EMPLOYMENT TRIBUNALS

Claimant: Ms A. N Fazilova

Respondent: Host Staffing Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD remotely using CVP **On: 19- 21 May 2021**

Employment Judge: Ms D Henderson
Non-legal Members: Mr D Clay; Ms S Campbell

Appearances
For the claimant: In person
For the respondent: Mr R Morton (Paralegal)

JUDGMENT

It is the unanimous decision of the Tribunal that:

1. **The Tribunal had no jurisdiction to hear the claim of unfair dismissal as the claimant does not have 2 years' continuous service. The Tribunal made no formal findings as to the claimant's status as an employee.**

2. **The claimant's claims for direct sex discrimination; sex-related harassment and victimisation under the Equality Act 2010 do not succeed and are dismissed.**

3. **The Tribunal gave its Judgment and Reasons orally at the conclusion of the Hearing. The claimant requested written reasons, which are set out below. The parties were reminded that Tribunal Judgments and Reasons are placed on the Online Register and can be searched online.**

REASONS

1. This was a claim for unfair dismissal (constructive); direct sex discrimination and sex-related harassment and victimisation brought by an ET1 dated 22 December 2019, following early conciliation with ACAS from 21 November to 21 December 2019.

2. The claimant worked with the respondent as a "casual" worker in the hospitality industry. There was a dispute as regards the dates of her service with the respondent.

The Issues

3. The Tribunal clarified the issues for determination in this claim with parties at the commencement of the hearing. It was confirmed that these were the issues agreed by the parties at a Case Management Preliminary Hearing (telephone) on 22 April 2020 as follows:

Unfair Dismissal

-whether the claimant (C) had two years' continuous service to allow her to bring a claim of unfair dismissal; if yes
-whether C was employed by the respondent (R); if yes
-whether C's employment was terminated by C or R;
-if terminated by C, whether she was constructively dismissed (the repudiatory breach relied upon by C was R's alleged failure to deal properly with her informal and formal grievances (on 26 October and 5 November 2019 respectively) and failure to offer her any work after 4 November 2019;
-if the claimant was dismissed what was the reason for the dismissal;
-whether the dismissal was fair

Sex Discrimination

-whether Mr Grzymkowski acted as alleged by C on 26 October 2019; if so
-whether his conduct amounted to sex-related harassment or direct sex discrimination (it should be noted that no comparator was identified in the original list of issues). At the hearing the Employment Judge asked the claimant about who she said had received more favourable treatment than her and she referred to a female colleague who had also been late but who had been allowed to work. The claimant did not refer to any male comparators (actual or hypothetical); if it did
-whether R had established the statutory defence under section 109 (4) of the Equality Act 2010 (the EqA). This issue was not pursued by the respondent at the hearing.

Victimisation

-whether either or both of C's informal or formal grievances were protected acts under section 27 (2) (d) EqA namely "making an allegation (whether express or not) that the respondent or another person has contravened the Act"; if yes -whether R's failure to offer/give C work after 4 November was because of such protected act(s).

Conduct of the Hearing

4. The hearing was conducted remotely on the Cloud Video Platform (CVP). There were some initial problems with the claimant and one of the Tribunal members connecting to the hearing, but these were resolved relatively quickly. There were some minor connectivity problems with one or two of the witnesses, but these did not delay the hearing.

5. There was an electronic Agreed Bundle of documents (of 151 pages). Page references in this Judgment and Reasons are to that bundle.

Day 1

6. The Tribunal dealt with the preliminary issue of continuous service and also the potential of strike out of the direct discrimination and harassment claims (see below).

Day 2

7. The Tribunal heard evidence from the claimant. There was then an application by the respondent for a strike out (under rule 37 of the Tribunal Procedure Rules 2013) on the basis that having heard the claimant's evidence there was no case to answer. This application was refused (see details below).

8. The Tribunal also heard evidence from Ms Asel Seidimatova (on behalf of the claimant) and on behalf of the respondent from Mr Batrek Grzymkowski (Recruitment Consultant); Ms Molly Fallon (Accounts Manager) and Ms Elaine Hannon (HR Manager). All the witnesses adopted their written statements as their evidence in chief.

