



EMPLOYMENT TRIBUNALS

Claimant: Miss Gisele H da Cruz Andrade

Respondent: East London NHS Foundation Trust

Heard at: East London Hearing Centre (by CVP)

On: 14 October 2020

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Cyril Adjei, of Counsel, instructed by Bronya Greatrex of Hempsons Solicitors

JUDGMENT

1. The Claimant was employed by the Respondent from 06 September 2016 until 30 June 2019. Accordingly, she has the two years' qualifying service needed to bring a claim for unfair dismissal.
2. On 30 June 2019 the Claimant was dismissed by reason of redundancy.
3. The existing case management orders remain to be followed, and the case remains listed for hearing 2-5 February 2021 (which may need to be a virtual hearing).

REASONS

Background, purpose of hearing and parties' positions

1. This hearing is to decide:
 - a) The Claimant's correct legal status during the period from 6 September 2016 to the end of December 2019. The Claimant

alleges she was an employee throughout. The Respondent disputes this.

- b) If the Claimant was an employee at any point, the date on which her employment started and ended.
- c) Whether by the date of the Claimant's dismissal, she had been continuously employed for a period of not less than two years so as to qualify to bring a claim for unfair dismissal and a claim for a redundancy payment.
- d) Whether the Claimant was dismissed by reason of redundancy at any point.

2. Ms Andrade claims to have sufficient service as an employee to bring a claim for unfair dismissal. She asserts that this was between 06 September 2016 – 31 December 2019. The Respondents do not agree.

3. It is common ground that Ms Andrade worked for the Respondents as part of their bank of people who work as and when needed and available, starting in 2006. She was a healthcare worker. On 06 September 2016 she started working on an NHS funded project with the acronym CQUIN, standing for Commissioning for Quality and Innovation. She says that this was the start of her employment and that she was employed on a fixed term contract, which was continuous with one starting on 09 March 2018, but was never given a paper document. The Respondent says that she remained a bank worker, and signed a new bank agreement when starting that role.

4. There was then a period of employment under a fixed term contract. This commenced on 09 March 2018. It was for 12 months, expiring on 31 March 2019. It was extended by two months and then for a further month to 30 June 2019. It is not in doubt that Ms Andrade was an employee for that period. She started as a Band 4 project manager in the CQUIN team of two (her and Sheena Nixon) then in February 2019 moved to a Brexit project until the end of her fixed term and was then briefly in the estates department after 30 June 2019.

5. Ms Andrade last worked for the Respondent on 05 July 2019. She remained on the bank until 31 December 2019, but was signed off as unfit for work by reason of stress. She says that she remained employed after her fixed term contract ended, as she says she was promised a further 6 months, then reduced to 4 and to a bank arrangement, and relies on her claim that there was a promise of a 6 month term.

6. The Respondent says that Ms Andrade accepts that she was dismissed on 30 June 2019, so that she was not an employee after that, and reverted to being a bank worker.

7. The Respondent says that she was only an employee for the time she was on a fixed term contract, and that for the rest of the time she was a *"limb b worker"* on an ad hoc bank arrangement, employed by the day, and without continuity of service as there were breaks of more than a week, which they say were not which absences from work in circumstances such that, by arrangement

or custom, she was regarded as continuing in the employment of his employer for any purpose¹ (which would bridge the gaps if so).

Evidence

8. I heard oral evidence from Ms Andrade, and from Sheena Nixon, who was also, from 2018, on a fixed term contract on the CQIUN project, and who was Ms Andrade's manager, and from Mason Fitzgerald, a senior manager to whom Ms Nixon reported (Director of Performance and Planning). I was given a bundle of documents from the Respondent of 314 pages. Ms Andrade objected that some documents were omitted and sent in her own bundle of 236 pages. Mr Adjie was very helpful in identifying the overlaps and in directing me to redacted copies in the Respondent's bundle where Ms Andrade referred to documents in her bundle where they contained without prejudice matters. Ms Andrade also sent in copies of her bank statements immediately before the hearing. Sensibly, Mr Adjei took no issue with that late delivery: the point of them was to demonstrate when money arrived in Ms Andrade's account from the Respondent, Ms Andrade not accepting that there was a complete record of payslips.

Submissions

9. I made a full note of the submissions in my typed record of proceedings, and they find their way into my reasons, below.

