



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr R G Sima

AND

Respondent
Pearson Anderson Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

25 September 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr Dutton, Retired non-practising Solicitor
For the Respondent: Miss Zaeem-Sattar, Trainee Solicitor

JUDGMENT

The judgment of the tribunal is that

- 1. The claimant has insufficient service to complain of unfair dismissal and his unfair dismissal claim is dismissed; and**
- 2. The claimant's claim for breach of contract is dismissed; and**
- 2. The claimant's claim for accrued holiday pay is dismissed on withdrawal by the claimant.**

REASONS

1. In this case the claimant Mr Radu Gabriel Sima claims that he has been unfairly dismissed, and also brings a claim for breach of contract (wrongful dismissal). His holiday pay has now been paid and he therefore withdraws his earlier claim for accrued but unpaid holiday pay. The respondent contends that this Tribunal does not have jurisdiction to hear the claimant's unfair dismissal claim, and that the reason for the dismissal was gross misconduct, and denies the remaining claim.
2. I have heard from the claimant, and I have heard from Mr Raj Gorania and Ms Kiran Lidder on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence,

- both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is an employment business which supplies agency workers as temporary personnel within the nursing home and care sector. The claimant commenced employment as an Healthcare Assistant. He is of Romanian national origin and through a local recruiting agency the respondent recruited healthcare workers in Bucharest. The claimant was interviewed and agreed to come to England to work, and says that the only basis upon which he agreed to do so was that there would be a minimum three-year term, which would provide him with a degree of certainty and security.
 5. The claimant commenced work in April 2016. He was assigned to a client of the respondent in the Torbay area. He signed and agreed a statement of terms and conditions of employment on 19 April 2016 ("the First Contract"). The contract referred to the application of the Agency Workers Regulations 2010 and referred to assignments as a period of time during which he would be supplied to a client of the respondent. Nonetheless it was clear that the claimant was an employee of the respondent employment business. The contract of employment in clause 4.1 provided: "Your employment under this contract of employment commenced on 23 April 2016 and will continue for a fixed period of three years i.e. until 23 April 2019 unless terminated in the interim by the Company in accordance with clause 8 or clause 9." Clause 8 relates to the probationary period which the claimant passed and which is therefore no longer relevant. Clause 9 is headed "Termination and Notice Period" and clause 9.1 provides: "Following the successful completion of your probationary period the length of notice you are entitled to receive in writing from the company is [9.1.1] one week's notice if you have been employed for less than two years; and thereafter [9.1.2] one week's notice for each completed year of continuous service up to a maximum of 12 weeks' notice."
 6. The respondent then issued a different contract of employment which the claimant agreed and signed on 14 October 2016 ("the Second Contract"). There was no mention of any potential three-year fixed term and the notice provisions merely reflected the statutory minimum position as set out in 9.1.1 and 9.1.2 of the First Contract.
 7. The respondent also now has a contract which is headed: "Agency Worker Contract for Services" ("the Third Contract"). Under this contract the respondent is expressed to be an employment business and that it would endeavour to find healthcare assignments which the worker is free to accept or decline. The arrangement is expressed to continue for a maximum period of three years but there was no guarantee to offer work and no obligation on the worker to accept it. The respondent says that it was sent to the claimant and because he did not object to it he has impliedly accepted it. However, there is no evidence that this Third Contract was ever agreed by the claimant and he has not signed one.
 8. The relationship between the parties terminated in the Spring of 2018 in circumstances which are both unclear and disputed between the parties. What is clear is that the respondent was notified that the claimant was subject to an investigation into safeguarding issues relating to the abuse of residents. It is important to note that I have heard no evidence and I make no findings as to the truth or otherwise of these allegations, and given that the claimant was able subsequently to obtain his own DBS certificate and continue working in the care sector his protestations that he has done nothing wrong and that no findings were ever made against him is clearly an argument which can be put with some force.
 9. Be that as it may, the respondent had no choice other than to suspend the claimant when it was informed on about 9 February 2018 that the claimant was subject to an investigation into serious allegations which involved both the local Police and the Torbay Safeguarding team. Mr Gorania of the respondent informed the claimant by telephone on about 9 February 2018 that he was suspended for these reasons. He also told him that he was not to approach the care home where he had been working. This was confirmed in a letter at about that time to the claimant's last notified address, which was accommodation in an annex to the care home where he had been working on assignment. Mr Gorania spoke again to the claimant on the telephone about a week later to tell the claimant not to make

