EMPLOYMENT TRIBUNALS

Claimant: Mr A B Adewoyin

Respondent: Central and North West London NHS Foundation Trust

Heard at: **London Central by CVP** **On:** **20 February 2024**

Before: **Employment Judge N Walker**

Representation
Claimant: in person
Respondent: Mr J Cainer of Counsel

JUDGMENT

The Claimant's claim for unfair dismissal is dismissed as the tribunal has no jurisdiction to consider it.

REASONS

1 Application

1.1 The respondent made an application to strike out the claimant's claim on the basis the claimant did not have sufficient qualifying service for the tribunal to have jurisdiction to consider his claim for ordinary unfair dismissal.

2 Evidence

2.1 The tribunal heard evidence from the claimant himself and from Ms Swann, who is currently the Assistant Director of HR Operations for the respondent. At the time of the claimant's dismissal, Ms Swann was responsible for managing the respondent's temporary staffing.

2.2 The tribunal also had a bundle of documents. The claimant supplied some more witness statements.

2.3 The parties both agreed that the claimant began his involvement with the respondent in April 2021 as bank staff. The claimant produced a document headed "Appeal against Decision to Summarily dismiss me" in which he stated:

> *"My employment with CNWL began on 6 April 2021 as bank staff and continued until late in October 2021 at which point I transitioned to permanent staff. My employment was terminated on 23 June 2023."*

2.4 The respondent argues that as a bank staff member, the claimant did not have employment status and the employment he did have between 18 October 2021 and June 2023 was insufficient to meet the qualifying period for a claim for unfair dismissal.

2.5 The issue in the case was therefore what was the status that they claimant held as a bank staff member and the key dates are effectively between June 2021 and 18 October 2021 as the claimant's employment ended on 22 June 2023.

2.6 The claimant in his evidence confirmed that the letter in the bundle at page 87 was the first letter he received which appointed him as a bank staff member. He explained this was like being a zero hour's worker. He worked shifts on the ward. When he was on the ward, he wore the same uniform as other staff and he reported to the Head Nurse or Manager as other staff did. Bank staff could work in any ward in the Trust. The claimant could work a shift if he was available. He explained that there was a process for indicating availability for shifts but in addition they might call you up if they knew you or indeed you might be on a WhatsApp group but if you weren't available to do the shift, they would give it to another person.

2.7 The claimant worked at a variety of different times. Sometimes he would work more shifts and sometimes less. Sometimes he would only do one shift in a week, but he knew that nothing would happen if he didn't do any shifts, provided the claimant worked one shift every six months. If he didn't work one shift each six months the expectation was that he could be removed as a bank staff member. The respondent pointed out this was not definitive, and the documentation stated that staff could notify the team in charge if there was a reason why they couldn't work for some time so that the temporary staff team would know what was happening. However, removal from the system was clearly highlighted as a potential consequence if a bank staff member did not work at least one shift in six months.

2.8 As a zero hour's worker, there were no guaranteed hours and additionally the claimant confirmed the respondent trust could cancel him if they were overloaded. Likewise, the claimant said that he could cancel any shifts he was due to work if he wasn't available for some reason. The arrangements had changed over the time that the claimant was with the respondent, but it ended up with a situation where the respondent had to give 4 hours' notice before the shift started otherwise, he was paid a minimum amount of two hours pay. At the start of his bank work, the minimum notice of cancellation before a payment was made was a much shorter period of 60 minutes notice before the shift started.

2.9 The claimant's pension monies were taken by the respondent from his wages.

2.10 The claimant accumulated holiday pay and the more he worked the more holiday pay he would accumulate. There was a form to fill in so he could take payment for holiday, however taking holiday was not dependent on the form. There was no requirement that the claimant had to fill in a form which said when he was proposing to be away, but rather a form which indicated how many hours, he wanted holiday payment for. He would have to have earned that amount of holiday pay before he would be paid out.