Findings of fact

10. Ms Andrade started working for the Respondent in 2006 when an undergraduate student. She enjoyed the work, and carried on after she graduated. She signed a standard bank employee form, and worked under it for 10 years. She worked shifts in a caring capacity in all (or almost all) of the Respondent's establishments.

11. As a bank worker, Ms Andrade did not have continuity of employment. She was free to accept or reject any shift, and not obliged to make herself available for work for any particular times. She was not an employee save when at work, and she does not say that this gave her any rights as an employee with continuous service (and nor was she continuously employed).

12. The CQUIN project was separately funded by the NHS to the extent of £12.5m a year across the country. Ms Nixon acquired the role of running that project for the Respondent, at Band 8c. She had been an independent contractor at first, but with the change to IR35 rules had become a bank employee in 2017, before also obtaining a fixed term contract in 2018.

13. From 06 September 2016 Ms Andrade became involved in CQUIN as an administrator. She had extensive working knowledge of the Respondent's places of work, and a degree in a relevant discipline.

14. On 05 August 2016 Ms Nixon emailed Ms Andrade (72):

¹ S212(3)(c) Employment Rights Act 1996

“Again, thank you for the conversation yesterday and I’m very much looking forward to working with you. By way of confirmation, please see below:

-Your role will be CQUINN project support at a Band 4

-The hourly rate for you is £11.29, which translates into £423.375 per week (37.5 hours).

- Your start date will be 6th September at 9.00, Alie St. Ring me when you arrive and I will meet you in the foyer. You’ll be located on the 1st floor in Alie Street.

-Further information on CQUINS can be found here: [website address] I recommend you read the CQUIN guidance to give you an overview.

I am on leave from today until 22 August. Please liaise with Mohit if you have any urgent queries while I am away, otherwise liaise with me by email or phone [number given] today or from 22nd August onwards.

Have a wonderful holiday.

Best wishes,

Sheena”

15. On 08 September 2016 Ms Andrade signed a new bank worker’s form (74-75). The Respondent was not able to say why one was required, as she had been a bank worker for 10 years. Ms Andrade says that this supports her claim that this role was on a different basis.

16. Ms Andrade submitted timesheets and was paid on the PAYE basis getting standard NHS payslips. These were headed “*Bank Admin Grade 4*”. The payslips show that Ms Andrade worked almost every week. Where there were gaps in payslips, Ms Andrade was able to show that her bank statements showed money coming from the Respondent that can only have been pay. For about half a year there was a gap in the computer records as the payslips were done manually. The payslip (132) for week 35 in 2017/2018 – to 26 November 2017 – shows Ms Andrade going up to Band 5 and an annual pay (fte) of £21,138, up from £18,087.

17. The payslips do not record an even flow of money. I accept Ms Andrade’s evidence that this reflected an uneven processing of timesheets rather than an uneven flow of working time. Many of her timesheets show her working 45 hours a week, which she says (and I accept) she never did, others only 25 hours. In a week where she worked 30 plus hours some time would not be processed in time for the pay run, only for the next week all the timesheets to be processed in time, plus the one missed from the previous week, hence an apparent variance in working pattern.

18. Ms Andrade worked autonomously: she reported to Ms Nixon and was directed by her, but (by agreement) she worked a day a week at home, and Ms Nixon was content for Ms Andrade to choose which day. Ms Nixon said that Ms Andrade worked 3-4 days a week in total, every week, and had projects to complete.

19. From 20 July 2017 - 04 September 2017 Ms Andrade went home to Cape Verde to prepare for her forthcoming nuptials. There is no documentation about how this came about, other than a friendly email from Ms Nixon before she left.

20. The fixed term contract commenced on 09 March 2018. The offer was first dated 14 May 2018 (156-8), at £27,220 a year based on 30 hours a week. This was a second pay rise for Ms Andrade. The contract document originally prepared was dated 02 July 2018 (163). It was a contract at 30 hours a week, but this was increased to 37.5 hours a week, confirmed by Ms Nixon to human resources on 10 July 2018, with effect from 01 June 2018 (159). Before that Ms Andrade had worked fewer hours. She was effectively full time. She had no other employment or work.

