Case Number: 1400569/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON**

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

BETWEEN:

Mrs A Johnson

Claimant

AND

(1) JSA Services Ltd
(2) Huntswood CTC Ltd
(3) Lloyds Bank PLC

Respondents

ON: **21 September 2017**

APPEARANCES:

For the claimant: Self-represented
For the first respondent: Mr P Jeffcoate (Legal Representative)
For the second respondent: Mr B Randle (Counsel)
For the third respondent: Mr S Margo (Counsel)

RESERVED JUDGMENT

ON PRELIMINARY ISSUES

The judgment of the tribunal is as follows:

1. The first respondent (JSA Services Ltd) was the claimant's employer. The tribunal has jurisdiction (subject to any subsequent judgment or decision, including as to whether employment was terminated) to hear the following claims against the first respondent:

    a. Unfair dismissal.
    b. Pregnancy/maternity discrimination.
    c. Breach of contract.
    d. Failure to pay accrued holiday pay on termination.

2. The tribunal has no jurisdiction to hear any claims against the second respondent (Huntswood CTC Ltd). All claims against the second respondent are therefore dismissed for want of jurisdiction.

3. The tribunal has no jurisdiction to hear an unfair dismissal claim against the third respondent (Lloyds Bank PLC). The claim of unfair dismissal against the third respondent is therefore dismissed for want of jurisdiction

4. The tribunal has jurisdiction to hear the claimant's pregnancy/maternity discrimination claims against the third respondent (Lloyds Bank PLC), solely by virtue of section 41 of the Equality Act 2010.

REASONS

Background to the preliminary hearing of 21 September 2017

1. A claim was presented on 20 March 2017, bringing claims (apparently against all three respondents, although the first respondent was identified as the employer) for unfair dismissal, pregnancy/maternity discrimination, notice pay, unauthorised deduction of wages and breach of contract. The claims were not fully particularized.

2. The respondents all resisted the claims. The first respondent confirmed that it was the employer, but asserted that there had been no dismissal. The second respondent contended that the tribunal had no jurisdiction to hear any of the claims against it. The third respondent maintained that it was not the employer, and had no contract with the claimant, and that the only basis for any jurisdiction could be section 41 of the Equality Act 2010, in respect of the pregnancy/discrimination claim, albeit it was argued (at this stage) that the tribunal did not have jurisdiction.

3. A preliminary hearing (PH) was listed for 15 June 2017. The judge identified that the claimant was also seeking to bring a claim for accrued holiday pay, outstanding at termination, in addition to the above claims, and summarized the key issues. These included that the first respondent was the employer, albeit the first respondent maintained that there had been no dismissal, and that jurisdiction against the other two respondents could, it appeared, only rest with them in relation to any discrimination claims as "principals" under section 41 of the Equality Act 2010. There is no record of the claimant indicating that the judge's analysis might be mistaken. The judge listed a further (one-day) PH for 21 September 2017, giving case management orders in respect of disclosure, a bundle and witness statements. The purpose of the PH (paragraph 9 of the case management summary in the orders) was as follows:

> "There will be a preliminary hearing to address two matters: firstly, to identify the correct respondent(s) to each claim and secondly to address late presentation in relation to the claim of unauthorised deductions from wages. When the tribunal has addressed those matters consideration can be given as to the best way to progress proceedings."

Background to the preliminary hearing of 21 September 2017

4. At the start of the PH the judge confirmed that the purpose of the PH was as set out above, and expressed some concern that the tribunal had been presented with a lengthy bundle, written submissions, case law and detailed witness statements from four witnesses. There were four separate parties. It did not appear that it would be possible to complete all matters within one working day. The hearing was, however, timetabled by agreement, the judge indicating that he hoped that it would be possible to issue a judgment on, at least, the time jurisdiction point, but that judgment would be reserved on any other points, with a further telephone PH being listed.

5. The claimant objected to the third respondent calling any evidence, and the judge dealt with this matter (see below).

6. The judge went on to go through the key issues, in as far as it was necessary to do so in respect of the preliminary hearing, and confirmed that the claimant was now bringing her claims of breach of contract and holiday pay solely against the first respondent. These claims were therefore dismissed upon withdrawal against the other two respondents.

