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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111748/2021

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**Open Preliminary Hearing Held by CVP on Friday 28 January 2022 at
10.30am**

Employment Judge Russell Bradley

Mrs Lynsey McMullen

**Claimant
In person**

Scottish African Safari Park Limited

**Respondent
Ms H Donnelly
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

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1. The claimant was not continuously employed by the respondent for a period of not less than two years ending with her effective date of termination as required by section 108 of the Employment Rights Act 1996 in order to make a claim of unfair dismissal.
2. The tribunal has no jurisdiction to determine her claim which is therefore dismissed.

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E.T. Z4 (WR)

REASONS

Introduction

1. On 18 October 2021 the claimant presented an ET1. It records the period of her employment as being between 3 July 2019 and 31 July 2021. Her claim was resisted. In its Grounds of Resistance the respondent asserted that; the claimant did not acquire two years' qualifying service during her time working for the respondent; the employment tribunal does not have jurisdiction to hear a claim of unfair dismissal; and sought a preliminary determination of that issue. The ET3 set out that "*the Claimant's employment was not continuous and there was a gap in service between 10 December 2019 and 13 January 2020.*"
2. The notice which fixed this preliminary hearing set out that it was to determine whether the claimant had sufficient continuous service to be entitled to claim unfair dismissal. A standard case management order was made on 26 November 2021.
3. In advance of this hearing, the respondent prepared, lodged and copied to the claimant an indexed bundle of papers of 61 pages. I was advised that the parties had exchanged views on what was, and was not, to be included. Also in advance, the respondent had intimated a list of cases for reference in its closing submission. The claimant was able to access either paper copies or "*freely accessed*" online versions of them.
4. In discussion with the claimant prior to hearing evidence, she agreed that the respondent was correctly named as Scottish African Safari Park Limited. She also confirmed that her single claim was one of unfair dismissal.
5. In discussion with Ms Donnelly, it was agreed that the respondent's evidence would come first, the burden being on her side.

Issues

6. The issues for determination were:-

(a) had the claimant been continuously employed for a period of not less than two years ending with the effective date of termination?

And thus

(b) did the employment tribunal have jurisdiction to consider her claim of unfair dismissal?

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Evidence

7. I heard evidence from Emily Boyd the respondent's HR manager and from the claimant.

Findings in Fact

10 8. I found the following facts admitted or proved.

9. The claimant is Lynsey McMullen. She is married. Since about 2014 she traded on her own account as JoJo's Little Party People. As its name suggests, the business is in the provision of parties and similar events for small children. The claimant worked in the business with the help of her husband and on occasion others, predominantly family and friends.

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10. The respondent is a safari park. It is a visitor attraction for tourists.

11. On or about 3 July 2019 the respondent, via Katie McFarlane its then Education Team Leader issued to the claimant a statement of terms and conditions of seasonal employment (**page 26**). It was issued as part of a "new work pack." The claimant's employment under those terms began that day, 3 July 2019. It set out that her employment (and continuous employment) began that day. The claimant's job title was handwritten as being Education Officer. Her contract hours were 14 per week. Her normal place of work was stated as Blair Drummond Safari and Adventure Park. The statement set out terms relating to pay, pension, holidays and working time. It set out, under the heading of **END OF SEASON 27 10.19** that "*Your employment will terminate at the end of the season without the need for further notice.*" It is the respondent's normal practice that seasonal employees' contracts end on the date stipulated for its end of season. On or about that date, the park ordinarily closes to the public. It re-opens the following Spring. At the end of a season, about 150 seasonal staff leave the respondent's employment.

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12. The respondent ordinarily issued wage slips to the claimant for pay due to her for work done under the seasonal contract. No wage slips were produced.
13. As Education Officer, the claimant was responsible for a number of visitor-related activities. They included taking visitors "*behind the scenes*" at that park and delivering talks about the animals within it. She reported to Katie McFarlane.
14. During the period after 3 July 2019, the claimant continued with her work for her business JoJo's Little Party People.
15. In a period of about two weeks towards the end of September 2019, the claimant was on holiday. She was in Florida. It was her wedding anniversary. While on holiday, Ms McFarlane messaged the claimant to say that she was leaving the respondent's employment.
16. The respondent operates a time management system. **Pages 54 to 60** are copies of part of a report from it. They refer to the claimant. The report shows an "*In/Out*" column. It records the date and time at which the claimant clocked in and out of work. **Page 54** records that the claimant clocked out at 17:30:13 on 26 October 2019. It records the next entry, "*In*" as being 25 November 2019.
17. In a period following the end of the seasonal contract, the claimant was in email contact with Emily Boyd. The gist of those emails was to the effect that; if there was any future work, Ms Boyd would bear her in mind; the claimant did not wish to return on a seasonal contract, she was looking for something more permanent. None of those emails were produced.
18. Around 20 November 2019, Ms Boyd contacted the claimant. Ms Boyd offered the claimant some work for the respondent. The discussion about it included the respondent's acceptance that any work done would fit around other work being done by the claimant for others. This included her work for JoJo's Little Party People. It also included work as a photographer whereby the claimant was sub-contracted by another business to undertake its work, which was principally the taking of school photographs.