21. On 27 November 2018 Ms Andrade raised a grievance against Ms Nixon (MF ws para 9). This apparently related to Ms Andrade's wish to become a Band 7: the detail is not relevant to the issues I have to decide and they are not set out in the witness statements, other than that Ms Andrade described Ms Nixon as "*an abusive manager*" in an email of 28 June 2019 to Mr Fitzgerald and others (255). Mr Mason hoped to resolve this by mediation, but the Trust took so long to organise it that Ms Andrade, having agreed to this originally, changed her mind in February 2019.

22. On 11 March 2019 Mr Mason wrote to Ms Andrade (177), referring back to a discussion on 14 January 2019 about the ending of the fixed term contract on 31 March 2019, and discussed further on 06 March 2019. The letter records that funding for CQUIN had been halved for the financial year 2019/2020. She was placed on the "at risk" (of redundancy) register. He extended her fixed term contract by two months so that she might seek project work outside CQUIN. He records that he offered a move to a project called "Agile" but that she had declined it, and asked to be funded for a course, "Prince2".

23. On 27 February 2019 Mr Fitzgerald moved Ms Andrade in a supernumerary role to a short term Brexit project (206). This was in response to a request to do so made by Ms Andrade's union official. I accept his evidence that he had declined to do so when the grievance was raised (November 2018) because he hoped the relationship between Ms Andrade and Ms Nixon could be repaired, but when Ms Andrade declined to continue with mediation and her union officer requested it he saw no alternative. I do not find that this was motivated by any wish to remove Ms Andrade. I so find on consideration of Mr Mason's extensive efforts to find Ms Andrade a role so that she did not have to leave on 30 June 2019.

24. On 25 March 2019 Mr Fitzgerald wrote to Ms Andrade again (183-184). He said that he was to reduce the CQUIN lead post by half (Ms Nixon's role) and to remove Ms Andrade's post entirely, because of the 50% funding reduction. He noted Ms Andrade's wish to work in project management, and said that he had obtained funding approval for Prince2 training, as she had asked. Her work on Brexit preparation was continuing, which might continue, depending on national matters. She had priority for suitable alternative roles. Mr Mason was not happy that Ms Andrade had put in for another course (QI coaching) and stated that this had been discussed with him, when it had not: he would not support that.

25. Before the funding was halved Mr Mason put in post someone to undertake the role Ms Andrade had fulfilled before being moved, on a 6 month secondment.

26. The “*at risk*” priority for job vacancies extends to jobs at the same band as the person was on, or the band below, with ring fenced pay for 3 years. Ms Andrade sought a Band 7 role, but this was outwith the policy. Ms Andrade claimed to be Band 6, but this was only for the very short time she was working with the estates team and expressly as a bank role: a matter of a few days. She was contracted at Band 5.

27. Mr Mason extended Ms Andrade’s contract by a further month, to the end of June 2019, to work in a supernumerary capacity in the estates team, where there might be project work to be undertaken. “*Supernumerary*” meant that her salary cost came from his budget, not that of the estates team. From 01 July 2019 Ms Andrade was paid at Band 6 rate. Mr Mason said that this was in recognition for the type of work usually done by an Estates Project Manager. An email of 24 June 2019 (250) to Ms Andrade and everyone else involved from the resourcing manager said:

“I can confirm that following my discussion with Mason, we agreed that you will be paid at band 6 substantively from 1 June 2019 until 30 June 2019. I completed a change form to reflect this which is being actioned by payroll for this month pay. You will then be set up on the bank from 1 July 2019 as band 6. The bank team is currently processing this and you receive a new assignment number before then.”

28. Ms Andrade found the issue of becoming a bank employee so stressful that she went off sick on 05 July 2019 and did not return.

29. No-one was sure where the date of 31 December 2019 had come from, and I make no finding of fact in regard to it.

Conclusions

30. The role of working in CQUIN was completely different to the previous work undertaken by Ms Andrade for the Respondent. It was administrative, not caring. Nothing turns on that, per se, but it may account for the signing of the new bank form.

31. Ms Andrade says that the human resources team said they would take time to get a contract to her, and that the bank form was necessary for her to be paid, pending the preparation of the fixed term contract she says she was offered and accepted. It is correct that the human resources department was dreadfully slow in getting a standard form fixed term contract to Ms Andrade in 2018 (as the Respondent accepted and for which it apologised). Ms Andrade had to chase the human resources person (who worked on the same floor of the same building) daily for 150 days until she finally got her fixed term contract of employment. Ms Andrade says this accounts for the absence of a fixed term contract in 2016.

