



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104943/2022

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Held via Cloud Video Platform (CVP) on 14 February 2023

Employment Judge L Wiseman

10 **Ms J Adegun**

**Claimant
Represented by:
Ms V Toyi -
Friend**

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The Scottish Ministers

**Respondent
Represented by:
Ms S Monan -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim of unfair dismissal because a tribunal does not have jurisdiction to determine the claim in circumstances where the claimant
25 does not have the necessary period of qualifying service to bring the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 5
September 2022 complaining of unfair constructive dismissal. The claimant
30 noted on the claim form, at box 5, that her employment started on the 20 July
2020 and ended on the 6 June 2022.
2. The respondent entered a response in which it asserted the claimant did not
have the necessary period of qualifying service to proceed with a claim of
unfair dismissal.

3. The hearing today was to determine whether the claimant had the necessary period of qualifying service to proceed with the claim of unfair dismissal.
4. I heard evidence from the claimant and I was referred to a small number of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

5. The claimant worked for the respondent in the role of Personnel Assistant until 28 February 2020. The claimant was an agency worker, provided to the respondent through Pertemps.
6. The claimant applied and was interviewed for the role of Finance Administrator. The claimant received an email dated 12 March 2020 (page 13) attaching a Conditional Offer of Permanent Appointment, which she was asked to print out and wet sign. The respondent's Pre-Employment Security and Eligibility Checks were also attached. The email confirmed the checks required to be completed prior to arranging a start date.
7. The Conditional Offer of Permanent Appointment contained a paragraph (page 16) entitled Joining Letter, which stated that *"Following completion of satisfactory pre-employment checks and return of your signed acceptance, a joining letter will be issued which will also contain details of your annual leave entitlement for the remainder of the year and any changes which have been agreed, for example, in relation to your working pattern"*.
8. The Pre-Employment Eligibility and Security Check documentation (page 30) stated *"We will need to conduct eligibility and security checks before we can make you a formal offer of employment.."*
9. The claimant signed and returned the Conditional Offer of Permanent Appointment on the 13 March 2020.

10. The claimant took all of the required documentation to the Pre-Employment Team at Saughton House, on the 19 March 2020. The claimant understood they were satisfied with her documents.
11. The claimant asked about a start date and was told that as an announcement about lockdown was anticipated, they would be in touch.
12. The claimant received a letter dated 8 July 2020 (page 49) entitled New Entrant – Joining Letter which acknowledged receipt of the signed acceptance of terms and conditions of appointment and successful completion of security records checks, and confirmed permanent appointment as a Civil Servant in the Scottish Government commencing on 20 July 2020.
13. The claimant commenced work on the 20 July 2020.
14. The claimant was paid at the end of July 2020 for the work carried out during July (page 114).
15. The claimant was successful in applying for the promoted post of Regeneration Policy Officer. The offer for this post was conditional on the claimant returning a signed acceptance of the terms and conditions of appointment (page 51). The Schedule of principal terms and conditions of employment (page 54) included a paragraph entitled “Continuity of Service” which provided that the claimant’s previous employment with the Scottish Government would count towards the period of continuous service, which was considered to have begun on the 20 July 2020.

Claimant’s submissions

16. Ms Toyi acknowledged the issue for the Employment Tribunal to decide today was length of service. Ms Toyi agreed the claimant had received a conditional offer of permanent appointment by email dated 12 March 2020 and had delivered all of her documents for checking on the 19 March 2020. The claimant believed that but for Covid, she would have started earlier in the post.

Ms Toyi submitted the unusual circumstances of lockdown should be taken into account.

