cs

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
(sitting alone)

BETWEEN:

Mrs M Atanasiu **Claimant**

AND

Personnel Selections Ltd **Respondent**

ON: **9 May 2017**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr T. Dracass, Counsel**

WRITTEN REASONS PURSUANT TO AN ORAL REQUEST BY THE RESPONDENT

1. My judgment in this case which was given orally at the hearing and sent to the parties shortly afterwards, was that the Claimant is not an employee of the Respondent within the meaning of s230(1) Employment Rights Act 1996. The Claimant cannot therefore bring a claim of unfair dismissal against the Respondent.

2. It was established at a preliminary hearing on 3 November 2016 before Employment Judge Balogun, that there was an issue about the Claimant's employment status. The preliminary hearing was listed accordingly.

3. At the hearing I heard oral evidence from the Claimant herself and from Mr Hill, Manager of the Brighton branch of the Respondent through which the Claimant was recruited. Both witnesses had also provided written statements which I read before the oral evidence commenced. I also reviewed a bundle of documents

pertaining to the Claimant's engagement by the Respondent. Any reference to page numbers in this judgment are to page numbers in that bundle.

Relevant law

4. Section 230 ERA provides as follows:

> **"230**
>
> **Employees, workers etc.**
>
> **(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—**
> **(a) a contract of employment, or**
> **(b) 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;**
> **and any reference to a worker's contract shall be construed accordingly.**
> **(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.**
> **(5) In this Act "employment"—**
> **(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and**
> **(b) in relation to a worker, means employment under his contract;**
> **and "employed" shall be construed accordingly. "**

5. S230(1) merely refers to an employee as one who works under a contract of employment so the definition is somewhat circular but the well-established authorities make it clear that in order for a contract for service, or employment contract, to exist there are certain minimum criteria, an "irreducible minimum requirement", which must be established (**Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497).** The first of these criteria is personal service - did the Claimant undertake to provide her own skill and work under the contract to the other party to the contract? The second is mutuality of obligation - did the Claimant undertake to provide her own skill and work to the other party to the contract in return for pay? The third criterion is control. Was there a sufficient degree of control exercised by the other party to the contract to enable the individual to be called a servant, or employee, of that other party?

6. It was the second and third limbs of this test that were at issue in this case. The Claimant has brought her claims against the Respondent, which is an employment business. The employment status of agency workers, or as they are more accurately described, workers engaged by employment businesses, has been considered in a number of cases. The leading authority is now **James v London Borough of Greenwich [2008] EWCA Civ 35**. In that case the Court of

Appeal expressly approved and upheld the decision of the EAT in the case and adopted the guidance set out by the EAT in **James v Greenwich Council UKEAT 0006/06/1812**, including the EAT's view that:

> **"It will be an exceptional case where a contract of employment can be spelt out in the relationship between the agency [employment business] and worker."**

7. As discussed in **James**, the difficulties in establishing an employment relationship in these cases arise from the tests described in paragraph 4 and the particular nature of an employment business arrangement. Where a worker is engaged by an employment business, ordinarily that worker is not providing her services to that business – instead she is providing them to the clients of that business – other businesses who have a need for a temporary or flexible workforce. It is those other businesses, the "end users" of the individual's services, who ordinarily also exercise control over the work done. There is therefore a tripartite arrangement in which there is no contractual arrangement between the individual and the end user (unless one can be implied from the circumstances, which is rarely the case following the decision in **James**), a commercial contract between the end user and the employment business and an agreement between the individual and the employment business under which the employment business agrees to try to identify work opportunities for the individual. However that agreement usually makes no provision for the individual to provide her services to the employment business itself or to be controlled by it in the way she does the work. Hence the irreducible minimum required to establish that an employment contract exists between the individual and the employment business is usually absent in these arrangements.

Findings of fact and conclusions

8. The Respondent operates as an employment business acting as an intermediary between individuals who are seeking temporary work and business needing the services of temporary workers. I was shown the documents that temporary workers engaged by the Respondent entered into when joining as potential workers for the Respondent's clients. There was a dispute of fact as to whether the Claimant had seen all of these documents and in particular the terms and conditions set out at page 60. I find on a balance of probabilities that the document was at some point made available to the Claimant but that she did not read it. Certainly she had no real recollection of it and her clear evidence was that she did not perceive herself to be a self employed individual as that document described her. I find however that the document at page 60 was a genuine reflection of the terms that prevailed between the parties. The contract was not a sham.