19. On or about 25 November 2019 Ms Boyd issued to the claimant an undated letter/contract (**pages 27 to 34**). On 10 December the claimant signed it. Amongst other things the document says; the respondent
5 *“requires flexible workers because of the fluctuating demands of the business and is entering into this agreement to record the terms on which the working relationship is entered into”*; this *“contract governs your engagement from time to time by the Company as a flexible worker. This is not an employment contract and does not confer any employment rights on you (other than those to which workers are entitled). In particular, it does not create any obligation on the Company to provide work to you and you will work on a flexible, ‘as required’ basis”*; it *“is entirely at the Company’s discretion whether to offer you work and it is under no obligation to give any reasons for its decision to offer or not offer work”*; each *“offer of work by the Company which you accept shall be treated as an entirely separate and severable engagement (an assignment). The terms of this contract shall apply to each assignment but there shall be no relationship between the parties after the end of one assignment and before the start of any subsequent assignment”*; and the *“fact that the Company has offered you work, or offers you work more than once, shall not confer any legal rights on you and, in particular, should not be regarded as establishing an entitlement to regular work or conferring continuity of employment.”*
20. Ms Boyd took advice before preparing the document. She explained to the claimant that it was different from her seasonal contract. She explained
25 that the arrangement was intended to work for both parties in that it permitted the claimant to continue with her other work.
21. The claimant undertook work in accordance with the contract. She carried out various tasks including the handing out of flyers/leaflets promoting a pantomime. She did so at the Buchanan Galleries in Glasgow and at the
30 Thistle Shopping Centre in Stirling. Her duties also included checking, reading and replying to incoming emails to do with the park. The time management record (**page 54**) records days of clocking in/out as being November; 25 and 26; December; 4, 10 and 17. It records the day prior to the first of them as being 26 October. Wage slips were issued for that
35 work. They were not produced.

22. In or about early December 2019, the claimant applied for a more permanent role with the respondent. On or about 17 December she attended an interview for it. She submitted a CV in support of her application (**pages 38 to 39**). It records the claimant as the “*present*”
5 owner and operator of JoJo's Little Party People.
23. By letter dated 18 December the respondent offered the claimant the position of Education and Conservation Team Leader. It set out that she would be working 40 hours per week on a salary of £25,500 per annum. The salary was agreed between the parties that on the basis that it was
10 sufficient such that she would discontinue her involvement with JoJo's Little Party People. On 23 December by her signature the claimant accepted the offer.
24. As per the offer, the claimant’s start date in the role Education and Conservation Team Leader was Monday 13 January 2020. The letter does
15 not set out the date from which her continuous employment began. **Page 54** suggests that she worked that first week until Friday 17 January. It suggests that she next worked on 20 and 21 March. The park opened for the season on 21 March. It was open only for that one day before closing again for reasons related to the COVID-19 pandemic.
- 20 25. **Pages 54 to 60** record the claimant’s working days and times in the period between 29 June 2020 and 24 June 2021.
26. By letter dated 1 July 2021 the respondent gave notice to terminate the contract. The reason given was redundancy. The letter set out that the claimant’s leaving date would be recorded as 1 August 2021.
- 25 27. The respondent regarded the claimant as an enthusiastic and passionate employee and worker.
28. The claimant believed that her seasonal contract did not end in October 2019. She believed that the work that she did later that year was a continuation of that contract with no break. The respondent did not issue
30 to her a P45 relative to it ending in October 2019. She believed that that fact and the fact that she continued to do work, albeit different work, meant that her contract continued.

Comment on the evidence

29. Both Ms Boyd and the claimant gave honest and credible evidence. On key findings of fact, there was no real dispute between them.

30. My impression of the claimant was that she loved her work with the respondent. That impression is based on how she described her enjoyment of that work and the fact that she was willing to give up control of her own business (which she had operated for about 6 years) in order to accept the offer in December 2019. The claimant was visibly upset in the course of the hearing. My impression was that its cause was the need in this hearing to revisit an episode of her life which had been traumatic.

31. It was regrettable that contemporaneous documents (for example emails, messages and wage slips) were not included in the bundle.

Submissions

32. Ms Donnelly made an oral submission. Her focus, as per her caselaw, was on section 212 of the Employment Rights Act 1996. She listed:-

(a) *Fitzgerald v Hall, Russell & Co Ltd* [1970] AC 984

(b) *Ford v Warwickshire County Council* [1983] IRLR 126

(c) *Bentley Engineering Co Ltd v Crown and Miller* [1976] IRLR 146

(d) *Hussain v Acorn Independent College Ltd* [2011] IRLR 463

(e) *Welton v Deluxe Retail Ltd t/a Madhouse (in Administration)* [2013] IRLR 166

(f) *Booth v United States of America* [1999] IRLR 16

(g) *Curr v Marks & Spencer plc* [2003] IRLR 74

33. I do not repeat her submission here. Of particular relevance to the issues, she said; there were significant breaks in the total period of work 3 July 2019 and 1 August 2021; the second contract was not offered to start before October 2019; no work was done between 26 October and 25 November 2019; the contract which regulated the relationship in that period was that of worker, not employee; there was no dispute that she was employed continuously in the period between 13 January 2020 and 1 August 2021, but that period of service was insufficient to attract the right

to claim unfair dismissal. On section 212, the respondent's focus was on subsection (3)(c).

34. In reply, the claimant said; all three written contracts provided for the possibility of performing duties beyond the job title, with particular reference to "*other duties*" (**page 26**, the original contract) and **pages 28** (clause 4.2) and **44** (clause 2.2); she could do and did a variety of roles; she did not understand or believe that her first contract had ended; no P45 was issued; as she understood it, she continued to work for the respondent; and she particularly highlighted that she had access to internal email throughout.

The Law

35. Section 94(1) of the Employment Rights Act 1996 provides that "*An employee has the right not to be unfairly dismissed by his employer.*"
36. Section 108(1) of that Act provides that "*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.*" Section 108(3) disapplies section 108(1) in a number of circumstances. None is relevant in this case.
37. Section 212 of the 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.*
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- "*(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, 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)."*

Discussion and decision

38. In my view, the claimant has not been continuously employed for a period
5 of not less than two years ending with the effective date of termination.
She does not have the requisite service to claim unfair dismissal.
39. Looking at matters chronologically, on 3 July 2019 the parties agreed that
the employment would end on 27 October without the need for any further
10 notice. While not strictly relevant, the rationale for such a term was
obvious, and can be seen from the contract itself. That date was the end
of the respondent's season. Its principal activity, its park, closed. Related
to that is the fact that the claimant was one of about 150 whose contracts
ended at that time. It is a common misconception that the provision (or
15 non-provision) of a P45 is in some way indicative of the ending (or non-
ending) of employment. Regrettably for the claimant it is not conclusive.
Notwithstanding the absence of a P45 on or shortly after 27 October 2019
her contract ended on that date. While her evidence was that she
continued to do work for the respondent shortly after that date, I accepted
that there was no contractual relationship at all again until at earliest
20 25 November 2019. This is borne out by the time records on **page 54**.
40. The question then becomes; what was the nature of the relationship
between that date 25 November 2019 and 13 January 2020? In my view
the claimant was engaged as a worker in that period. I have set out at
25 paragraph 19 above what I consider to be the relevant provisions of the
contract that governed that period. There is no suggestion that the contract
was a "*sham*" or that it was an attempt by either party to disguise the true
nature of the relationship. It was the provision of work by the claimant as
and when requested by the respondent. She was free to decline all or any
such requests. There was no obligation to provide any work. The
30 arrangement was suitable for the claimant because of her continued
involvement in and work for the business which she owned. In my view,
the claimant was not an employee in this period.

41. The respondent properly accepted that the claimant had continuity of service from 13 January 2020 until 1 August 2021. But without being able to “*cast back*” to early August 2019 the claimant does not satisfy section 108 of the 1996 Act. She is not able to do so because her first contract of employment ended on 27 October and between that date and 13 January 2020 she was not an employee of the respondent.

42. Ms Donnelly agreed that section 212(3) provides for three situations in which weeks would still count in computing the employee’s period of employment notwithstanding their occurrence; one is where the employee is incapable of work in consequence of sickness or injury (subject to that period being not more than twenty-six weeks); the other two are where the employee is absent from work. One is on account of a temporary cessation of work. The other is in circumstances such that, by arrangement or custom, the employee is regarded as continuing in the employment of the employer for any purpose. On my analysis the circumstances of this case do not fall within any of the three situations anticipated by section 212(3). The claimant did not suggest that her employment fell within any.

43. As noted above, in the period between 25 November 2019 and 13 January 2020 the claimant was not an employee. Her continuous service which ended on 1 August 2021 began on 13 January 2020. She does not have two years’ service which is necessary to bring a claim of unfair dismissal. The tribunal has no jurisdiction to hear this claim. The judgment reflects my view on the issues.

Employment Judge:
Date of Judgment:
Date sent to parties:

R Bradley
16 February 2022
16 February 2022