EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms I Akaluogbo		**Total Facilities Recruitment Ltd**

Heard at: London South Employment Tribunal **On:** 25 June 2021

Before: Employment Judge Hyams-Parish (sitting alone)

Representation:
For the Claimant: In person
For the Respondent: Mr J Green (Counsel)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

It is the Judgment of the Employment Tribunal that:

The Claimant was neither an employee, nor a worker of the Respondent, and as such, her claims cannot proceed and are dismissed.

REASONS

Claims

1. By a claim form presented to the Employment Tribunal on 25 June 2019, the Claimant brings the following claims against the Respondent:

    (a) Unfair dismissal

    (b) Unlawful deduction from wages

2. This preliminary hearing was listed to determine the Claimant's status. In order to proceed with her unfair dismissal claim, I must find that she was an employee. For her unlawful deduction from wages claim, I must find that she was either a worker or an employee.

3. The Claimant's case was that she was employed by the Respondent. The Respondent's case is that she was neither their employee nor worker.

The hearing

4. This hearing had been listed for one day. For the hearing the Claimant had prepared a witness statement and brought with her a bundle of documents which she sought to rely on. The Respondent had also prepared its own bundle and a witness statement for Louise Walsh, a director of the Respondent.

5. During the hearing, it became clear that there had been problems agreeing a consolidated bundle of documents and therefore, in the interests of pragmatism and the need to conclude the hearing within the time available, I allowed the parties to refer to documents in their own bundles. There was a considerable overlap of documents in the bundles, although the Claimant had additional documents which were not in the Respondent's bundle and which she wanted to rely on.

6. Having sorted out how we would proceed for the day using two bundles, I took some time to read the witness statements and the documents referred to therein. The Claimant gave evidence and was cross examined by Mr Green. Ms Walsh then gave evidence and was cross examined by the Claimant.

7. As submissions did not finish until late in the afternoon, I informed the parties that I would reserve my decision.

Background findings of fact

8. The following findings of fact were reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. I have only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

9. The Respondent is an employment business that specialises in the supply of temporary and permanent workers related to facilities management and buildings maintenance.

10. The Respondent operates from one office in central London. It currently has 10 employees engaged in sales, administration and finance roles. The Respondent does not employ any of the temporary workers that are sourced and provided to its clients.

11. The Claimant applied via a job board for a role advertised by the Respondent working with one of its clients, CBRE. CBRE had a contract with Guy's and St. Thomas' Hospital to maintain the building and manage the facilities at the site.

12. The role was described as "*a junior facilities assistant required by a large building maintenance company to work on a large commercial contract in Central London*". The advert went on to say that the successful candidate would be "*Working with the maintenance team from Monday to Friday 9am to 5pm, you will initially be tasked with water flushing i.e., running taps to check for Legionella and other bacteria. You will be trained on how to do this and in time also other areas of building services*". The role was advertised as paying £8.00-£9.00 per hour.

13. Vacancies for work with CBRE were advertised with pay rates set by CBRE. The roles were generally advertised with both a "*PAYE rate*" and a "*limited company*" rate. For those choosing the *'limited company'* rate, the worker could choose to work through their own limited company or a third-party payroll/umbrella company. Usually if they chose a third-party company, workers would be employed and paid by that company.

14. If the worker chose the PAYE option, the Respondent paid the worker, less tax and national insurance, retaining an amount for its fee. If the worker chose the limited company option, the Respondent paid the limited company the worker's gross pay, including tax, national insurance and holiday pay, retaining a small amount as its fee. The limited company would then operate its own PAYE system, paying the worker net pay and paid holiday. If the limited company was a payroll/umbrella company, it would usually retain a small amount as an administrative fee.

15. There are usually some small tax advantages for workers operating through payroll/umbrella companies, which is why most workers chose this route. Others preferred to work through a payroll/umbrella company (or their own limited company) because they worked with various employment businesses simultaneously. It was therefore easier to manage their payments through one company.