2.11 The respondent gave some evidence that very few employees were applying for holiday pay properly and many were losing their holiday pay entirely so eventually the respondent changed the system and paid out accrued holiday pay. The respondent could not find any records of holiday payment to the claimant in 2021 but did find payments made in 2022 and 2023. It is not clear if those records are the only holiday payments made to the claimant under the bank system as older records have been archived.

2.12 The claimant says that in late September and into October 2021 he went to Nigeria. He said he had been told that if he became permanent staff, (and we know he was appointed to a permanent role on 18 October 2021), he wouldn't then be able to take holiday and he might lose it. He said he was paid holiday pay at the time and he had to fill out a form. As noted, the respondent was unable to locate any information which verified that position for 2021. The claimant said his passport would show his trip to Nigeria. The claimant had not had much notice of this issue and was not represented. After his employment ended, the claimant didn't have access to the centralised HR systems or to his e-mail. I understand he was not able to look for all the documents he might have wished. I accept his evidence about his taking a trip to Nigeria.

2.13 The claimant's evidence about the form he had to fill out when he went to Nigeria was unclear. It is my view that the claimant was describing a form he filled out in order to get payment for his holiday, rather than a form seeking permission to go on holiday. The claimant was entitled not to work whenever he chose. His bank worker status meant that he simply did not need to accept shifts when he wanted to go away. There was no need for any holiday request form, and I do not consider one existed for bank staff.

2.14 The respondent directed the tribunal's attention to various clauses in the documentation which applied to the bank workers which was contained in the bundle.

The document was titled "Temporary staffing Handbook and Agreement for Bank Workers". There were various parts. The introduction section headed "Welcome/ Our vision and values" stated:

> *"Bank workers are engaged to undertake casual work at the Trust in accordance with departmental staffing needs. Assignments are allocated to bank workers depending on their availability, qualification and relevant skill set."*

2.15 Under the heading "General and contact information" it stated in bold:

> ***"There is no obligation from the Temporary Staffing service to offer you work once you have registered and you have the right to refuse any work offered to you".***

2.16 There were provisions for uniforms and ID badges. There were provisions for mandatory training and induction. Under the heading: “Ending your Registration & Absence”, there was provision stating:

> *“If you have not undertaken any work as a bank worker for at least six months you will be automatically deregistered unless you have previously notified the Temporary Staffing service to say that you will be unavailable to provide services for a period of time. In such circumstances, if you subsequently wish to undertake further work you will have to re-register.*
>
> *Re registering as a bank worker is not automatic and will depend on the Trust’s need for temporary staffing in your field/area of expertise. “*

There were other provisions for absence, but these all related to an absence in respect of an assignment which had been agreed. Ms Swann gave evidence that this six month provision was there to address the fact that there was a cost for the licence for each bank worker. The respondent did not want to have to pay that fee for bank members who were no longer interested in any work.

2.17 Part 2 was headed “Terms Applying to Each Engagement”. This was a set of terms applying to each assignment and it addressed all the matters you might expect to see in a statement of terms and conditions of employment. The document stated:

> *“ The terms applying to your engagement with temporary staffing are as described below. They will apply to you each time you accept an engagement that has been made to you by the Trust and will last for the period of that engagement. In each case you are confirming your acceptance of these terms by accepting the offer of the engagement.”*

2.18 The document stated that staff should use the Bank Timesheets in EOL to confirm bookings and also to check whether a worked shift has been approved for pay and submitted to payroll.

2.19 Amongst other matters, the document explained arrangements for holiday pay and noted that bank only workers are entitled to the equivalent of 5.6 weeks annual holiday during each holiday year (including all bank holiday entitlements), calculated on a pro rata basis depending on the number of hours actually worked. There was no requirement set out for requesting holiday. Rather the document stated: “it is the responsibility of the bank worker to ensure that they take their annual leave entitlement in accordance with the terms laid out in the annual leave request form”. I was not shown such a form, but I believe it to be a form to request accrued holiday pay as it also states: “Please use one Annual Leave form for each period of holiday pay that you are claiming.”