7. In respect of the unfair dismissal, under section 98 of the Employment Rights Act 1996, the claimant maintained that all three respondents were jointly her employer, and should each be jointly liable for the unfair dismissal. She rejected the judge's analysis of her case as expressed in the 15 June 2017 case management order, and maintained that it was not just the first respondent that was her employer.

8. In respect of unauthorised deduction of wages (against just the first respondent) the issue was whether the claim was out of time and whether time should be extended. This has been the subject of a separate judgment, dismissing the claim, the oral reasons for which were announced on 21 September 2017.

9. In respect of the maternity/pregnancy discrimination, the claimant brought the claims (albeit not adequately particularised) against all three respondents, as her "joint" employers, but in the alternative under section 41 against the second and third respondents. She did, however, make it clear that the subject-matter of the alleged discrimination was solely in respect of her being prevented from going back to work after maternity leave, from 14 December 2016 onwards.

10. The key issues to be determined (subject of these written reasons) were the identity of the employer for the unfair dismissal and discrimination claims, and whether the tribunal, in the alternative, had jurisdiction to hear the discrimination claims by virtue of section 41 of the Equality Act 2010. The judge confirmed with the parties that no party was seeking to argue that there could be jurisdiction on any other basis. The claimant. In particular, did not seek to argue that there could be any alternative basis

for her to bring discrimination claims against the second or third respondents.

11. Having received written submissions from the second and third respondents, and having confirmed the parties' outline cases in respect of the matters to be determined at the PH, the judge canvassed timings (and the arrangements for cross-examination) and then adjourned to read witness statements and key documents.

12. After an adjournment the following witness evidence was called, in relation to the issues in dispute: The claimant; Mr James Harris (Compliance Manager for the first respondent); Mr Inderjit Parmar (Head of Legal for the second respondent) and Ms Clare Wakefield (Senior Supplier Manager for the third respondent).

13. The tribunal heard submissions from each party, and after an adjournment announced its judgment and reasons on jurisdiction to hear the wages claim. Judgment was reserved in respect of who the respondents should be for the unfair dismissal and discrimination claims. A telephone PH and case management orders were agreed, with the proviso that the second and third respondents would need to participate only to the extent that this would arise from the tribunal's rulings as to jurisdiction, which would be clarified in the orders.

14. The judge was able to allocate time to deliberate during the following working week, and the reserved judgment was decided, and written reasons produced, on the date which appears under the signature block, below.

<u>Ruling on admission of oral evidence on behalf of the third respondent</u>

15. It was evident that the legal representatives for the third respondent, like Employment Judge Emerton, had read the judge's orders arising from the previous case management preliminary hearing as indicating that the only basis for liability for the third respondent would be under section 41 of the Equality Act 2010, and clearly only in relation to discrimination. It was also evident that the third respondent, at least pending clarification of the discrimination claim against them, had decided not to dispute that they were the "end user" and could therefore, in principle, be liable for discrimination against a contract worker under section 41. On that basis, there would be no need for the third respondent to call oral evidence at the PH, and it is clear that on the date for witness statement exchange, there was no witness statement served by the third respondent.

16. Having read the contents of the claimant's witness statement, which in fact alleged that the third respondent was the employer and should therefore be liable for claims brought against the employer, the third respondent then took a witness statement from Ms Wakefield and served it on the other parties. The claimant explained that she received this statement on the afternoon of Tuesday 19 September 2017, prior to the PH on Thursday

21 September. The case management order had required leave from the tribunal if a party sought to call witness evidence which had not been prepared in accordance with the orders given. The claimant objected to such leave being given.

17. The claimant explained that she thought the statement had been served too late, and that it was prejudicial to admit the third respondent's evidence. On being pressed by the judge to explain why she believed it was prejudicial to receive late evidence, she asserted that because the statement was served late she had not had the chance to read it.

18. Mr Margo outlined the background to witness statement exchange and why the respondent had not expected to need to call evidence (the third respondent's case as to section 41 being based on contractual documentation, contained within the bundle), and explained that instructions needed to be taken and a statement obtained once it was appreciated that the claimant's arguments at the PH would go much further than those which had been identified at the last PH. He argued that it would be fair to permit the third respondent to respond to the claimant's arguments as to jurisdiction by calling evidence, albeit Ms Wakefield's evidence would be brief.