16. The *'limited company'* rate was higher because it included national insurance and holiday pay that the limited company, as the worker's employer, would be responsible for.

17. At the outset of her registration with the Respondent, the Claimant elected to work through a third-party company. After considering a number of payroll/umbrella companies, the Claimant chose a third-party company called Crystal Clear Contract Services Limited (Crystal).

18. Crystal invoiced the Respondent in respect of the services which the Claimant provided to CBRE each week. Crystal paid the Claimant through its own payroll. The contract between the Claimant and Crystal was not included in the bundle. However, there were plenty of pay slips in the bundle which showed that they were responsible for paying the Claimant and supported what Ms Walsh told me about the arrangement. The Claimant suggested that the Respondent was responsible for paying the Claimant, because their name appeared on certain payslips. However, it was clear to me that this was a mere reference to the Respondent as the employment business that had sourced the worker and did not mean that the payslip was produced by the Respondent, or that they were responsible for paying the Claimant, which I concluded that they were not.

19. In or about June 2017, Crystal went into liquidation. The Respondent therefore suggested other payroll companies that the Claimant could use. The Claimant chose a company called Get My Payslip. Get My Payslip contracted with the Respondent but employed workers through subsidiary companies. The Claimant was employed by three such companies: Zeta Contracting Limited from June 2017 until March 2018; Eamenmart Limited from March 2018 until October 2018; and finally, Tebusec Limited from October 2018 until May 2019. I was shown contracts of employment between the Claimant and each of these companies.

20. On 21 January 2019, the Respondent received an email from the Claimant with details of a complaint the Claimant had made to CBRE about her colleagues a week earlier. This email was not written in the expectation that the Respondent should do anything about it.

21. On 12 March 2019, the Respondent was contacted by their client CBRE explaining that they had been informed that their contract with Guys' & St Thomas' Hospital was not going to be extended, and they had been given three months' notice that the contract would be terminated. CBRE

announced that it no longer needed workers provided to it by the Respondent. Workers were told by CBRE that 31 May 2019 would be their final day of working.

22. On 16 April 2019, the Claimant sent the Respondent a letter purporting to raise a grievance. The Respondent found the letter confusing and difficult to respond to. Having looked at it myself, I too had difficulty understanding the grievance. In any event, I did not need to hear evidence about the substance of the grievance for the purposes of determining the Claimant's status.

23. The next the Respondent heard from the Claimant was when she wrote to the company by letter dated 7 May 2019 purporting to resign from her "employment" with the Respondent.

24. On 28 May 2019, the Respondent received a further grievance from the Claimant regarding non-payment of monies she said she was owed. The Respondent did not respond to this letter.

Legal analysis, conclusions and associated findings of fact

25. Under the Employment Rights Act 1996 ("ERA") an 'employee' is defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) a 'contract of employment'.

26. For these purposes, a 'contract of employment' is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

27. The most common judicial starting point for identifying a contract of employment was provided by Mr Justice Mackenna in the case of ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*** in which he said:

> ***'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other the master. (iii) The other provisions of the contract are consistent with its being a contract of service.'***

28. The continuing relevance of this passage was confirmed by the Supreme Court in ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC***, where Lord Clarke called it the 'the classic description of a contract of employment' and said that the ***Read Mixed Concrete*** case can be condensed into three questions:

(a) did the worker agree to provide his or her own work and skill in return for remuneration?

(b) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

(c) were the other provisions of the contract consistent with it being a contract of service?

29. Following the ***Ready Mixed Concrete*** decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements:

(a) Control

(b) personal performance or service, and

(c) mutuality of obligation and control.

30. Most cases on employee status now focus on one or more of the three elements comprising the irreducible minimum. However, a wide range of other factors may also be taken into account (including the extent to which the worker is integrated into the business, whether the worker uses his/her own tools, etc) and these can serve to supplant the presumption of employee status that arises when the irreducible minimum is present.