2.20 There were also terms for automatic enrolment into the pension scheme as well as the various disciplinary and other policies applicable to staff. The claimant signed his copy on 1 April 2021.

2.21 The claimant distinguished his role as a bank worker from that of an agency worker explaining that he worked directly with CNWL. He had a badge and ID from CNWL, and he had a uniform whereas an agency worker would not be entitled to those things. He also had access to the computer system for patient records. The claimant admitted that during the initial period when he was a bank worker for the respondent, he also had another role for a different company entirely which the tribunal understand was not a hospital related role but probably security work. It seems that once he became a permanent employee for the respondent, that came to an end.

2.22 The bundle contains various documents including HR systems report which shows the date of hiring for the claimant was 1 April 2021 but also includes further information detailing his start date as 18 October 2021.

2.23 In a letter dated 8 October 2021 from the respondent to the claimant, there was a reference to the recent offer of the post of healthcare assistant which had been made to the claimant and this letter confirmed that the respondent was now in receipt of satisfactory pre-employment checks and able to confirm the start date of 18 October 2021. The claimant's written statement of terms and conditions of employment prepared to deal with his permanent employment shows the NHS Entry date, which I understand to be the first date of employment for the purpose of calculating continuous employment with the NHS, as 18 October 2021. This date should include previous work for any other trust or indeed the CNWL Trust. It is an important date from the point of view of NHS staff and as I have said, the respondent's record shows that date as 18 October 2021.

2.24 After the claimant was appointed as a permanent member of staff he remained on the Bank system and was able to do some shifts as a bank staff member as well as carrying out his permanent role.

2.25 When the claimant took his holiday to go to Nigeria, his last work date was 25 September. He was on a break between 26 September and 9 October 2021. He started work again on 10 October according to the records prepared by the respondent, which the claimant did not challenge.

3 Submissions

<u>Respondent's Submissions</u>

3.1 The respondent produced detailed submissions in writing before the hearing and then spoke about those submissions and addressed some queries that I raised.

3.2 The issue we had to deal with was whether the claimant had sufficient service to enable the tribunal to have jurisdiction over his claim for ordinary unfair dismissal. He was required to have two years continuous service to qualify. There was no doubt that he had been an employee between 18 October 21 and 22 June 2023. However, that was less than two years. in order to have two years qualifying service, he would need to have continuity of service as an employee between 23 June and 18 October 2021. The respondent submitted that there were two ways this could arise. Either the client worked as an employee under a global or overarching contract as a bank worker and thus his service was counted as employment, or he had to show continuity of service under a series of contracts of employment.

3.3 The respondent submitted that the nature of bank shift work precluded a finding that the claimant worked under a global contract of employment because there was no mutuality of obligation between the respondent and the claimant. In particular the respondent referred to the bank agreement and to provisions in the bank workers handbook being a reference guide and to being a temporary assignment. It also referred to temporary workers. The respondent referred to assignments being allocated depending on availability, qualifications, and relevant skills. The respondent referred to the temporary staffing service and the team offering temporary work within the Trust. Specifically, the respondent referred to the provisions which said there was no obligation from the temporary staffing service to offer you work once you have registered, and you have the right to refuse any work offered to you. They also refer to the provision that said the temporary staffing service will notify you when a suitable engagement arises. You will then be able to choose whether or not you accept the engagement.

3.4 The respondent referenced the provision that provided for automatic deregistration if someone was not available for a shift for six months. They also referenced evidence that this was not an absolute minimum number of shifts and there was no sanction for not accepting any shift. This was really to do with the pragmatic cost concern because there was a licence fee to sign up to the app.

3.5 Overall the respondent argued there was no evidence of any control between each bank shift although they accepted there was control while in the course of a shift. The respondent accepted there was a requirement for personal performance. In the circumstances the respondent said there could not be a global contract.

