EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Yasmin Niazi	**v**	**Hill Group Services Ltd**

Heard at: Watford (by CVP) **On**: 26 October 2021

Before: Employment Judge Andrew Clarke QC

Appearances

For the Claimant: In person
For the Respondent: Ms Charlotte Goodman, Counsel

JUDGMENT

The claim for unfair dismissal is dismissed for want of jurisdiction. The claimant lacks the required two years' continuous service required to bring such a claim.

REASONS

1. There is no dispute that the claimant was employed by the respondent from 24 September 2018 until her dismissal with effect from 28 August 2020. Claims including those for race discrimination arising out of her employment are to be heard over five days in 2022 following and in accordance with detailed directions given by Employment Judge Bedeau.

2. The claimant also brought a claim for unfair dismissal. However, if her employment began on 24 September 2018, she lacks the necessary two years of continuous employment in order to bring such a claim.

3. She maintains that the period of her employment by the respondent began some time prior to 28 August 2018 so that she would have the required period of continuous service. This preliminary hearing was established by orders given on 20 June 2021 in order to consider whether the unfair dismissal claim should be struck out for want of jurisdiction.

4. I have heard evidence from the claimant herself and from the respondent's head of human resources, Clare Smithson. Both sides also produced a number of helpful documents at the hearing.

5. From the evidence I have seen and relying particularly on the contemporaneous documents I am satisfied of the following facts.

6. On 19 July 2018 the claimant commenced full time work at the respondent. She did so via an agency. That agency gave her the particular assignment which she did not understand to have any particular duration.

7. The agency paid her and was responsible for her tax and National Insurance. She was sent a booking form every week which identified the hours of work for which she should attend the respondent's premises and instructed her as to the kind of clothes she should wear in order to appear a smart temporary worker assigned by their agency and also instructed her as to the making of claims, on a weekly basis, in order that she should be paid.

8. Shortly after beginning her engagement with the respondent, she learnt from another worker that the respondent was looking to find someone to do the work she was then undertaking on a permanent and employed basis. In due course she discussed this with her manager. However, during the currency of those discussions, in August 2018 into September of that year, she remained engaged by the agency.

9. On 8 September 2018 a completed application form was submitted to the respondent containing details of the claimant's application for a job doing, in effect, the work that she was currently doing as an agency worker.

10. It is unclear whether that form was filled in by the claimant herself or by her manager on her behalf having spoken to her. The version which I have seen is unsigned. It seems to me likely that her manager had made clear to her his support for her candidacy and he may have gone so far as to say that the job was hers, subject to his obtaining necessary approvals to appoint her.

11. On 10 and 11 September 2018 the claimant's manager sought approvals to appoint, first from a director and then from the CEO, in order to engage the claimant as an employee of the respondent. Such approvals were given.

12. On 13 September 2018 a detailed offer letter, accompanied by terms of employment, was sent by the respondent to the claimant.

13. On 16 September 2018 the claimant signed a contract of employment and submitted the signature page to the respondent by email.

14. Sometime thereafter the claimant was sent a P45 by the agency which she submitted to the respondent.

15. On 24 September 2018 the claimant commenced employment with the respondent, albeit doing the work that she had previously done up to that date when assigned to that work by the agency.

16. That start date also appears in an invoice from the agency to the respondent for a fee payable to the agency in respect of the engagement of a temporary worker previously supplied by the agency. Although I have not seen the document, I have no doubt that the contract between the agency and the respondent relating to the engagement of the claimant would have contained provisions dealing with what might happen if the respondent chose to engage the claimant as its employee. As the claimant accepted, such terms are routinely found in such contracts.

17. Towards the end of October 2018, the claimant received her first payslip (and her first payment) from the respondent. She was paid by the respondent for the period from 24 September to the end of that month as well as for the whole of October.

18. The law relating to this matter is relatively straightforward. S.94 of the Employment Rights Act 1996 ("the 1996 Act") gives the right to an employee not to be unfairly dismissed by his, or her, employer. S.230(1) of the 1996 Act defines "employee" as "an individual who has entered into or works under… a contract of employment."

19. S.211(1)(a) of the 1996 Act provides that an employee's period of continuous employment for the purposes of any provision within the Act is (subject to a provision which is irrelevant for present purposes) a period which "begins with the day on which the employee starts work…".

20. It is not in dispute here that in order to bring a claim for unfair dismissal an employee needs to have a period of two years' continuous employment.

21. Ms Goodman on behalf of the respondent reminded me of a number of authorities relating to the interpretation of s.211(1)(a) of the 1996 Act. In particular she reminded me of what was said in General of the Salvation Army v Dewsbury [1984] ICR 498. The EAT held that the reference to a period of continuous employment beginning with the day on which the employee starts work was a reference to the beginning of the employee's employment under the relevant contract of employment. It did not refer to the day on which the employee first turned up physically to start work, although that might well be the same date. She also referred me to what was said by Judge Auerbach in the EAT in O'Sullivan v DSM Demolition Ltd (UKEAT/0257/19/VP). In that case the Employment Tribunal had to consider the claim of an individual who did casual work prior to being put on the payroll. The case re-emphasised the point made in the Salvation Army case to the effect that it is not the beginning of work which is being referred to but the beginning of work under the relevant contract of employment.

22. The key question here is when did the claimant cease to be engaged by the agency and become employed by the respondent. There is no dispute that

she started as an employee of the agency. It is clear that the agency paid her, was responsible for her tax and National Insurance and exercised that degree of control over her that one would expect from an agency supplying a contract worker. She contends that this relationship changed when she had agreed to become an employee of the respondent. However, I do not think that she became an employee of the respondent until 24 September 2018.

23. That she had indicated a willingness to become an employee of the respondent is not material. The fact that there was an agreement made prior to 24 September that she would enter into a contract of employment effective from that date is immaterial. She did not become an employee (and did not work for the respondent as such) until that date. Up until then she was working for the agency.

24. Even if her manager told her that the job was hers, subject to approvals, she did not cease to be the agency's employee from the moment her manager made that statement. That would be so even if what they said to each other amounted to an agreement that she would be employed by the respondent subject to his getting consent to employ her. I am satisfied that, properly understood, all their discussions were subject to the agreement of a contract of employment. That did not take place until later (see above).

25. In any event, I am not persuaded that there was any such informal and non-binding agreement made prior to 28 August 2018. The claimant says that there was, but the contemporaneous documents do not support this in my view and given the fallibility of human memories, I prefer to focus on the contemporaneous documents. These suggest that any such informal agreement must have taken place slightly prior to the manager seeking approval to a point on 10 September 2018.

26. Furthermore, I do not consider that she began to work for the respondent under a contract of employment from the date she signed and returned the contract, namely 16 September. It was an agreement which she worked under only from 24 September. Yet even if I am wrong on that matter, this would not assist her because she would still lack two years' continuous service if the key date was 16 September.

27. For those reasons the claim for unfair dismissal cannot proceed further and is dismissed. However, I emphasise that the remaining claims dealt with by the orders of Employment Judge Bedeau do remain to be dealt with at the hearing which he provided for.

28. At the conclusion of the hearing the claimant asked to extend the date in paragraph 4.2 of the orders made by Employment Judge Bedeau, that is the order relating to her commenting on what documents ought to be included in the bundle. Given the time before the hearing (many months) and the fact that the bundle itself is not to be produced until April 2022 I here record that I extended time under Order 4.2 to **4pm 17 December 2021**.

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Employment Judge Andrew Clarke QC

Date: …4 November 2021……..

Sent to the parties on: ..5.11.2021....

.....GDJ.....
For the Tribunal Office