EMPLOYMENT TRIBUNALS

Claimant: David Simpson

Respondent: BUPA Care Services Ltd

Heard at: **London Central (CVP)** **On: 13 June 2023**

Before: **EJ Leonard-Johnston**

Representation
Claimant: In person
Respondent: Mr. H. Dhorajiwala, counsel

RESERVED JUDGMENT

1. The Claimant does not have the required qualifying service in order to bring a claim of unfair dismissal. The unfair dismissal claim is dismissed.

2. The Claimant does not have the required continuous service to bring a claim under the Flexible Working Request. The flexible working request claim is dismissed.

REASONS

1. Mr Simpson worked in a care home owned and managed by BUPA Care Services Ltd, the Respondent. He worked in a number of roles at the care home during his time there including as a home assistant, a carer, on reception and as a financial administrator. Mr Simpson is claiming unfair dismissal, arrears of pay and a refusal to accept a flexible working request.

2. The claimant says that he worked for BUPA for two years. His case is that he worked the following:
    a. From April 2020 as a home assistant bank worker and from July 2020 as a reception bank worker. His case is that this was a contract of service.
    b. From September 2020 to October 2021 as a care assistant, on a 22-hour employment contract (and additionally as a bank worker on reception and as a home assistant). His case is that the 22-hour contract was a contract of service.

c. From December 2021 to January 2022 in reception on a 32-hour employment contract (and additionally as a bank worker and care assistant). Both parties accept that the 32-hour contract was a contract of service.
d. 31 January 2022 until 18 February 2022 as a bank worker and on a 22-hour contract. His case is that he reverted to the position set out in subparagraph b.
e. 18 February 2022 until 17 June 2022 as an employed 40 hr financial assistant. Both parties accept that this was a contract of service.

3. The claimant says that he worked regular hours and he worked 45 hours a week on average. The claimant's case is, first, that when he was engaged as a bank worker he had employment status, and second, that his 22-hour employment contract continued without a break from September 2020 until 18 February 2022.

4. The respondent's case is that that the employment status of the Claimant was as follows:
    a. The claimant was engaged as a bank (casual) worker in April 2020.
    b. There was no 22-hour contract between September 2020 and October 2021.
    c. From 5 November 2021 until 31 January 2022, he was employed as a receptionist, but he chose to return to being a bank worker on 31 January 2022 because the rate of pay was preferable; as a salaried worker he was not paid overtime.
    d. Between 31 January 2022 and 17 February 2022, he was a bank (casual) worker.
    e. He was employed from 18 February 2022 until 17 June 2022, as a financial administrator until he resigned giving one month notice on 17 May 2022. The claimant's final working day was 17 June 2022.

5. The matter was listed for a case management hearing on 14 March 2023 before Tribunal Judge Plowright sitting as Employment Judge. Judge Plowright listed the matter for a public preliminary hearing on 13 June 2003, to determine the following issues:

    a. Does the Tribunal have jurisdiction to hear the claimant's claims for unfair dismissal? Specifically:
    Did the claimant have sufficient qualifying service to bring an unfair dismissal claim pursuant to section 108 Employment Rights Act 1996 ("**ERA**")? The claimant asserts that he worked for the respondent continuously from April 2020 until June 2022. The respondent asserts that he worked for the respondent continuously as an employee from 18 February 2022 until 17 June 2022 – acknowledging there was another period of employment between 5 November 2021 and 31 January 2022.

    b. Does the Tribunal have jurisdiction to hear the claimant's claims around the alleged Flexible Working Request, in particular:
        i. Did the claimant have sufficient service under Regulation 3 of the Flexible Working Regulations to raise a Statutory Flexible Working Request? The respondent asserts that the claimant had not been continuously employed for a period of at least 26 weeks.
        ii. In the event that the claimant does have the requisite 26 weeks' continuous employment, should the claim be struck out on the basis that it has no realistic prospect of success or should a

deposit order be made? The respondent asserts that the statutory criteria are not met. The respondent states that there was no written request and further that any request took place after the claimant had resigned.

THE HEARING

6. The hearing took place by cloud video platform. The claimant appeared in person and gave evidence. The respondent's witness Linda Marks gave evidence. I have taken into account the oral evidence, oral submissions and all documentation in the bundle, including the latest correspondence and submissions between the parties, even if they are not specifically referred to below. References to page numbers are to the electronic (not internal) page numbers of the hearing bundle.