3.6 In that event, the respondent said the next question was whether the claimant worked under a contract of employment during each shift. The respondent accepted there was personal performance and control during a shift. On the question of mutuality of obligation, the respondent argued that notwithstanding the mutual right to cancel a bank shift, the respondent considered that during each individual bank shift worked there was mutuality of obligation for the duration of the individual shift.

3.7 The respondent, having conceded that the requirements for control, personal performances and mutual obligation were satisfied within each individual bank shift, argued that other circumstances might indicate that the claimant was providing services as an independent contractor. Specifically, the respondent relied on the fact that the claimant had another job while he was a bank worker for which he earned more than he did as a bank worker which it was suggested indicated he was in business on his own account and so self-employed.

3.8 If the tribunal rejected that suggestion and considered that the claimant was working on a series of short contracts and during the course of each shift that he accepted and worked, he was an employee, the respondent argued that the claimant had to have two years continuous employment. The respondent argued that the claimant's continuity of employment had been broken by some weeks when the claimant was not working.

3.9 The respondent submitted that there was a shift which finished on 23 September at 8:00 a.m. and a further shift which started on 15 October and between those two shifts there was a two-week break which broke continuity.

3.10 It was noted that this shift was actually when the claimant was on holiday, in Nigeria. The respondent argued that the right take holiday which would apply to a "worker" under the employment legislation was independent of the forms and systems applicable to determine continuity. The respondent argued that there was no evidence of anything other than the respondent providing accrued holiday pay, when and if the claimant applied.

3.11 The respondent referred to the fact that the claimant said that he had sought to take a break. He did not need any permission to do so. He simply had to reject any shifts offered to him at that time. If he sought pay for that time, it was a matter for him. He could do this at any time provided the pay had accrued.

3.12 The respondent argued that the two-week break did not operate so as to amount to an arrangement or custom that the claimant was regarded as continuing in employment and thus broke continuity.

Claimant's Submissions

3.13 The claimant also made submissions and argued but he was an employee. The claimant's primary argument was that he was not self-employed and he was not an agency worker and therefore he must have been an employee.

3.14 The claimant referred to case law being Ibrahim v Maidstone NHS Trust 2300321/2020 and Uber v BV Aslam [2021] ICR 657.

4 The Law

4.1 Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.

4.2 Section 108 of the Employment Rights Act 1996 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.

4.3 Section 230(1) of the ERA states:

> *"employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contact of employment"*. A contract of employment is defined at s.230(2) as *"a contract of service or apprenticeship, whether express or implied (and if it is express) whether oral or in writing"*.

4.4 A worker is defined in s.230(3) as:

> *... an individual who has entered into or works 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*.

4.5 The effect of section 230(3) is that all employees are workers, but not all workers are employees. Only an employee can claim unfair dismissal.

4.6 A number of different tests have been applied by courts and tribunals in order to determine whether an individual is employed under a contract of service and is thus an employee, or whether they have been engaged under a contract for services and are an independent contractor. Those tests include:

a. The degree of control exercised by the employer (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 Q.B. 497*).

b. Whether mutuality of obligation exists between the parties; namely, whether the employer is obliged to provide work and the individual is obliged to accept it (*Carmichael v National Power Plc [1999] 1 W.L.R. 2042*).

c. Whether the individual is required to perform the contract personally, or whether a right of substitution exists, allowing the individual to send someone else in their place. In *Pimlico Plumbers Ltd v Smith [2018] UKSC 29; [2018] 4 All E.R. 641* the Supreme Court concluded that a limited right of substitution was not inconsistent with an obligation of personal performance as, on the facts of that case, personal performance remained the dominant feature of the contract. See also: *Stuart Delivery Ltd v Augustine [2021] EWCA Civ 1514*.

4.7 Other tests which can be considered are:

d. The extent to which the individual is integrated into the employer's organisation, including the nature and length of their engagement and whether it is permanent or for the duration of a specific task (*Lee Ting Sang v Chung Chi-Keung [1990] 2 A.C. 374*).

e. Whether the individual is in business on their own account (the "economic reality" test); i.e. whether the individual is free to work for others and how independent they are of the employer's business (*Lee Ting Sang v Chung Chi-Keung*).

f. Whether the individual shares the profit or risks loss.

4.8 The tax position can be helpful but is not determinative.

<u>Position of casual workers</u>

4.9 Under section 212 of the Employment Rights Act 1996 (ERA), a casual worker may be classified as an employee if either:

(a) There is a ‘global’ or ‘umbrella’ contract of employment that governs their relationship with the employer and which continues to exist during periods when he or she is not working. If such a contract exists, the

employee will be able to establish continuity of employment under S.212(1) ERA.

(b) the worker is employed under a series of individual contracts of employment provided that any gap between the individual contracts is less than one week.

4.10 Breaks of over a week will operate to break continuity of employment. Section 212(3) of ERA specifies that some breaks are exceptions such as a temporary cessation of work or an arrangement whereby the individual in question is to be regarded as continuing in employment.

4.11 In order to ascertain whether there is a global contract, the question will be whether there is an obligation to provide and perform any work which becomes available and whether that obligation continues during non-working periods. That has been repeated in a number of cases. In Hellyer Brothers Ltd v McLeod and ors; Boston Deep Sea Fisheries Ltd v Wilson and anor 1987 ICR 526, CA, a case involving trawlermen, the Court of Appeal held that there were no facts from which it could properly be inferred that the men had ever placed themselves under a legally binding obligation to make themselves available for work in between crew agreements or to refrain from seeking or accepting employment from another trawler owner during such periods. In addition, there was no continuing obligation on the employer to offer employment to any particular individual. There was no 'continuing overriding arrangement which governed the whole of [the parties'] relationship and itself amounted to a contract of employment'.

4.12 The Court of Appeal again reiterated the importance of mutuality of obligation in O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728, CA, where the workers were known as 'regular casuals'. Again, it was said that the essential ingredient of mutuality of obligation was missing. The workers had the right to decide whether or not to accept work and were free to obtain work elsewhere. The Court concluded that the workers were hired under successive contracts for services.

4.13 In Clark v Oxfordshire Health Authority 1998 IRLR 125, CA, the Court of Appeal held that no contract of employment — whether it be given the name global, umbrella or any other name — can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period. A nurse who was retained by a health authority to fill temporary vacancies in hospitals did not have a global employment contract spanning her various individual engagements because there was no mutuality of obligation during the periods when she was not working.

4.14 In Carmichael and anor v National Power plc 1999 ICR 1226, HL, the House of Lords said that 'the parties incurred no obligations to provide or accept work, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other'.

4.15 The requirements for a global contract were reviewed by the Court of Appeal in Stringfellow Restaurants Ltd v Quashie 2013 IRLR 99, CA. Lord Justice Elias referred to Nethermere (St Neots) Ltd v Gardiner and anor and Carmichael and anor v National Power plc as authority for the principle that, for a global contract to exist, it is necessary to show that there is at least 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work

engagements. The significance of the irreducible minimum is that it determines whether a contract exists at all during the periods of non-work.

4.16 A casual worker may still be able to establish sufficient mutuality of obligation in relation to each specific engagement entered into as part of that relationship. If so, the worker may be regarded as an employee in respect of each engagement, even though the employment relationship ends when each engagement is completed — McMeechan v Secretary of State for Employment 1997 ICR 549, CA and Cornwall County Council v Prater 2006 ICR 731, CA.