9. The Tribunal also heard oral closing submissions from Mr Morton and the claimant.

Day 3

10. The Tribunal spent the morning in chambers reaching their decision – which was delivered orally to the parties at 2pm. The claimant asked for written reasons. It was explained that the judgment and reasons would be placed on the online register and could be searched using the names of the claimant and respondent.

Preliminary Issue of Continuous Employment re Unfair Dismissal claim

11. It was agreed with the parties that the Tribunal would deal first with the issue of continuous service as a preliminary point, to determine whether the claim for unfair dismissal could be heard by the Tribunal.

12. The parties' prepared written witness statements did not specifically deal with this point, but each of the claimant and Ms Hannon gave oral evidence on oath.

Findings of Fact - length of service

13. The claimant said that she went through a registration process on 7 January 2018. At that time, the respondent's name was Fuel Hospitality Ltd, but it was the same legal entity as the current respondent (namely company number 10120220). The claimant regarded the registration process as the start of her employment. She said her P45 showed her leaving date as 15 January 2020. This meant she had two years' service.

14. The claimant accepted in cross examination that her first working day was not until February 2018 – as her first payslip showed wages for the week ending 25 February 2018 (page 150). The claimant also accepted that she had resigned on 14 November 2019 (page 76) because of the incident with Mr Grzymkowski on 26 October 2019 and that she had last worked at the end of October 2019.

15. She had consulted ACAS on 21 November 2019 (page 1) and she accepted that when she did so, she believed that her employment had ended. There was also an email from the claimant (page 102) to the respondent dated 21 November 2019 which said that she had found a new job with another (more professional) agency. The claimant relied on the fact that her P45 (page 105) stated her leaving date as 15 January 2020.

16. Ms Hannon was asked about the leaving date on the P45 (which was issued on 20 January 2020). She said that although the claimant had last worked in October 2019 and had resigned on 14 November 2019, she was owed accrued holiday pay, which was not paid through the respondent's pay roll until 15 January 2020 (page 104). Ms Hannon said that the P45 could not be issued until after that date.

17. The non-legal members of the Panel both commented in deliberations that this did not appear to be correct and was most likely a deficiency in the respondent's systems. There is no reason why a P45 cannot show an earlier termination date prior to final payments being made to an employee/worker. The Tribunal does not accept Ms Hannon's evidence on this point as accurate, though it may be her genuine belief.

Conclusions – length of service

18. On the basis of the evidence presented, the Tribunal finds that the claimant commenced her employment (at the earliest) in or around 25 February 2018 which was her first working day. Section 211 of the Employment Rights Act 1996 (ERA) states that the continuous period of employment begins "with the day on which the employee starts work". This is not necessarily the same as the date of any contract signed or of the registration process.

19. The claimant resigned on 14 November 2019 and had another job and consulted ACAS on 21 November 2019, which indicated that she regarded her employment as at an end. Further the claimant brought her claim for unfair dismissal (and discrimination) on 22 December 2019 and her ET1 says her employment ended on 22 December 2019. There is inconsistency as to the exact date of termination of employment.

20. At the earliest the claimant's employment ended on 14 November 2019 and at the latest on 21 November 2019 when she obtained another job. Accordingly, from 25 February 2018 to 21 November 2019 is not a period of 2 years. Even if the Tribunal were to accept 15 January 2020 as the leaving date, the claimant would still not have completed two years' service.

21. The Tribunal has no jurisdiction to hear the claimant's unfair dismissal claim.

Consideration of Strike Out of the claims for direct sex discrimination and harassment on sex-related grounds

Tribunal Consideration – Day 1

22. The Tribunal sought to identify the exact nature of the discrimination claims with the claimant on the first day of the hearing.

23. She said that the less favourable treatment was the incident with Mr Grzymkowski on 26 October and that a colleague of hers who was 30 minutes late was not told to go home and was allowed to work; however, that colleague was female. The claimant had not realised that she needed to compare herself with someone who did not share her own protected characteristic of sex.