7. A preliminary issue arose relating to disclosure of documents. There had been a number of communications between the parties relating to disclosure, and the claimant was seeking documentation relating to his asserted contracted hours. In particular, there was one copy of a weekly report in the bundle (page 64) relating to the week commencing 30 September 2021. However similar weekly reports from the other weeks worked were not included. The respondent asserted that the information was contained in other documentation, however I noted that the other reports did not contain a column stating "contracted hours". Given that this is relevant to whether the claimant was contracted to work 22 hours from September 2020, in my view they were relevant, and I asked the Respondent to disclose them. At lunchtime on the day of the hearing the Respondent provided screenshots of the HealthRoster document from 19 August 2021 until 30 September 2021. I asked for all further reports for the relevant time period to be disclosed by 20 June 2023. Given that the Claimant is a litigant in person and required some time to consider the documents, I allowed the claimant to make written submissions limited to the late disclosure by 27 June 2023 and the Respondent to provide any response by 4 July 2023. Unfortunately, the parties did not comply with that order because of a misunderstanding about the documents and a further direction was made on 9 August 2023 for the parties to make their written submissions on 25 August 2023 and 8 September 2023 respectively, after which I would go on to decide the matter without further delay. The claimant provided submissions on 29 August 2023 with the agreement of the Respondent. The Respondent replied on 8 September 2023. I have taken the submissions into account. The additional disclosure and written submissions are reason why this decision has been delayed. The Respondent explained that the documents already disclosed on the day of the hearing and in the bundle were the full extent of the documents held. The weekly report dashboard was only used from September 2021 onwards, and the annotated weekly report at page 64 of the bundle was only produced once. I confirm that I am satisfied that the Respondent has complied with its obligations, that the Claimant has had sufficient opportunity to consider the documentation, and that the documentation available to the Tribunal is sufficient to enable a fair hearing of the matters.

THE LAW

8. The statutory right to claim unfair dismissal and to make a flexible working request is available only to employees who have been continuously employed for not less than two years ending with the effective date of termination (section 108 ERA). Whether a worker will be an employee depends on whether they fall within the statutory definition in the ERA. Section 230(1) ERA defines an 'employee' as

'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. Section 230(2) provides that a *contract of employment* means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

9. For a contract of service to exist there are three minimum requirements; control, personal performance and mutuality of obligation (See, *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC* and *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*). Here we are concerned only with mutuality of obligation, without which there will be no employment status. There must be an obligation on the employer to provide work and pay for the work done, and a corresponding obligation on the employee to accept and perform the work offered. The written contract will be relevant to this consideration but will not be determinative, or the starting point; it is necessary to look at the true nature of the relationship (*Autoclenz*, and *Uber BV and ors v Aslam and ors 2021 ICR 657, SC*).

10. Where there are breaks in the employment relationship of more than a week that are 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) ERA. This provides that certain breaks in employment, such as where the employee has been on sick leave or there has been a temporary cessation of work, count as periods of continuous employment despite the fact that no contract exists. Continuous employment starts on the day the person starts work under a contract of employment.

11. A flexible working request must be made in accordance with section 80F ERA and Regulation of the FWR. It must be made in writing, dated and be a request for the purposes of s 80F (including inter alia an explanation of the effect of the change on the employer). Without these requirements the Tribunal has no jurisdiction to hear a claim.

ISSUES

12. The key issues to be resolved are as follows. First, was the Claimant an employee from the date of his engagement in April 2020? If the answer is negative, then the Claimant cannot have the required two years continuous service for the purposes of unfair dismissal. This is because if the time as a bank worker from April 2020 is not counted towards the two years continuous service, then even taking the rest of the claim at it's highest and assuming that an employment contract was in place from September 2020 until June 2022, that is not enough continuous service to meet the requirement in section 108 ERA.

13. The second issue to be resolved is whether the Claimant was employed between 31 January 2022 and 18 February 2022, in between the two periods of employment as accepted by the Respondent. If the answer is yes, then the claimant will meet the requisite 26 weeks of continuous employment for the purposes of the Flexible Working Regulations 2014 and section 80F of the Employment Rights Act. If not, then it is not necessary to consider whether the application would have any prospect of success.

14. Only if the second issue is answered in the affirmative is it necessary to consider whether a flexible working request was made in accordance with the statutory requirements in the Flexible Working Regulations 2014.

FINDINGS

Employment status from April 2020

15. As stated above, in order to bring a claim for unfair dismissal, the claimant must establish that he was an employee from April 2020 onwards, otherwise he cannot meet the two-year threshold set out in section 108 ERA.

16. The claimant's case was that the nature of the working relationship from the outset was one in which there was mutuality of obligation. The claimant's evidence was that prior to joining BUPA he had worked for many years in retail. He had not come across a bank contract before and was not aware of the differences between bank workers and employees. His evidence was that he was given no contract and no induction. His evidence was that he quickly fell into a regular pattern where he was expected to turn up for particular shifts. Those shifts were allocated on the "health roster" system. His evidence was that his hours of work were regular and that he was expected to work those particular shifts. His evidence was that he was entitled to turn down shifts but only those shifts that were offered in addition to his regular shifts. His evidence was that if he wanted to take holiday then it was up to him to arrange cover for his regular shift. There were instances where he turned down shifts, but his evidence was that those he turned down were only "extra" shifts.

17. The Respondent's case was that the claimant was engaged as a casual worker, and that while it was convenient for the Respondent and the Claimant to work regular hours, there was no obligation on the parties to offer or accept those regular shifts. The Respondent accepts that the Claimant was a hard worker and a valued member of staff, and that he worked a lot of shifts, however it's position is that this was of mutual benefit to both parties, rather than by way of obligation.

18. Out of the five various contracts between the parties, the Respondent has only provided two, which is very unfortunate. It appears that written contracts were not regularly provided to the Claimant nor were communications with staff about their employment status put in writing. In circumstances such as this it is not surprising that there has been a dispute about employment status.

19. At page 55 of the bundle there is a document called "Offered candidate details" dated 17 April 2020, stating that the Claimant was being offered a Bank role as a Home Assistant. The Claimant says he did not see this document until it was in the bundle for these proceedings. I find that the Respondent provided no written contract to the Claimant in April 2020.

20. At page 58 of the bundle there is a "Bank Contract" dated 4 June 2019 (incorrectly) which was signed on 8 July 2020. The Claimant understood this contract to be related to his additional reception role. The document states that "Bupa may offer you work from time to time as a Bank Receptionist". I accept that this contract relates to the Claimant's position as a Bank receptionist and does not itself cover the period from April 2020 to July 2020. However, it does set out the contractual provisions for the claimant as a bank worker. These include provisions that make it clear that the contract is not an employment contract and that there is no obligation to perform work even if offered and for Bupa to provide work (paragraph 1) and that it is at Bupa's discretion whether to offer the

Claimant work (paragraph 2). Paragraph 4 repeats that the Claimant was under no obligation to accept any work offered at any time.

21. Whilst this contract does not cover the period of April 2020 to July 2020, I accept that it was representative of the contract entered into in April 2020 by the parties for the Claimant to be a bank worker as a Home Assistant. I find that when the Claimant was engaged as a bank worker the above provisions applied, and he was aware of those from (at least) July 2020.

22. At page 75 of the bundle there is an Offer of Employment dated 1 March 2022 which relates to the Financial Administrator role from 18 February 2022 to 17 June 2022. That contract does not assist in relation to the bank work, except by way of comparison.

23. The Respondent states that it is indicative of a lack of mutuality of obligation that the Claimant picked up work outside of his relationship with BUPA. The Claimant admitted that he picked up work elsewhere for financial reasons. There were occasions that he turned down extra shifts because he already had plans to work elsewhere. I do not find this determinative, because it is possible to have a part time employment position and still work for other organisations. However, it does indicate that the Claimant was a casual worker.

24. The Respondent also relies on the fact that the Claimant understood the nature of the different contracts. Indeed, in January 2022 he terminated his part time 32-hour employment contract (reception) because he would be paid more as a bank worker. He says he did not realise at the time he was offered the reception role that it would be salaried. But by choosing to return to bank work, it indicates to me that the Claimant was willing to accept less security in his employment status in exchange for slightly better pay, and he was therefore aware in January 2022 of the nature of the bank contract he has been on since April 2020. In addition, if the Claimant truly considered that he was an employee when he was doing bank work, he would have not considered the termination of the 22-hour contract to have disrupted his service (further below).