32. However, Ms Andrade's internal correspondence claiming that she had a fixed term contract before 09 March 2018 does not predate 09 April 2019 (188), and so lacks the weight of anything contemporaneous. In particular she made no request for her fixed term contract at any time between 06 September 2016 and the offering of a fixed term contract in early 2018.

33. Ms Andrade's witness statement stated:

"The post was initially advertised as a six months fix-term contract band 5 post but during my interview with the Director, Mohit Venkataram (Commercial Director and responsible for CQUIN at that time), he has insisted that I start at a band 4 instead, promising that this will be just for the first six months so we both have an idea of how things goes and that if after six months CQUIN contracts were to continued and renewed for another year and we were both happy to continue working with CQUIN then I my contract would also be renewed for the next financial year and then I could start at the advertised band 5."

34. The difficulty with this is that there was no advertisement produced. Ms Andrade was paid by the hour and worked with timesheets, whereas when on her fixed term contract had a salary. I find that she was told the project was NHS funding dependent and was likely to be for 6 months initially at band 4, but if all went well, it would be continued and at band 5. That was what happened. When funding looked secure there were fixed term contracts for Ms Nixon and for Ms Andrade. Ms Nixon accepted that she was not on a fixed term contract until 09 March 2018. There is no reason why Ms Andrade would be on a fixed term contract and Ms Nixon, to whom she reported, would not be.

35. There is nothing else to suggest that Ms Andrade had a fixed term contract from 06 September 2016. There was discussion about a fixed term contract in 2018, for both Ms Nixon and Ms Andrade. Ms Nixon did not have one before Ms Andrade, and the discussions and letters do not make any reference (as might be expected) to a preceding fixed term contract.

36. Accordingly I find that Ms Andrade was not employed on a fixed term contract before 09 March 2018.

37. Mr Adjei suggests that as there was no fixed term contract and there was a bank arrangement for payment that Ms Andrade must fail to satisfy me that she was an employee before the start of the fixed term contract. That does not follow (as was discussed in the hearing), as although plainly Ms Andrade's situation changed on 09 March 2018 to becoming a fixed term employee, it does not follow that if she was not, as she claimed, a fixed term employee before 09 March 2018 she had to be a bank employee, although that was what she was signed up as (and recorded as such on her payslips). The documentation is not definitive: it is to the reality of the situation that I must look².

² Autoclenz Ltd v Belcher & Ors [2011] UKSC 41, para 35 "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

38. Bank workers are employees for the day, usually, or the week. It is the absence of mutuality of obligation and the breaks in employment that preclude them acquiring 2 years' service.

39. The CQUIN contract was not, however, like bank work where people are booked by the shift, or maybe by the week. This was a long-term project, initially of six months with the hope and expectation that it would continue after that, as it did. No one other than Ms Andrade and Ms Nixon worked on the CQUIN project. It was Ms Andrade's job to work on the various projects that CQUIN funded, along with Ms Nixon, and no-one else. They did more and more work until they got fixed term contracts of employment, and in Ms Andrade's case at a higher band.

40. A bank worker can accept or reject the offer of a shift. Ms Andrade had an ongoing series of projects to undertake. No-one else was available to do that work. Ms Nixon had work enough of her own. There was the expectation of 6 months' work, and then a continuation of that long-term pattern of work. Ms Andrade's job was as Ms Nixon's sole assistant in the CQUIN project work. Her emails had a job title – "*CQUIN Support Lead*" (eg 154). She was integrated into the organisation. She had her own direct dial telephone number, stated on her emails. This was the job of an employee.

41. It is not impossible to be long term bank staff, just as one can be long term agency staff³ but the difference between agency staff and Ms Andrade is that the relationship was solely the Respondent and Ms Andrade.

42. Mr Adjei laid stress on an asserted lack of mutuality of obligation, and on breaks in service exceeding one week, which would prevent continuity building up.

43. The work of Ms Andrade and Ms Nixon was fairly intense: Ms Nixon firmly agreed with this assessment. Ms Andrade worked every week on it, unless on holiday. She says that she took no sick leave, and the Respondent is not able to gainsay that. (So that there is no record of any sick pay is not a point indicating that there was not an employment relationship.)