19. Having briefly adjourned to consider the submissions (and to examine Ms Wakefield's statement), the judge ruled that leave should be given to permit the third respondent to call the desired evidence. The decision was taken in accordance with the over-riding objective to deal with cases fairly and justly. It was clearly in the interests of justice to allow the respondent to call evidence on a relevant issue under dispute at the preliminary hearing, especially when it had not been apparent that these particular evidential matters were in contention when the judge had issued case management orders at the last PH. It was accepted that the need for a witness statement only became apparent after exchange of statements. It was unfortunate, in a case where hearing time was already very limited, that the tribunal needed to deal with this matter. It was also clear that the four-page witness statement was relatively straightforward, responded directly to evidential matters raised by the claimant herself, and it was abundantly clear that the claimant would have had ample time to read the statement and to absorb its contents prior to the PH. The judge rejected her improbable suggestion that she had not had time to read it, and also noted that she had not asked for any extra time to read the statement, if there was any truth in the assertion that she had not had time so far. In any event, as this matter arose before the judge adjourned to read the evidence in the case, the claimant would then have a further hour or so for preparation. It was not accepted that the late service of the witness statement had caused, or would cause, any prejudice to the claimant. It would be draconian to put the third respondent at risk of having to defend an unfair dismissal case at final hearing, where there might be no proper legal basis for the tribunal having jurisdiction in the first place.

20. The tribunal would also observe that in the event, the claimant had very

few questions for Ms Wakefield in cross-examination, and evidently accepted the majority of her witness evidence without any challenge. The contents of Ms Wakefield's witness statement did not, in fact, appear to be particularly controversial.

Closing submissions as to jurisdiction for unfair dismissal and discrimination

21. What appears below is aimed to highlight the main aspects of the parties' salient arguments on the subject-matter of these written reasons. It is not intended to be a comprehensive summary. The tribunal has however retained the written submissions and other documents, and a note of oral submissions, and all these matters have been taken into account. Matters relating to time jurisdiction in respect of the wages claim have not been set out below.

22. The tribunal heard first from Mr Jeffcoate, on behalf of the first respondent (JSA Services Ltd) In essence, although the first respondent resisted all the claims, and would also argue that there was no jurisdiction to hear claims of unfair dismissal and monetary claims arising out of termination, he accepted that as it was the claimant's employer, the claims were properly brought against the first respondent. Although the first respondent's ET3 had asserted that the claimant was a "contract worker" under section 41, Mr Jeffcoate did not wish to make submissions as to jurisdiction relating to the other, separately represented, respondents.

23. The tribunal next heard from Mr Randle, on behalf of the second respondent (Huntswood CTC Ltd). He relied upon his skeleton argument, which argued that as the claimant was not an employee nor a worker of the second respondent, the unfair dismissal claim (and also the wages, breach of contract and holiday pay, which had not at that point been withdrawn against the second respondent) should be dismissed. As for the discrimination, the second respondent was plainly not the employer, and liability could only be as a contract worker. But this did not apply to the second respondent, as it did not fall within the definition of "principal" for the purposes of section 41. The ultimate beneficiary was the third respondent. The claimant had a contract of employment with the first respondent. The first respondent had an agreement with the second respondent. The second respondent had entered into a framework agreement for consultant and other services with the third respondent, under which the second respondent provided services, including personnel, to the third respondent. Reference was made to the law (section 230 of the Employment Rights Act 1996 and sections 39, 41 and 83 of the Equality Act 2010, and the case of *MHC Consulting Services Ltd v Tansell [2010] ICR 789)*. Only the first respondent could, on the facts, be the employer for the non-discrimination claims and discrimination claims, and any additional liability for discrimination against contract workers under section 41 of the Equality Act would rest only with the third respondent (Lloyds Bank PLC) as the "principal", as defined in the 2010 Act and the case law.

24. In his oral submissions, Mr Randle addressed the tribunal on unfair dismissal. The claimant would need to be an employee under section 230 of the 1996 Act. She was not, and the second respondent could not in some way be an additional co-employer, when it was clear that the first respondent was the employer. There could only be one employer, and that was not the second respondent. He also adopted the third respondent's arguments under the *James v Greenwich LBC* cases (see below). Similar arguments applied to "employment" under the slightly different test for the purposes of 83(2)(a) of the 2010 Act. The only alternative claim open to the claimant, on the facts, was under section 41 as a contract worker. Any possible ambiguity under the legislation was dispelled by the Court of Appeal in *MHC Consulting***,** which he took the tribunal through in detail. The principal was the "end user", and that was clearly the third respondent, not Huntswood CTC Ltd.

25. The tribunal next heard from Mr Margo, on behalf of the third respondent (Lloyds Bank PLC). He relied upon his skeleton argument, which accepted that the claimant was a contract worker for the purposes of section 41, and that the claimant "*could, in principle, bring a discrimination claim against the third respondent, although particularisation of that claim is required*" (paragraph 3 of the skeleton argument). The third respondent was not the correct respondent for the other claims, as it was not the employer. The Court of Appeal, in *James v Greenwich LBC [2008] ICR 545*, had made it clear that on the particular facts of this case, there was no basis for concluding that the third respondent, rather than the first respondent, was actually the employer. The view expressed by Judge Reed at the first PH was clearly correct: the first respondent was the employer, and supplied service through the second respondent to the third respondent. The first respondent notified employees of their place of work, who they were working for and the nature of each assignment. The employment contract made provision for all the usual terms. The third responded had no involvement in day-to-day resourcing issues and no control over which contractors were released or re-engaged. The express contractual arrangements excluded the third respondent as employer, and there was no need to look beyond them – there was in any event no mutuality of obligation between the claimant and the third respondent, with insufficient control.

26. In oral submissions, Mr Margo first addressed the tribunal on unfair dismissal. He had little to add to what was already in the written submissions and what Mr Randle had said. The third respondent was not the employer. There was only one employer, and as the "end user" or principal of the contract for services, the third respondent could not become the employer. The claimant was employed by the first respondent, which had a contract with the second respondent, who contracted with the third respondent to provide services. There was no direct contractual relationship between the claimant and third respondent. The contractual documentation was clear. In any event, even without relying in *James*, there was no mutuality of obligation, and no day-to-day control by the third respondent. The third respondent could not be the employer. As for

section 41, the point was conceded in principle for the purposes of this PH, albeit once the claimant had properly particularised her claim it might be that the third respondent would argue that it was not the "principal" for the purposes of the clarified claim.

27. In her brief oral submissions, the claimant explained that she relied upon her witness statement. The tribunal noted that the statement set out what the claimant saw as the salient facts, but in so far as its assertions as to the identity of the employer, and the basis of any section 41 jurisdiction, the claimant was rather less clear. She made reference to involvement by the third respondent in arrangements for matters such as holidays, training, control and so on, and the second respondent sought indemnity as to employer obligations, suggesting they were employer. She asserted (paragraph 33) that "*I believe that all three respondents are collectively my employer*". She did not adequately explain why or how this could be the case. The witness statement made no reference at all the potential position of the second or third respondents as "principal" for the purposes of section 41 of the Equality Act 2010.

28. In oral submissions, the claimant did not demur from the second and third respondents' arguments that if they were not the employer, liability could only be by virtue of section 41. She did not, however, address the tribunal at all upon the section 41 point, despite it having been identified as an issue at the first PHs, in the respondents' written submissions, and at the start of the second PH, and having had ample opportunity to consider her case on the point. Indeed, in making the last submissions in reply to the arguments put forward by the other parties, the claimant was in a good position to set out her case as to why the tribunal should have jurisdiction, and why the other parties were mistaken. However, she argued that in reality all three respondents supplied work to her, managed her and paid her. She had worked exclusively for the third respondent since 2011. She had not seen evidence to show that work was not available from day 1 of her maternity leave. The respondents were seeking to evade her contractual rights.

29. The only other matter raised, in answer to the claimant's point about working for Lloyds for a long period of time, was that Mr Margo pointed out that in *James*, the EAT had dealt with the point as to the passing of time, and the contractual arrangement could be a long term one.

The facts

30. Most of the facts are not in dispute, and this is a case where the various contractual relationships have been set out clearly in writing. Save where referred to below, there has been no need for the tribunal to prefer one party's evidence (or more properly, perhaps, one person's interpretation of the evidence) over another, especially as not all the relevant background facts would be within the personal knowledge of the claimant. I note that the claimant had no questions in cross-examination for Mr Harris, and very few for Mr Parmar and Ms Wakefield. I found all three respondent

witnesses to be clear and credible.

