation lasts, relative to the periods of employment, is also another relevant factor.

102. I considered the principles, and applying the law to my findings of fact I conclude that, when assessing from the end position, it is clear that there was a cessation, and this was indeed temporary as the Claimant returned to work. I have found that at she was engaged as a worker prior to the closure and upon her initial return, and not the principles in *Hussain* where a difference between a fixed term and permanent contract was not fatal. In context, the Claimant did not work for approximately 7 months (18 May to 22 December 2020). She worked for only 3 or so weeks prior to May 2018 and some 21 months or so from her return in December 2020. The gap in which she did not work was substantial. The cessation in these circumstances was significant, it was not a planned closure or summer holiday period. This was

not a planned cessation, it was a forced and unwelcome closure. There was no expectation on the Respondent's part that the closure, the cessation was temporary. It hoped that to be the case but ultimately whether or not the care home was permitted to re-open or not was not within its control. The Claimant should also have held the same expectation as the Respondent based on the information given to her. Although she hoped for more work and kept in contact to check the position, she was not given any assurances.

103. In all of the circumstances, I do not consider the cessation of work to be temporary.

104. Section 212(3)(c) relates to absence from work in circumstances where there is an arrangement or custom that regards the employee as continuing in employment.

105. The care home had shut. I have found that the payment of £117.27 was not a retainer payment. There was no evidence of an arrangement being in place on 18 May 2020 in which the Claimant was regarded as continuing in employment. Indeed, in order to work for the Respondent again after the care home re-opened the Claimant was required to undergo an interview and be offered work. For completeness, I have concluded that there was no custom either.

106. In all of the circumstances, I do not consider there to have been an arrangement or custom that regarded the employee as continuing in employment.

107. I remind the parties that these are alternatives conclusions, should I have been wrong in relation to my conclusions regarding employment status in the period of April and May 2020.

Employment Judge G Cawthray
Date 27 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 28 July 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche