



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr E Ceylon

v

Braddell Ltd t/a Stansted Citylink

Heard at: Watford

On: 27 & 28 February 2018 &
1 March 2018 (in Chambers)

Before: Employment Judge Smail

Appearances

For the Claimant: Ms S Gilani, Solicitor

For the Respondent: Ms H Norris, Solicitor

JUDGMENT

1. The Claimant's claim of unfair dismissal is dismissed.
2. The Claimant's claims for holiday pay, notice pay and unauthorised deductions of earnings have been compromised on terms agreed between the parties. Those claims will be dismissed in 21 days' time unless restored by the Claimant on the grounds that the compromised figure has not been paid.

REASONS

1. By a claim form presented on 25 November 2016, the Claimant claims automatic unfair dismissal, notice pay, holiday pay and unauthorised deductions from earnings.
2. The claims for notice pay, holiday pay and unauthorised deductions from earnings have been compromised at the conclusion of day 2 of the full merits hearing. I am told that the Respondent agrees to pay £3,000 to the Claimant within 14 days to compromise those claims. That leaves me to adjudicate only the question of unfair dismissal.
3. On his own case the Claimant's length of service was 1 February 2016 to 28 August 2016. Accordingly, he did not have two years' service to claim

general unfair dismissal. His case is one of automatic unfair dismissal under section 104 of the Employment Rights Act 1996.

The Law/the issue

4. By section 104, sub-section 1 of the Employment Rights Act 1996, an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee alleged that the employer had infringed a right of his which is a relevant statutory right. By sub-section 2 it is immaterial whether the assertion of the statutory right is correct, but it must be made in good faith.

Findings of fact relevant to the issue

5. With effect from Monday 28 September 2015, the Claimant started work as a coach driver on the Stansted Citylink service between King Cross St Pancras and Stansted. He was initially recruited on a temporary to permanent basis by James Lewis Ltd which was a recruitment agency engaged by the respondent. The idea was that for 12 weeks by way effectively of a probationary period, the Claimant would be employed by a partner company of James Lewis Ltd called Clipper Contracting Group Ltd. This was essentially a payroll company which had no other involvement in the Claimant's engagement. After the 12 weeks the Claimant would become employed directly by the respondent. In the interim, the respondent would pay an invoice from James Lewis Ltd on a weekly basis covering the cost of the Claimant plus a mark-up for James Lewis Ltd.
6. In due course, the respondent issued the Claimant with a contract dated 27 January 2016, effective from 1 February 2016. There were conditions in the contract including the receipt of references. It was said that it was a condition that there be a satisfactory test result for drugs and alcohol conducted at any time during the employment. I reject the suggestion by the respondent that these were conditions precedent. Other drivers had passed from employment by Clipper Contracting Group Ltd to the respondent without the need for references or an additional drugs test. The Claimant had a drugs test at the commencement of his engagement through James Lewis. He had failed it in the sense that there were traces of prescription drugs. Having established that drug traces were prescription drugs, the respondent deemed the test as passed. It was not intended there be another test.
7. There was a provision in the letter of 27 January 2016, to the effect that the Claimant was to read carefully and return a signed copy of the contract to indicate that he understood the terms and conditions under which he had been employed as soon as possible to the address stated on the contract, which was the Head Office at Cricklewood. I accept from the Claimant that he returned the contract not to the Head Office, but to one of the offices used by the respondent at Stansted Airport. He gave the signed contract to a lead driver by the name of Rafael.

8. I accept the authenticity of the Claimant's whatsapp message to Rafael on 22 February 2016 when he asked him, "did you give the signed documents I gave to you in the office last week to Sarah." Rafael replied, "I left all the documents for her with notes that I got them from you and all of the paperwork is now with Sarah and Joe."
9. Joe is a reference to Mr Hughes who was the seconded Operations Manager from Metroline to run the Stansted Citylink operation.
10. The respondent's denial that there was offer and acceptance constituting a contract of employment has been misplaced and to my mind most unimpressive. I accept entirely from the Claimant that he followed the process that had been asked of him: he was given the contract by Andrew, who was a Supervisor in the Stansted office, and was asked to return the signed document to the Stansted office. I note for example that there was no chasing from the Cricklewood office asking for the whereabouts of the signed contract. On the balance of probability, and so I find as a fact, the Claimant accepted the offer of employment and returned it efficaciously to the respondent and entered a binding contract of employment. I find on the balance of probability that Mr Hughes was entirely aware of this fact.
11. When later the Claimant raised the fact that he was still being paid via the agency, rather than through the respondent, Mr Hughes wrote him an email on 24 August 2016 "offers of employment at the uptake of any role with Stansted Citylink is solely at my discretion and based on driver head count, hence your employment offer was never issued to you." On 26 August 2016, Mr Hughes wrote the Claimant an email "you plainly feel you should be employed as you have a letter and a signed contract, your own copy, however, that contract was never actioned, authorised or progressed due to some of the issues noted in previous emails. That said and for clarification, you are not employed by Stansted Citylink and remain an agency driver."
12. It seems to me that the picture was that it was Mr Hughes' belief that whatever was intended at the time of original recruitment, that is to say permanent placement after 12 weeks, and whatever the contractual position was between the Head Office and the Claimant, if Mr Hughes had not confirmed employment status then as far as he, Mr Hughes, was concerned the Claimant remained an agency worker.
13. There had been some issues with the Claimant's conduct during the relationship. There were one or two incidents in February 2016. There was an issue about whether the Claimant was entitled to use a microwave at St Pancras. There was an issue about the manner in which he had reversed and left the bay at Stansted, Mr Hughes believing it to have been far too hasty. There had also been an issue in June 2016 when in relation to one of the Supervisors, the Claimant had acted rudely by using the retort "whatever" prompting a complaint from Sarah the Supervisor. On two occasions Mr Hughes instructed James Lewis to terminate the Claimant's engagement

owing to his attitude. That was then rescinded following a conversation between the Claimant and Mr Hughes on both occasions.

14. At a time before 24 August 2016, it became apparent that the respondent had to reduce its operation out of Stansted. In or about June or July 2016, it had added a stretch to the service by extending the journey from Kings Cross to Victoria. A company called Panavision had been forced to stop operating a service between Victoria and Stansted and then between Victoria and Kings Cross. Stansted Citylink had sought to cover part of their operation. The extension of the service had required something like five additional drivers and coaches. However, in August 2016 the decision was taken that the respondent would no longer cover that additional stretch. Indeed, there were negotiations taking place for the Kings Cross to Stansted service to be taken on by Callinan Coaches UK Ltd and eventually that did happen. The respondent employed drivers who were TUPE transferred to Callinan, but that was after the Claimant's employment had terminated.
15. In August 2016, Mr Hughes had decided that the agency drivers would no longer be required in the light of the decision to stop servicing Victoria. Five drivers were understood to be agency workers. Mr Hughes understood the Claimant to be an agency worker because he had not in his own eyes authorised the recruitment of the Claimant into the employed ranks.
16. I accept from Stuart Francis of James Lewis Ltd that this decision had been communicated to him in a telephone call before 24 August 2016, and that he prepared termination letters for the drivers, who were to be released including the Claimant by 24 August 2016 when at 14.32 he emailed draft termination letters to Mr Hughes. The letter was issued to the Claimant on 26 August 2016 at 16.52 by James Lewis Ltd.
17. In the meantime, on 24 August 2016, the Claimant had sent in a letter querying the contract inconsistency between his understanding of being employed directly by the respondent and still being paid through James Lewis Ltd. He wrote,

"I am writing in regards to the inconsistency of my contract with Stansted Citylink. I have been working with Citylink since it started in September 2015 after a period of 12 weeks I received contract documents from Citylink on 1 February 2016 which I signed on 15 February 2016 and handed it over to Rafael (lead driver) in the manager's office. He also confirmed a couple of days later that the documents are now with Sarah and Joe, the supervisor and manager. However, I am still referred to as agency driver and still getting paid through the agency despite having a signed contract with Stansted Citylink and my manager Mr Hughes still dismisses the fact that I signed and handed in my contract.

"Recently I had my two weeks work holiday which I didn't receive any payment for when I enquired about it I was told I'm agency driver and don't get paid for work holidays. The fact here is I'm not an agency driver and I shouldn't be treated like one because I have signed a contract with

Stansted Citylink. As it stands I don't get paid for my holidays, I don't get lieu days and I'm losing money getting paid through the agency.

I am therefore writing to request a clarification of my contract with Citylink and possibly amendments and missing payments.”

18. There is no doubt that this letter represents an assertion of statutory rights by the Claimant in respect of his entitlement to holiday pay. The question is was that letter the reason for the dismissal.
19. I have come to conclusion it was not. I find that Mr Hughes held an erroneous belief that the Claimant was an agency driver because he, Mr Hughes, had not sanctioned taking the Claimant into the employed ranks, whatever paperwork had come from Head Office. It is a fact that the service needed to be reduced because they were no longer travelling to Victoria. There was a need for fewer drivers which meant he could dispense with the agency drivers. He knew also down the line there was the possibility of a TUPE transfer.
20. The TUPE transfer element does not assist the Claimant, because an employee also needs two years' qualifying service to bring a claim of automatic unfair dismissal in relation to a dismissal connected with a TUPE transfer.
21. Accordingly, the reason for the Claimant's dismissal was that he was treated as an agency driver and the need for agency drivers had been removed when it was decided no longer to cover the service to Victoria. The service could be covered by the employed drivers for the Kings Cross to Stansted service.
22. I reject the suggestion of the respondent that on each occasion the Claimant was re-engaged by it following a termination for conduct that whatever the status has previously been, he was engaged solely on agency terms. On each of those occasions no new paperwork was addressed. Mr Hughes was not interested in what the contractual arrangement was. I accept from the Claimant that the Claimant had raised the matter verbally with Mr Hughes on at least two occasions, one in April and one in June. On both occasions Mr Hughes dismissed what the Claimant told him, rejecting that there was a concluded employment contract. Mr Hughes, it seems to me, simply ignored this fact. When he re-engaged the Claimant, he did not address his mind to the contractual position. The contractual position was that there was an offer of a contract of employment accepted by the Claimant in relation to which the respondent was in continuing breach.
23. Those continuing breaches are the subject of the compromise of the unauthorised deductions, holiday pay and notice pay claims.

Conclusions

- 24. I have to assess what the true reason for dismissal was. In general, of course, an employee needs two years' service to claim unfair dismissal. The Claimant is seeking to establish an exception to that.
- 25. In my judgment he was not dismissed because he had raised the issue of holiday pay. He was dismissed because Mr Hughes believed he was an agency driver – in Mr Hughes' terms – and there was no longer a need for any agency drivers. They were redundant, if that term can be used to non-employees.
- 26. I have considerable sympathy for the Claimant in this case. He was badly treated in that the respondent never engaged directly and fairly with his claim that he was a direct employee. However, he was not victimised for raising the question of his statutory entitlements. A decision had already been made to release him because he was perceived to be agency.
- 27. With some regret, then, I conclude that the Claimant was not automatically unfairly dismissed. The claim has however been very respectably argued by the Claimant and his representative.

Employment Judge Smail
Date: 24 / 4 / 18
Sent to the parties on:
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For the Tribunal Office