31. Section 230(3) of the ERA provides:

> ***In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under –***
>
> ***a contract of employment, or***
>
> ***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***

32. In the recent case of ***Uber BV v Aslam [2021] UKSC 5*** Lord Leggatt emphasised the relevance of the control exercised by the putative employer:

> ***In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the***

> ***individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".***

33. Turning to the relationship between an employment business and a worker, this was considered by the Court of Appeal in ***Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437***. In that case, the claimant had been assigned by the respondent employment agency to work exclusively for a local council for four years. The Court found that no contract of service existed between them:

> ***Brook Street was under no obligation to provide Mrs Dacas with work. She was under no obligation to accept any work offered by Brook Street to her. It did not exercise any relevant day to day control over her or her work at West Drive. That control was exercised by the council, which supplied her clothing and material and for whom she did the work. The fact that Brook Street agreed to do some things that an employer would normally do (payment) does not make it the employer… The role of Brook street was not that of an employer of Mrs Dacas. Rather it was that of an agency finding suitable work assignments for her and, so far as the council was concerned, performing the task of staff supplier and administrator of staff services. The real control over the work done by Mrs Dacas at West Drive and over her in the workplace was not exercised by Brook Street.***

34. Similarly, in the EAT judgment of ***James v Greenwich London Borough Council*** [2007] ICR 577, (subsequently approved by the Court of Appeal), Elias P held at §22:

> ***…It is plain that, whilst of course every case turns on its own particular facts, it will be an exceptional case where a contract of employment can be spelt out in the relationship between the agency and worker: see Montgomery v Johnson Underwood Ltd [2001] ICR 819, Bunce v Postworth Ltd (trading as Skyblue_ [2005] IRLR 557 and Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437, para 64, per Mummery LJ. Typically, the agency does not have the day to day control which would establish such a contract. Nor, indeed, is the worker carrying out the work directly for the benefit of the agency, and there is usually no obligation on the agency to find work or on the worker to accept it, let alone personally do it…***

35. In ***James v Greenwich London Borough Council*** [2007] ICR 577, Elias P held at §35 that in order to imply a contract to give business reality to what was happening, the question was whether it was <u>necessary</u> to imply

such a contract. The EAT cited the judgment of Bingham LJ in ***The Aramis 1 Lloyd's Rep 213, 224***:

> ***it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.***

36. Applying the above legal principles to the facts in this case, I concluded that the Claimant was not employed by the Respondent. The reasons for that conclusion are as follows:

    (a) The Claimant provided no services to the Respondent. Her services were provided to CBRE.

    (b) There was no obligation on the Respondent to offer the Claimant work and no corresponding obligation on the Claimant to do any work if offered.

    (c) The Respondent had no control whatsoever over the Claimant. Indeed, they had very little dealings or contact with the Claimant at all. During her evidence, the Claimant suggested that she was in daily contact with the Respondent, suggesting that the Respondent acted like an employer. Ms Walsh rejected any suggestion that they were in direct contact with the Claimant, stating that there would be no time to have anything like the contact with the Claimant, or any worker, that the Claimant was suggesting. I preferred the evidence of Ms Walsh in this respect. I do not accept that the Claimant had anything like the contact with the Respondent that she suggested. I find that any control over the Claimant whilst working at CBRE, was by CBRE.

37. I considered there to be a complete absence of the "irreducible minimum" as referred to above. I therefore conclude that the Claimant was not employed by the Respondent.

38. I considered whether a contract of employment should be implied as between the Respondent and the Claimant. However, the facts of this case were such that it would be entirely inappropriate to do so.

39. I then considered whether the Claimant was a worker of the Respondent and again concluded that she was not. For the Claimant to be a worker, there would need to be a contract to provide services personally to the

Respondent. There was no such contract, and the Claimant did not provide any services to the Respondent. She could therefore not be a worker.

40. As the Claimant was neither a worker, nor employee, for the reasons stated above, the Claimant cannot pursue the claims she has brought against the Respondent. These claims are therefore dismissed.

Employment Judge Hyams-Parish
9 July 2021

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