Respondent's submissions

- 5 17. Ms Monan submitted the tribunal did not have jurisdiction to determine the claim of unfair dismissal because the claimant did not have the necessary length of service required to bring such a claim. Ms Monan referred to section 108 Employment Rights Act which provides that section 94 (the right not to be unfairly dismissed) does not apply to the dismissal of an employee unless
10 s/he has been continuously employed for a period of not less than two years ending with the effective date of termination.
18. There was no dispute in this case that the effective date of termination of employment was the 6 June 2022. Section 211(1) Employment Rights Act states that an employee's period of continuous service begins with the day on
15 which the employee starts work. There was no dispute in this case that the claimant started work on the 20 July 2020.
19. Ms Monan referred to the fact the claimant had changed her position several times regarding the period of her employment. The claim form noted the employment started on the 20 July 2020 and ended on the 6 June 2022. It
20 was only when the respondent raised the issue of length of service, that the claimant adopted the position that a contract had been formed on the 13 March 2020. The date the claimant started work changed from the 20 July to the 8 July. The claimant now appeared to be arguing the contract was formed on the 19 March 2020 when she was told her documents were satisfactory.
- 25 20. Ms Monan submitted the claimant was neither credible nor reliable because she kept changing her position, and that she did so because it was convenient to her case. Ms Monan referred to a previous case where the Employment Tribunal had described the claimant as being prepared to tell lies to support her case; and to a previous preliminary hearing where the claimant stated she
30 had not received a document when it was clear she had received it.

21. Ms Monan referred to the conditional offer of permanent appointment, which made clear the offer was conditional upon pre-employment checks being satisfied and the acceptance of the terms and conditions of employment being returned. The letter also made clear that a joining letter would then be issued to confirm the appointment. Further, the pre-employment eligibility and security checks made clear that following completion of satisfactory pre-employment checks and return of the signed acceptance, a joining letter would be issued.

22. Ms Monan submitted there was no binding contract prior to the 8 July 2020 because no start date had been confirmed. The joining letter dated 8 July 2020 was accepted by the claimant when she turned up for work on the 20 July 2020. This was supported by the fact the claimant was not paid prior to the 20 July 2020.

23. Ms Monan submitted the claimant did not have qualifying service to proceed with a claim of unfair dismissal.

Discussion and Decision

24. The tribunal had regard firstly to the relevant statutory provisions. Section 94 of the Employment Rights Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 108 provides that section 94 does not apply to the dismissal of an employee unless s/he has been continuously employed for a period of not less than two years ending with the effective date of termination.

25. There was no dispute in this case that the effective date of termination of employment was the 6 June 2022.

26. The issue for the tribunal to decide is whether the claimant had been continuously employed for a period of not less than two years ending with the effective date of termination of employment on the 6 June 2022.

27. There was no dispute regarding the fact the claimant was sent a conditional offer of permanent appointment by email of the 12 March 2020. The claimant was required to accept that conditional offer by signing and returning the signed acceptance, which she did on the 13 March 2020. The claimant was also required to complete pre-employment eligibility and security checks. The claimant personally delivered all of the required documentation for checking on the 19 March 2020.
28. The claimant argued that once her documents had been successfully checked, a contract was formed. The tribunal considered this argument was wrong both legally and factually. The tribunal acknowledged the conditions set by the employer may have been met, but the conditional offer of permanent appointment made clear that following completion of satisfactory pre-employment checks and return of the signed acceptance, a joining letter would be issued. The Pre-Employment Eligibility and Security Checks made clear that the checks had to be conducted before a formal offer of employment could be made. The claimant had to wait for the joining letter to be issued before starting employment.
29. The tribunal acknowledged the fact Covid/lockdown may have delayed the issuing of the formal offer of employment, and that but for that situation the claimant may have started employment sooner, but those facts are not relevant to determining the length of the claimant's service.
30. The joining letter was issued on the 8 July 2020 and the claimant's employment started on the 20 July 2020. The claimant did not carry out any work for the respondent prior to this date and was not paid (or entitled to be paid) prior to the 20 July 2020.
31. The conditional offer and the pre-employment eligibility and security checks made clear that the conditional offer had to be accepted, and the eligibility and security checks conducted, before a formal offer of employment could be made. The tribunal did not doubt the claimant, having read the documents, was aware of the (two stage) process.

32. The tribunal concluded, from these facts, that the claimant's employment commenced on the 20 July 2020. The effective date of termination of employment was the 6 June 2022. The claimant has less than two years continuous service. The claimant, accordingly, does not have the necessary period of qualifying service to proceed with a claim of unfair dismissal. The tribunal decided to dismiss the claim because a tribunal does not have jurisdiction to determine the claim in circumstances where the claimant does not have the necessary period of qualifying service to bring the claim.

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Employment Judge: L Wiseman
Date of Judgment: 15 February 2023
Entered in register: 20 February 2023
and copied to parties

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