24. The claimant was referred to her ET1 and the formal grievance of 5 November 2019 where she said she believed she was "treated unfairly because of my gender" and asked what she had meant by that comment. The claimant repeated her earlier statement that her female colleague had been treated better than herself, which was not fair. The claimant also said that the respondent treated casual workers badly and with no respect – these workers were both men and women.

25. Mr Morton made no formal strike out application but said that the Tribunal could strike out the direct sex discrimination and sex-related harassment claims on its own initiative (under rule 37 of the Tribunal Procedure

Rules 2013) as the claimant's responses demonstrated that these claims had no reasonable prospect of success. However, he accepted that the reference in the formal grievance to "gender" could make this a protected act under section 27 (2) EqA and therefore, accepted that the Tribunal should hear the victimisation claim.

26. Having considered this matter, the Tribunal decided not to strike out the direct discrimination and harassment claims. The Tribunal bore in mind the guidance from higher courts about the danger of striking out discrimination claims without hearing all the evidence. As the Tribunal would be hearing evidence on the victimisation claim, which was essentially the same evidence as for the other discrimination claims, it would be appropriate to consider the discrimination claims as a whole in the light of the evidence presented to the Tribunal.

Respondent's application – Day 2

27. On the second day of the hearing (after the claimant had concluded her evidence) Mr Morton made a formal application to strike out all the claimant's discrimination claims under rule 37 on the basis that they had no reasonable prospect of success. He said that following the claimant's evidence, the respondent had no case to answer as the claimant could not produce a relevant comparator for her direct discrimination claims.

28. Mr Morton again acknowledged that there may be some justification for allowing the victimisation claim to continue given the reference to "gender" in the formal grievance on 5 November 2019. He accepted that the situation had not changed in any material way since the discussion of these matters on Day 1 as the claimant's evidence was wholly consistent with her earlier assertions about her case.

29. Mr Morton referred to the Tribunal to the cases of **Anyanwu [2001] ICR 391** and **Ezsias {2007] IRLR 603**– though he gave no formal references. He said that a Tribunal should strike out only in the most obvious cases, and this was one such case. Mr Morton referred to the overriding objective and said that if the victimisation claim alone continued it would reduce the hearing time considerably.

30. The claimant opposed the application by simply repeating her assertion that the respondent treated casual workers badly. The Tribunal confirmed with her again that these workers included men and women.

31. The Tribunal refused the strike out application in its entirety. None of the matters discussed on the second day differed from those canvassed on day one. The only difference was that the claimant had given her evidence, which was wholly consistent with what she had said on the first day. The Tribunal noted the case references made by Mr Morton – these were the references which it had in mind when referring to the "guidance from the higher courts" in its decision on strike out on day one.

32. The Tribunal refused the strike out application. It was appropriate to hear the claimant's full case and also to hear from the respondent's witnesses and to allow the claimant to cross examine them. The Tribunal would ensure that the questions asked were relevant to the issues.

33. The Tribunal was mindful of the overriding objective but noted that all the remaining witnesses had relatively short statements and the issues were fairly brief. The hearing would not be unduly lengthened. In fact, all the remaining witnesses gave their evidence and submissions were all concluded on the second day of the hearing.

Findings of Fact - Discrimination Claims

The incident on 26 October 2019

34. On 26 October the claimant was booked to work at the London Stadium (one of the respondent's clients). Mr Grzymkowski was the manager overseeing that site. The claimant arrived at the site 15 minutes late and was told by Mr Grzymkowski that her work had been given to another colleague and that she might need to go home but also that she could stay and wait to see if another job came up. The claimant tried to explain the reason for her lateness but Mr Grzymkowski would not listen to her.