44. If Ms Andrade had ceased to come to work, then this would not have been acceptable to the Respondent. If the Respondent had arbitrarily said to Ms Andrade that she was being replaced in her role, she would justifiably been unhappy about that. There was a mutual expectation to the extent of obligation which goes to the root of the relationship. There is no possibility that Ms Andrade was in business on her own account as a contractor, and Ms Nixon had needed to cease being so for IR35 reasons. There is the necessary mutuality of obligation.

45. Mr Adjei points to a 6 week gap (20 July 2017 - 04 September 2017) when Ms Andrade went home to Cape Verde to prepare for her forthcoming nuptials as evidence of a break in continuity, and to other holidays of over a week. Mr Adjei says that Ms Andrade told the Respondent that was what she was doing, and did not ask permission. There is no documentation either way

³ As in James v London Borough of Greenwich [2008] EWCA Civ 35

about how it was arranged or communicated. Ms Nixon was supportive of Ms Andrade doing this. Ms Nixon sent her off with an email headed (151) "*Have a lovely August!*" and with a supportive message. At the time they worked collaboratively together. It was not said that Ms Nixon would have needed Mr Fitzgerald's permission to grant Ms Andrade time off. Ms Andrade was paid by the hour worked and not by the month, so there was no cost to the Respondent in Ms Nixon agreeing to that absence. It was discussed and agreed between them. It was not a unilateral decision by Ms Andrade. (Ms Andrade said in her submissions that there had been a similar absence during her fixed term employment: this was not anywhere in the evidence and I do not take account of that assertion.)

46. Given that Ms Andrade was involved in ongoing project work there was the clear expectation on both sides that she would return and finish the project on which she was engaged (or return to start a new one) every time there was an absence (and she did so).

47. Accordingly I find that there was mutuality of obligation to provide and to undertake work, at a fixed rate of hourly pay, and with continuity covering any breaks because of the effect of S212 of the Employment Rights Act 1996. Ms Andrade was an employee, not a daily bank worker, from 06 September 2016 until her fixed term employment commenced, and then until the end of that (extended) fixed term contract of employment on 30 June 2019.

48. I have concluded that Ms Andrade's employment did not continue after 30 June 2019, and that was because her employment ended by reason of redundancy. It was always made clear that the estates role would be as a bank employee. It may be that in time that would have been seen in the same way as I decide the post 06 September "*bank*" employment was continuous employment, but that is not possible in a 5 day period.

49. Ms Andrade's substantive post had been removed because of 50% reduction in funding for the post for which she had been employed: the fixed term of her contract had ended, and the secondment was to a short term post. Someone seconded has either to be returned to the original post or found another role, and neither was possible. I accept that the "*at risk*" policy does not extend to higher roles: Ms Andrade has no good claim that it was unfair not to promote her on the expiry of her fixed term contract (and Mr Mason did arrange for her to be raised to a band 6 level in estates department from 01 July 2019).

50. I am not required to decide whether the redundancy was fair or unfair, but my findings of fact as to the way this occurred may be relevant to that decision in due course:

- 50.1. The fixed term contract ended on 30 June 2019, by reason of redundancy.
- 50.2. Ms Andrade was substantively employed as a Band 5 in the CQUIN team of 2, with Ms Nixon her line manager (at Band 8c).
- 50.3. The funding for the CQUIN team was reduced by 50% for the 2019/2020 financial year.

- 50.4. Ms Nixon's role in CQIN was halved and she was given half a role in another area to make up a full role.
- 50.5. Ms Nixon was a higher band than Ms Andrade, so that it was logical for her to be retained.
- 50.6. There was no work for Ms Andrade to do in the CQIN department (which was reduced to ½ a person).
- 50.7. The "at risk" priority for roles was for the same Band (5) or one below.
- 50.8. Mr Mason obtained approval for training requested by Ms Andrade shortly before her employment ended.
- 50.9. Mr Mason arranged for Ms Andrade to work as a Band 6 Project Manager in the estates department on a bank basis as supernumerary in the hope that she might find long term work there.

51. The parties are reminded that there are directions made at a case management hearing on 09 March 2020, sent to the parties on 24 April 2020 and amended by letter of 14 May 2020. If either party considers that any direction needs to be varied (including as to the length of the hearing) application should be made (by email, copying in the other side).

**Employment Judge Housego
Date 16 October 2020**