4.17 The Court of Appeal in Pola v R (Health and Safety Executive) 2009 EWCA Crim 655, CA, considered whether a casual worker, who was not obliged to turn up to work on any particular day, was nonetheless properly characterised as an employee during the periods he did in fact work for the purposes of health and safety law. The Court found that the relevant workers were expected to work for the whole of any day on which they turned up and would be paid for the day in full. Consequently, they were employees during each day on which they worked.

4.18 In summary, in order to establish a global or overarching contract which subsists when there is no work underway, it is essential to establish mutuality of obligation when not working. If that does not exist, it is possible there is a series of short contracts when the individual is working but at that point the provisions for assessing continuity are important as weeks which do not count towards continuity will break it. There must be an unbroken period of two years qualifying service for an employee to claim unfair dismissal.

5 Conclusions

5.1 The key dates are from 23rd of June 2021 to the 18th of October 2021 being the dates that would be essential for the claimant to be an employee if he were to have sufficient service to amount to qualifying service for his unfair dismissal claim. It was common ground that the claimant was a casual worker at the relevant time and the claimant referred to himself being a zero hour's worker.

5.2 The status of casual workers is such that they are potentially employees if there is a global overarching contract governing their employment. The bundle contains the agreement which sets out the conditions upon which the claimant would work as a bank employee. These terms are intended to operate each time a bank employee undertakes a shift. The question is whether they are sufficient to demonstrate an umbrella contract or whether they simply apply each time the claimant worked.

5.3 I am mindful in particular of cases where the importance of mutuality of obligation has been emphasised including Clarke v Oxfordshire County Council 1998 IRLR125. The employee who worked for the respondent health authority in its nurse bank as a staff nurse had no fixed obligation to accept work but could be offered it as and when a vacancy occurred. She was not held to be an employee. Elias J in the case of Quaashie v Stringfellow restaurants explained that as he had said in a previous case, the issue of whether there is a contract at all arises most frequently in situations where a person works for the employer but only on a casual basis from time to time. He described mutuality of obligation as the irreducible minimum of obligation without which no contract exists. The agreement itself was clear that there was no obligation on the respondent to offer work and no obligation on the claimant to accept any work.

5.4 Given the legal principle of mutuality of obligation being the irreducible minimum, in the circumstances of this case, it is my view that there cannot be a global or umbrella contract. The claimant worked more or less exactly as the nurse in the Clarke case. He was entitled to cancel and he was entitled to do so without giving any reason. He was entitled not to accept work. The respondent was not obliged to provide any work. The claimant described it as a zero hour's contract. In those circumstances he was not employed under a global, umbrella or overarching contract.

5.5 I note that the respondent concedes that in the circumstances of this case, during each individual bank shift worked, there was a contractual obligation between the respondent the claimant for the duration of the individual shift. I note the respondent's submission that despite there being the key elements of control, personal performance and mutuality of obligation during those shifts, other circumstances might point away from a contract of employment. That submission relied on fact that the claimant undertook two jobs. Other factors which were referred to, were said not to point in either direction. Despite conceding that the case of White v Troutbeck SA was authority for the proposition that having two jobs did not necessarily preclude an employment relationship, the respondent suggested that having two jobs meant the claimant was in business on his own account.

5.6 I do not regard the respondent's contention about the claimant holding two jobs as a valid contention. The claimant was free to work for other employers if he wanted (or indeed needed to). There was no suggestion that the claimant marketed his services or that in any role he had some degree of risk. There were no factors indicating he was working on his own account in a business of any sort. The respondent in its agreement for bank workers assumed they were "workers" rather than self-employed. Both jobs as a health worker and as a security guard were clearly jobs undertaken in the nature of part-time employment. The claimant was working on a part time basis for two separate employers - that is all. It would be a desperate state of affairs if a hard-working individual was to be less secure in his working life because of his willingness to undertake a lot of work, than someone who did only one part time job. My conclusion on the question of whether the claimant worked under a contract of employment during each individual bank shift worked, is that he did. Each shift was a separate contract of employment.