35. The claimant said that Mr Grzymkowski was laughing at her and she felt that his behaviour was "*intimidating, malicious, offensive, insulting and aggressively dominating*" (as per the claimant's witness statement). The claimant said she was very upset by Mr Grzymkowski's behaviour and so she left the staff check-in area to find Ms Westwood-Hearn (Holly) the client, who was the manager of the Forge restaurant at the London Stadium. The claimant had been a regular worker at the Forge and hoped that Holly could assist her. Holly spoke to Mr Grzymkowski and told the claimant that the matter was "out of my hands"

36. The claimant put to Mr Grzymkowski in cross examination that his laughing her was aggressive. He did not agree, but accepted that if he had laughed at her, it would have been unprofessional.

37. The respondent said that the claimant had breached the security rules of the London Stadium. Mr Grzymkowski and Ms Fallon explained that there was a two stage process: first a security check/bag search upon entry. If cleared, the individual was given a wristband and then proceeded to the staff check-in area. They would then be registered and given a job card (and possibly another wristband) which card would give them access to the Stadium to carry out their work and could also be used to confirm the hours they had worked. The claimant had cleared the bag search but was not given a job card and so should not have entered the Stadium to speak to Holly.

38. Following this breach of security rules the claimant was sent home. She said that in doing so Mr Grzymkowski violated her dignity in the workplace; undermining her in front of Ms Fallon, Holly and her other colleagues. The

claimant also said that a female colleague of hers had been 30 minutes late and was still allowed to work her shift. The claimant believed that this was discrimination against her on the grounds of her gender.

39. Mr Grzymkowski and Ms Fallon accepted the sequence of events on that day. However, Mr Grzymkowski did not accept that he had been aggressive. The claimant asked him in cross examination whether he treated casual workers without respect, which he did not accept. The claimant also referred to her colleague who had been late but been allowed to work. Mr Grzymkowski said that this could have been because there was still a shift available. The claimant did not specify the name of the colleague she was referring to.

40. Ms Fallon confirmed Mr Grzymkowski's account of the incident and the security procedures, though she said that 26 October was her first time at the London Stadium carrying out registration. She said that she did not think the claimant appeared upset, but more confused as to why she was not allowed to work. Ms Fallon said the claimant appeared to have "a bit of an attitude", was rude and impatient and then had breached the security rules by entering the stadium without a job card. The card was important as the client needed to know (for safety reasons) who was on the premises.

41. Ms Fallon said that she had not regarded Mr Grzymkowski's behaviour as being discriminatory on grounds of the claimant's gender.

42. Much of the evidence of this incident is not in dispute – but on the question of whether Mr Grzymkowski was aggressive, dominating or abusing his position, the Tribunal find that no evidence was presented by the claimant to support those assertions. The Tribunal accepts that the claimant may have subjectively perceived that the refusal of work and being sent home was humiliating and violated her dignity and that she was upset by this. However, on her own evidence there was nothing to show that this treatment was linked to her gender.

<u>The grievances</u>

<u>The informal grievance of 26 October</u>

43. This was at page 83 and recited the factual substance of the claimant's witness statement as regards the incident at London Stadium and Mr Grzymkowski's behaviour.

44. The claimant accepted in her oral evidence that this grievance made no reference to any form of discriminatory behaviour. She said that she done this quickly after the incident and did not have much time. She said that her main concern had been Mr Grzymkowski's bullying and harassment of her and that she wanted the matter to be addressed by Ross Taylor the owner of the respondent.

45. The claimant accepted that the respondent could not know from this document that she was making any allegation of discrimination.

46. The Tribunal finds that this is not a protected act.

Formal grievance/appeal of 5 November

47. This was at pages 87-89. Both parties accepted that this was essentially an appeal against the grievance outcome made by Ms Hannon on 1 November 2019 (at page 85), after she had spoken to Mr Grzymkowski and Ms Fallon.

48. The claimant essentially reiterated the content of her informal grievance but adding more detail. The claimant also articulated her perception of Mr Grzynkowski's behaviour towards her and for the first time mentioned that it was intimidating, aggressive, humiliating and violated her dignity. The claimant also said (for the first time) that she had been treated unfairly because of her gender. When asked what she meant by this, the claimant again cited the example of her female colleague who had been 30 minutes late but was allowed to work her shift. She gave no other opinion as to why she had been treated differently from her colleague.