9. The Claimant was to her credit a wholly candid witness and I accept her evidence as true and the beliefs she held about her circumstances as genuinely held. However it is neither the written terms as provided by the Respondent nor the Claimant's perception of herself either alone or together that determine the issue of status in this case. That issue is determined by looking at the words of s.230(1) and considering whether they apply to the actual arrangements between the Respondent and the Claimant. It was clear from the drafting of the document

the Respondent maintained was given to the Claimant at the start of the arrangement, (page 60) that the Respondent wished to characterise the Claimant as a self employed worker. The Claimant maintained that she had never regarded herself as self-employed.

10. Mr Hill, whom I also found to be a credible witness, described the Respondent's processes to me. I find that the arrangements were that the Claimant enrolled with the Respondent by giving the Respondent certain information about herself on a Form 41 Rev 19 (page 61). The Respondent then added this information to a database and as and when clients contacted the Respondent with a view to finding workers for temporary or flexible assignments the Respondent would review its database and match individuals to the work available. The Respondent would then make offers of work to those individuals and those individuals were free to decide whether or not to take up those offers. That arrangement was contemplated by the terms at page 60 which stated (paragraph 3) "*We will endeavour to obtain suitable assignment for you. You are not obliged to accept any assignments we offer. You acknowledge that there may be periods when there is no suitable work available*". I find that these are typical employment business arrangements.

11. There was no evidence of any arrangement whereby the Claimant would provide any services to the Respondent itself and hence no evidence that there was an obligation on the Claimant's part to provide personal service to the Respondent. Furthermore the contractual arrangements did not involve mutuality of obligation. I find, again on the basis of Mr Hill's evidence and the extract from the terms at page 60 set out in the preceding paragraph, that the Respondent had no obligation to identify work for individuals on its database and the individuals had no obligation to take work when it was offered to them. The fact that an individual who refused an assignment might find herself out of work for a week or more is not as the Claimant suggested tantamount to an obligation on the Respondent's part to provide work - it is merely a reflection of the perhaps unfortunate reality facing the Claimant that if she declined an offer of work she might not be able to meet her financial obligations the following week.

12. The Respondent's practice of renewing the demand for its workers on a weekly basis as described by Mr Hill in his evidence and thereafter contacting workers on a weekly basis to discuss what work was available for the following week was I find on the facts of the case inconsistent with there being any obligation on the Respondent to offer work or on workers to accept it. The whole arrangement was predicated on there being no such obligation. I find on the basis of Mr Hill's evidence that the weekly review of work requirements and the discussion as to what was available for the following week, was a genuine exercise aimed at matching a flexible workforce to fluctuating client demand, with either party to the arrangement being free of obligation. If there was no work, the Respondent would not offer any and if the Claimant or any of her colleagues had not wanted to work they could simply say that they were unavailable. In either case there would be no adverse consequences. I note that the Claimant had been able to negotiate without difficulty an indefinite interruption of work between May 2014 and February 2015 during which she took a permanent job with another employer. She was then able to re-enrol with the Respondent when she wished to resume

working as a temporary worker. On the second limb of the test of the existence of a contract of employment there was not therefore the requisite level of mutuality of obligation between the parties for a contract of employment to exist between them.

13. I also find that the requisite level of control was absent. On the Claimant's own evidence control was exercised not by the Respondent but by the end user. It was the end user's employees who told the Claimant what to do and how to do it and the Respondent played no part in that exercise. The Respondent simply acted as a conduit between its clients and the individuals on its database and had no role at all in the direction of the work.

14. Hence on both the second and third limbs of the test of whether a contract of employment exists, the Claimant's claim that she was an employee cannot succeed. I have also found as a fact that the Claimant did not meet the first limb test – that of personal service to the Respondent. This analysis of the relationship between the Claimant and the Respondent is consistent with the passage from ***James v London Borough of Greenwich*** cited to me by Mr Dracass in paragraph 6 of his very helpful submissions. There are some employment agencies which take staff onto their books as employees but these are the exception. I find that the Respondent in this case was not such an exception and was not the Claimant's employer within the meaning of s.230 ERA.

15. Had I reached a different conclusion in relation to the Claimant's status I would nevertheless have found that the Claimant did not have the requisite period of employment under s 108 ERA to bring a claim of unfair dismissal under s.98. Again on her own evidence she confirmed that she took an indefinite break from working for the Respondent between May 2014 and February 2015. I find that even if the Claimant had been an employee, which I have found she was not, this period was not one in which a contract between the parties subsisted and it was not one to which any of the provisions of s.212(3) ERA could have applied. As her last assignment was in April 2016 the Claimant therefore has no hope of establishing that she had the two years of uninterrupted employment under s.108(1) ERA required for bringing a claim of unfair dismissal under s.98. I conclude therefore that the Tribunal has no jurisdiction to hear a claim of unfair dismissal by the Claimant and that claim is therefore dismissed.

_____

Employment Judge Morton

Date: 16 May 2017