5.7 That being the case, I have to consider whether, when the claimant worked, there were sufficient continuity of employment for that to be added to the employment which the respondent accepts was permanent employment, so as to give the claimant the necessary qualifying period of two years.

5.8 The respondent on this point refers to section 212 of the Employment Rights Act which addresses weeks counting in computing the employment. That provides that any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment can count in computing his period of employment. However, as I have found that there was no mutuality of obligation between shifts, any weeks when the claimant did not work, do not count unless they fall within a list of exceptions.

5.9 The exceptions are weeks where the employee was incapable of work in consequence of sickness or injury, absent from work on account of a temporary cessation of work or absent from work in circumstances such that by arrangement

or custom, the person is regarded as continuing in employment of his employer for any purpose.

5.10 There is a relevant break and that is the break between the 26 September and 9 October 2021. The claimant does not suggest that was a break where he was sick, or which involved a temporary cessation of work. In that period of time, the respondent submits that the claimant was absent from work without there being any contract of employment.

5.11 As I have noted, the reason for the break was that the claimant went to Nigeria and took the time as a holiday. Both the respondent and I have treated that explanation as a submission that the claimant fell within an exception as being some sort of arrangement where he would be able to take holiday and be regarded as continuing in employment.

5.12 I have to consider if there was an arrangement or custom applicable so that it maintained continuity of employment. I have found as a matter of fact that what the claimant did was submit a form seeking payment for outstanding holiday. He did not seek leave to take holiday. He was not required to do so as leave was not required to explain his absence. At that time, as a bank worker he was free to accept or decline shifts as he chose.

5.13 Even if the claimant had in some way sought permission to take holiday, which I reject, it does not appear that he would be entitled to take the length of time he actually took. I rely on the respondent's counsel for the calculations but accept that it seems the accrued holiday which he would have had at that time, was not enough to cover the actual break.

5.14 It is my conclusion on the facts that the claimant took the break because as a bank worker he had no obligation to work and as such he was free to not accept any work at any period of time he wished. He was clearly under pressure to do at least one shift in six months but other than that, there was no requirement to seek permission of the respondent to stop for a few weeks. In my view when the claimant went to Nigeria, that was a non-working period. There was no arrangement or custom under which both parties agreed the claimant was bound to return to continue as a bank worker. There may have been a general understanding the claimant would start work on 18 October 2021 as a permanent employee, but that was a different relationship entirely and not a continuation of the bank work. This non-working period broke any continuity of employment that might otherwise have existed by reason of the sequence of short contracts.

5.15 The claimant in his evidence referred me to the case of Ibrahim v Maidstone and Tunbridge Wells NHS Trust. This was a case in which there was an NHS doctor who was suspended. He was held to be entitled to pay during his suspension because of the way in which the Trust had written to him. Their obligations arose from their treatment of him at the time of his suspension, rather than any rights as a bank worker per se. The later case of Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust UKEAT/0232/20 confirmed that.

5.16 I have also looked at the case of Uber v BV Aslam which was the second case which the claimant referred me to. That important case is about the status of being a worker. The claimant's case was not about worker status. Many freelancer staff are "workers" but not employees. Workers are protected under a lot of employment legislation, but not all. Specifically, you have to be an employee

to be protected from unfair dismissal. In this case we are concerned with employee status.

5.17 My conclusion is that the claimant was not an employee for the requisite qualifying period of two years. While I consider that he was an employee over a series of short contracts, and then he became a permanent employee from 18 October, prior to that his continuity of employment was interrupted by the weeks when he took a break in order to go to Nigeria. That prevented him from getting sufficient service to have the requisite continuous 2 years as an employee which is necessary for what is called an ordinary unfair dismissal claim. Therefore, my conclusion is that the tribunal does not have jurisdiction to consider the claimant's claim.

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Employment Judge N Walker

Date: 28 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 March 2024

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FOR THE TRIBUNAL OFFICE