25. Taking into account all the evidence, I find that the Claimant has not established that his bank work was a contract of service. I find that it was a casual contract in which the Respondent was not obliged to provide any hours to the Claimant and the Claimant was not obliged to accept any hours. It was a matter of mutual convenience, given the circumstances of the pandemic, and a reflection of the Claimant's value as a member of staff that he was given a number of bank roles and was given many extra shifts. But the regularity of particular shifts does not change the nature of the bank contracts, which were by their nature casual contracts.

26. Accordingly, the Claimant is not able to meet the continuous employment threshold for the purpose of an unfair dismissal claim and the Tribunal has no jurisdiction to hear a claim of constructive unfair dismissal.

Employment status 18 September 2020 to 30 September 2021 (Care Assistant 22-hour contract)

27. One of the key issues in the Claimant's grievance was that a 22-hour Care Assistant contract of employment that commenced in September 2020 was terminated in September 2021 without his knowledge. The Respondent in its

grievance investigation and appeal found that no such contract existed despite indications of a 22-hour contract being on its systems. The Respondent took the view that was done in error. However, as already noted, the Respondent did not always issue a contract even when one had been agreed, and its record keeping was not entirely accurate. In these circumstances the lack of a written contract is not an indication that a contract of service did not exist.

28. The Claimant said that he had been told in September 2020 that he had been given a 22-hour contract. The Respondent provided no witness to challenge that such a conversation had taken place, possibly because the relevant staff members including the Claimant's manager no longer work there.

29. The Claimant's evidence that a contract existed was corroborated by a number of pieces of evidence that a 22-hour contract was in existence, albeit with no written contract. On balance, I find that it is more likely than not that such a conversation took place and that the Respondent did tell the Claimant that he had been given a 22-hour contract.

    a. On page 64 there is an email named "Subject:FW: KNS Trading call queries and info" containing a table setting out colleagues that did not work their contract hours. The Claimant is listed in that table for the week 30/09/21 and his listing states his contracted hours was 22, the contract hours worked 11 and bank hours worked 39.
    b. On pages 82 and 129 there are screenshots of an "Additional Job eForm" dated 1 December 2020 with an effective date of 18 September 2020, which shows that the new role is 22 hours per week, although I note that the box is ticked that the employee is not salaried. This is in contrast to a similar form on page 130 for the Claimant's new bank reception role on 1 July 2020 which states that the role is zero hours.
    c. On page 131 there is a "Change of Hours eForm" stating that from 1 October 2021 the Claimant is changing to zero hours and the reason for the change is "changing to bank from 22 hours HCA contract".
    d. On page 61 there is an email dated 23 October 2020 stating that "David Simpson has tested positive 22-hour contract swab carried out 19/10/20." The Claimant was paid when he tested positive, although the evidence shows that the Respondent's policy was that if he was a bank worker he would not have been paid.
    e. On the spreadsheet from the Respondent's HealthRoster system which contains all the shifts as registered on the system from 30 April 2020 to 17 June 2022, there are a number of shifts between 29 November 2020 and 28 September 2021 listed as "local" rather than "Bank". Local indicates an employed position and is therefore consistent with the Claimant having a contract of employment at that point. I note that the Respondent's case is that these shifts were entered by mistake. However I find them to be consistent with the Claimant's case that from September 2020 he worked activity, care and reception shifts, "*sometimes flexing between all three roles in the same day*". The Claimant's case is that he worked where he was directed to work, even if it did not correlate with the shift recorded on the HealthRoster system.
    f. The screenshots of the weekly reports from HealthRoster (19 August 2021 to 30 September 2021) disclosed on the day of the hearing show that he was registered on the system as having a 22 hour contract.

30. Overall, I found the Claimant to be a credible witness. He openly admitted points that could have been taken against him such as his initial ignorance of the care home sector and the fact that he had at points turned down extra shifts. He did not exaggerate his position. His evidence was internally and externally consistent.

31. I have considered the position of the Respondent. I have taken into account that the employees interviewed by Linda Marks as part of the investigation had no recollection of the Claimant having a 22-hour contract. However it is noted at page 140 in the grievance outcome that the Administrator and the Home Manager working at the care home at the time had left the business.