49. Ms Hannon was asked (in Tribunal questions) what she understood by the claimant's reference to being treated unfairly because of gender and whether she understood it to be a discrimination claim. She said that she had not regarded it as such because most of the casual workers were female. However, as she was not sure what the claimant meant by this, she had requested a meeting with the claimant to discuss this.

50. Both the grievances/appeal were sent by the claimant to Ross Taylor the owner of the respondent business. He responded on 5 November to the claimant in an email (page 97) to say that he had tried to call her without success and was asking HR (Ms Hannon) to deal with the claimant's complaints. The claimant acknowledged his email on 6 November (page 98) and apologised for missing his calls.

51. The claimant chased progress of her grievance/appeal on 11 November and then resigned (citing Mr Grzymkowski's behaviour on 26 October and the lack of work provided to her from 4 November onwards, as the reasons for her resignation).

52. The claimant did mention in her grievance/appeal of 5 November unfair treatment because of her gender; she is not expected to refer to the Equality Act 2010 expressly or to put her claim in legal terms. However, when the substance of the complaint she was making was explored with her, the claimant said that the allegation was about the more favourable treatment of her female colleague. The claimant's complaint appears to be about unfair and inconsistent treatment, possibly because of favouritism and she referred to Mr Grzymkowski's misuse of his power and to bullying and harassment of casual workers - but her complaint (as described by her in her own words) was not about discrimination based on her gender.

53. The Tribunal finds that this was not a protected act.

Claimant not given work after 4 November

54. There is no dispute that the claimant did not work any shifts after 27 October 2019.

55. The respondent says that the claimant continued to be offered the opportunity to work by means of their app and text messages. The work is handed out on a first-come, first-served basis and the claimant was not the first person to accept the work in each instance.

56. The claimant queried why she should be suddenly slower to accept work after the 26 October incident, when she had received plenty of work before that. She believed that Mr Grzymkowksi was preventing the respondent from giving her work because of her complaint against him.

57. In Tribunal questions Mr Grzymkowski accepted that as the manager of 10-12 sites (including the London Stadium) he did have some influence as regards the selection of casual workers on those sites, taking into account any wishes of the client. The claimant worked regularly at the London Stadium but not on any of Mr Grzymkowski's other sites.

58. Mr Grzymkowski said that following the 26 October incident he had decided that the claimant would not be offered any further work at the London Stadium because she had breached the security codes. He did not have any influences as regards sites that were not under his supervision.

59. At page 132 – 143 the respondent had listed the messages sent to the claimant to outline available work, over the period from 28 October 2019 to 10 December 2019, which is after the claimant resigned. The claimant did not dispute this and in fact complained at the end of her evidence about her information remaining on the respondent's system, saying this was a breach of the GDPR regulations. This is an indirect acknowledgement that the respondent was sending the job availability to the claimant.

60. The Tribunal finds that the respondent appears to have offered the claimant work after the 26 October incident and after 4 November, but not at the London Stadium. The respondent says that the claimant did not accept the work within the necessary time frame, the claimant in her resignation (on 14 November) complains that she has not been booked for any work since 4 November.

61. It was put to the claimant in cross examination that the period from 4 to 14 November was a relatively short one and the Tribunal agrees with this observation. There was no evidence presented to the Tribunal to show that the respondent had deliberately refused to give work to the claimant after 4 November (other than at the London Stadium).

General Observations about the claimant's case

62. The Claimant made several references to her complaints not being treated seriously by the respondent and not being dealt with by Mr Taylor. The Tribunal has found (see above) that Mr Taylor did try to contact the claimant to discuss her formal grievance/appeal and the claimant accepted that she had missed his calls. Mr Taylor suggested that the matter should be dealt with by HR, which the Tribunal finds was reasonable and appropriate in the circumstances.