- contact with others at the care home who had apparently complained that he was being aggressive.
10. There was then a period of some confusion. The claimant says that he tried to telephone the respondent's head office on numerous occasions to discuss what was happening, because he was no longer working and needed to work to meet his normal outgoings. Mr Gorania disputes this because the respondent's head office has about 20 employees, and the claimant had his personal mobile telephone number, and he says that if the claimant genuinely wanted to make contact with them he could easily have done so. Mr Gorania also says that he tried repeatedly to telephone the claimant on his last notified telephone number, but only ever got a ringing sound without an answer message facility.
 11. On about 27 March 2018 the respondent then had an internal meeting at which it either decided to terminate the claimant's employment, or at least confirmed that it had already ended. A leaver's pack was prepared and passed to the payroll department who raised a form P 45 confirming termination of employment. I have not seen this document and the claimant says he has not seen it either. Apparently it was dated 6 April 2018. The respondent sent it to the claimant's last known address. The respondent's position is therefore that the claimant had been suspended from mid-February and not offered any further assignments, and that the decision was taken to terminate his employment at about the end of March 2018. The form P 45 coinciding with the end of the tax year was then sent on 6 April 2018 the following week. The respondent says that in circumstances in which the claimant was failing to answer telephone and had failed to make contact with them, they could not communicate the dismissal in any other way.
 12. The claimant's version is that he had been told that he was suspended pending the investigation, and disputed that he had done anything wrong. He tried to telephone the respondent during late February 2018 because he had not been given any assignments and could not afford to be out of work. He says that he was not told that he was dismissed and says that he has never received the form P 45. On about 27 February 2018 the claimant applied for both Job Seekers Allowance and Housing Benefit. Clearly the understanding of the claimant at that time was that his employment had come to an end. It is not possible to apply for Job Seekers Allowance unless one presents as being unemployed and looking for work.
 13. The position is confused with no clear evidence either way. The respondent has hardly covered itself in glory given that it has a reasonably large administration department and is unable to produce evidence of exactly when the decision was taken to dismiss the claimant and/or when this was communicated to him. Equally I am satisfied that the claimant could have made contact with the respondent's head office and administration department if he had tried to do so, and it is clear that by the end of February 2018 the claimant understood that the employment relationship had come to an end because he must have made that assertion to the Benefits Agency in applying for Job Seekers Allowance. On balance I find that the events of February and March 2018 culminated in the termination the claimant's employment which was communicated to him by way of the form P 45 which was sent to his last known address on 6 April 2018. For these reasons I find that the claimant's employment had been terminated on or before 8 April 2018 when the form P 45 would have arrived in the normal course of post at the claimant's last known address.
 14. Having established the above facts, I now apply the law.
 15. Section 108(1) of the Employment Rights Act 1996 ("the Act") provides that section 94 of the Act (the right to bring a claim for unfair dismissal) does not apply unless the employee has been continuously employed for a period of not less than two years ending with the effective date of termination.
 16. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
 17. I deal first with the claimant's unfair dismissal claim. At the time of his dismissal the claimant did not have two years' continuous employment and applying section 108(1) of the Act I hereby dismiss the claimant's unfair dismissal claim.

18. I now turn to the claimant's claim for breach of contract, which is a claim for payment for the balance of the three year fixed term contract. I find that there was no three-year fixed term contract in place. The First Contract did refer to a fixed period of three years, but this was expressed to be subject to the normal statutory minimum notice provisions. I accept it is a slightly confusing document, but there is no doubt in my mind that the agreed intention was that the statutory minimum notice provisions would prevail within a relationship with would otherwise be unlikely to last beyond three years.
19. In any event that contract was superseded by reason of the claimants signed agreement to the Second Contract, which does not refer to any three-year fixed term, and in which the notice provisions are again the statutory minimum provisions. I reject the respondent's assertion that the claimant had agreed the Third Contract and that this was the applicable contract, because there is no evidence that this was agreed by the claimant. I find that the signed agreed contract of employment in place was therefore the Second Contract, in which there is no agreed three-year fixed term provision. Accordingly, the claimant's claim for breach of contract is also dismissed.
20. Finally, the claimant's claim for accrued but unpaid holiday pay has now been met by the respondent and that claim is also dismissed on withdrawal by the claimant.
21. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 13; a concise identification of the relevant law is at paragraphs 15 to 16; how that law has been applied to those findings in order to decide the issues is at paragraphs 17 to 20.

Employment Judge N J Roper
Dated 25 September 2018