32. The Respondent also notes that the Claimant did not always work 22 hours of care work every week and considers this to be evidence that no care contract existed. This is explained by the Claimant both in oral and written evidence in which he stated that he worked where he was directed to work, as requested by the Respondent, but that he could not refuse a request to work where he was needed. This is consistent with the evidence provided on the day of the hearing which is an email from Donald Day dated 1 September 2021, querying why so many staff who were contracted to particular hours and activities were not fulfilling those hours. It appears that this issue was not limited to the Claimant.

33. The Claimant says that at all times (save for two weeks of holiday) he worked well in excess of his 22-hour contract, and there is evidence that he was paid during the period when he did not work because he tested positive for Covid. I consider that this meets the mutuality of obligation requirement. In my view the nature of the relationship was such that from 18 September 2020 the Respondent was obliged to provide at least 22 hours of work to the Claimant, and the Claimant was obliged to accept at least 22 hours of work. Within those hours, the nature of the relationship was such that the Respondent directed the Claimant to work in different roles, as required by the business. Compliance with those directions was not a failure on the part of the Claimant to fulfil 22 hours per week in a care role, rather it was part of a reasonable management request by his employer to work where he was needed.

34. In my view it is implausible that if the Claimant had been told that he had been given a 22- hour contract, and one had been reflected in the Respondent's systems, that it was done in error. It is more likely that the person who formed the contract, who no longer works for the Respondent, did offer the Claimant a contract, but did not communicate it properly within the Respondent's management systems nor was it put in writing. I find in favour of the Claimant that a 22-hour contract was in existence from 18 September 2020.

35. I turn now to the termination of that contract. During the investigation the Respondent could find no trace of the request to cancel the 22-hour contract being made. However, the change was made on the Respondent's system, and it had the effect of terminating the 22-hour contract. That termination was then upheld by the Respondent during the grievance process because the Respondent denied that the contract existed. The Claimant says he discovered in November 2021 that his 22-hour role had disappeared from the system. This is consistent with the change of hours form at page 131. He states he queried this but was told that it was fine he could still work as a carer. There is no evidence that the Claimant was notified of this change. I find that the 22-hour contract was terminated on 1 October 2021 but was not notified to the Claimant. The effective

date of termination was 1 October 2021. The Claimant was not give a notice period or paid in lieu of notice.

36. I find that the 22-hour contract would have, in any event, ended on 5 November 2021 when the Claimant accepted a 32-hour contract as a receptionist. When the Claimant resigned from the employed receptionist role in January 2022 in order to return to bank work, the 22-hour contract was not reinstated or put on hold whilst the Claimant accepted another employee role. It had been terminated before that period of employment and was not renegotiated upon the Claimant's resignation. Accordingly, the Claimant was not employed on a 22-hour contract between 31 January 2022 and 18 February 2022 and there was a gap in employment periods between 31 January 2022 and 18 February 2022 which cannot be said to be continuous.

CONCLUSIONS

37. The Claimant was not an employee from the date of his engagement in April 2020, he was a casual bank worker. Accordingly, the Claimant does not have the required two years continuous service for the purposes of unfair dismissal.

38. The Claimant was employed on a 22-hour contract between 18 September 2020 and 1 October 2021. This was terminated on 1 October 2021 without notice.

39. The Claimant was not employed by the Respondent between 31 January 2022 and 18 February 2022. Accordingly the Claimant does not meet the requisite 26 weeks of continuous employment for the purposes of the Flexible Working Regulations 2014 and section 80F of the Employment Rights Act.

40. It is not necessary for me to consider whether the claim relating to a flexible working request would have a realistic prospect of success. However, for completeness, I do note that on the Claimant's own case he did not submit the application for flexible working in writing. He had an initial conversation with his manager, in accordance with the Respondent's policy (page 69), but did not get to the point of making a request in writing. It is difficult to see how the Claimant could establish that his request meets the requirements of regulation 4 of the Flexible Working Regulations 2014.

41. This decision has no impact on the remaining part of the claim relating to arrears of pay, which is as yet unparticularised. The parties are encouraged to attempt alternative resolution (through ACAS or otherwise) of that part of the claim before the next hearing.

Employment Judge Leonard-Johnston
25 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON : 25/09/2023

FOR EMPLOYMENT TRIBUNALS :