63. The Tribunal finds that generally Ms Hannon dealt with the claimant's complaints relatively promptly. She investigated the informal grievance (dated 26 October) and gave her response on 1 November. The claimant complained in her oral evidence that Ms Hannon had not interviewed her but only heard from Mr Grzymkowski and Ms Fallon, which was unfair. However, the claimant did not suggest that this was because of her gender; and the 26 October grievance contained no reference to gender/discrimination.

64. After the claimant resigned on 14 November, Ms Hannon attempted to arrange a meeting to discuss the grievance/appeal of 5 November. The claimant told the respondent that she had signed on with another agency and then approached ACAS, on 21 November and issued her ET1 on 22 December 2019, which indicated that the claimant did not wish the issue of her grievance/appeal using the respondent's internal procedures.

65. The claimant also made numerous references during the hearing to casual workers being badly treated and being bullied and harassed by the respondent. The claimant's witness Ms Seidamatova confirmed that belief in her witness statement (though she had no direct knowledge of the incident with Mr Grzymkowski on 26 October). First, the issue of the treatment of casual workers was not part of the discrimination claim and secondly, the claimant accepted that the respondent's casual workers are both male and female and gave no evidence to show that such alleged treatment was linked to her gender.

66. These matters may well have been unfair (though the Tribunal makes no finding of fact on this point) but there was no unfair dismissal claim before the Tribunal as the claimant did not have the requisite two years' service.

Conclusions

<u>Sex Discrimination</u>

-whether Mr Grzymkowski acted as alleged on 26 October 2019;

67. The Tribunal has found that Mr Grzymkowski's behaviour on 26 October towards the claimant may have been unprofessional and could have been perceived by the claimant as humiliating and violating her dignity as regards being refused work and being sent home. The Tribunal did not find that his behaviour had been aggressive or bullying.

-whether his conduct amounted to sex-related harassment or direct sex discrimination

68. The claimant has not satisfied the burden of proof (even taking her own evidence at its highest) under section 136 EqA to provide evidence of facts from which the Tribunal could find that Mr Grzymkowski's conduct was because of the claimant's gender. Even if (which is not the case) the Tribunal had found that Mr Grzymkowski had been aggressive towards the claimant, there was no evidence to show that this was because of her gender.

69. The claimant consistently referred when asked about why she considered this treatment to be discriminatory to a female colleague who had been better treated. The claimant did not appear to understand that the less favourable treatment must be because of her gender. The Tribunal do not criticise her for this as she was a litigant in person, but it had been explained to her several times during the course of the hearing.

70. The direct discrimination and sex-related harassment claims do not succeed

Victimisation

-whether either or both of the informal or formal grievances were protected acts under section 27 EqA;

71. The Tribunal has found that were no protected acts (see Findings of Fact above)

- *whether R's failure to offer C work after 4 November was because of such protected act(s).*

72. As the Tribunal has found that there were no protected acts, it does not have to go on to consider this issue.

73. However, even if the Tribunal were incorrect on its conclusions, it is only the formal grievance/appeal of 5 November which could be a protected act. If this were the case, the Tribunal finds that the respondent did continue to include the claimant in offers of work after 5 November (at sites other than the London Stadium) – this was based on the claimant's own evidence. Further, the claimant only waited another 9 days before resigning on 14 November, when she would not be seeking further work from the respondent. There was no evidence presented to the Tribunal to show that the claimant was subject to any detriment causally linked to a protected act during this period.

74. The claim for victimisation does not succeed.

75. In accordance with the overriding objective, the Tribunal took pains to explain to the claimant the issues for determination in this case in everyday

language bearing in mind that she was a litigant in person. This was done at the start of the hearing and on several occasions throughout the hearing.

76. The Tribunal also followed the guidance of the higher courts and did not strike out the claims but heard the evidence in full. The Tribunal understands the claimant will be disappointed with the outcome of this case, but we can only make decisions based on the evidence presented to us and by applying the relevant legal principles.

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Employment Judge Henderson

JUDGMENT SIGNED ON: 24 May 2021

JUDGMENT SENT TO THE PARTIES ON
24th May 2021

FOR THE SECRETARY OF THE TRIBUNALS