31. I am conscious of the need not to tie the hands of the tribunal dealing with the final hearing or any further PH, save in relation to those matters necessary for my making rulings on the matters before me. It is necessary to set out some background, in order that the story can properly be told, but I do not seek to make any binding findings of fact or binding conclusions, save insofar as they relate to the identity of the employer, and the applicability of section 41. I would hope that the other facts I shall refer to below are uncontroversial, but I will try to keep my summary of the evidence brief.

32. Having taken into account the documentary and witness evidence, and the parties' submissions, I make the following findings of fact upon a balance of probabilities.

    32.1. The third respondent, Lloyd Bank PLC, is a well-known bank ("the bank"). The tribunal accepted Ms Wakefield's clear and logical evidence as to how relevant matters were handled, which remained unchallenged by the claimant in cross-examination. Many of the support services within the bank are out-sourced, relying upon staff supplied by contractors. For example, pursuant to a written contract between the bank and the second respondent, Huntswood CTC Ltd ("Huntswood"), Huntswood provide services in respect of customer services, PPI complaints and complaints-handling generally.

    32.2. The bank operates a site at Andover, in Hampshire, where there is a "fully managed" service, provided by Huntswood. The bank supplies the work (namely PPI complaints to be investigated and resolved). Huntswood is contracted to provide the service to the bank, using staff that may be supplied to Huntswood by other contractors. The bank has no say on the recruitment of suitably qualified staff, and does not manage them on a day-to-day basis.

    32.3. The contractual relationship between the bank, as the end-user of services provided by Huntswood, is set out in comprehensive contractual documentation.

    32.4. The tribunal accepts that the nature of the PPI claims-handling work requires some degree of oversight by the bank, and confirmation that all contractors have completed appropriate training, but the bank has little day-to-day input into management of contractor staff.

    32.5. As for the service provided by Huntswood, the tribunal also accepts the clear and logical evidence provided by Mr Parmar. Again, the claimant did not challenge his evidence as to any relevant matter in cross-examination. Huntswood is a privately owned Company which provides specialist resourcing and

consultancy services focussed on governance, risk and compliance, especially to the financial service sector. It in turn engages contractors to allow clients to meet high volume customer and operational demands, supplementing the Company's own in-house functions.

32.6. Huntswood entered into a framework agreement with the bank in March 2006, providing various services to the bank, including PPI complaints-handling services. Individuals working on this project are engaged through contracts with other "umbrella" or personal services Companies, including the first respondent, JSA Services Ltd ("JSA"). Under this arrangement, Huntswood notified JSA of various assignments which have been made available with their clients, for which they required workers to provide services, and JSA supplies available workers to fulfil those assignments.

32.7. The arrangement at the bank's Andover site was that Huntswood managed various supports services. The bank provided overall direction, and day-to-day management within the particular service area was provided by Huntswood.

32.8. In turn, JSA, as an umbrella Company, provides services to a number of businesses and individuals, including to Huntswood, for example for its contract at the bank, subject to a commercial contract between JSA and Huntswood. Individuals would have a contract of employment with JSA, which would continue to act as employer, and pay its staff, notwithstanding where individual employees were deployed in furtherance of JSA's contracts with service users, or with intermediaries such as Huntswood.

32.9. In the claimant's case, she was originally employed by Conduit People Management Ltd ("Conduit"). Conduit, also an "umbrella company" was owned by the some owners of Huntswood, and it would appear that much of its work was contracted to Huntswood. Conduit had in the past provided staff to Huntswood to work on its various contracts with the bank. The claimant became an employee of Conduit in November 2011, having been recruited by Huntswood in pursuance of its contract to provide services to the bank. She accepts that she became an employee of Conduit.

32.10. Conduit was acquired by JSA in May 2015, and the claimant's employment transferred. She accepted her new contract of employment, under an "overarching contract" which enabled the claimant to undertake a number of different assignments for different end-users, without break in continuity of employment. In fact the claimant was already working for the bank (as end-user of the services for which she had been engaged), and continued to do so. She was paid monthly by JSA as an employee, and did not query her employment status until after she fell out with JSA during her maternity leave (see below). With her pay slip, she received a

monthly explanation of the basis of calculating her wages, which included a break down of the sums deducted from the income received by JSA, and the deductions from her wages. At the relevant time she had been working on PPI complaints-handling for the bank, in the role of QA Consultant.

32.11. It is not in dispute that in early 2016 the claimant was on an assignment to the third respondent, due to complete in June 2016. It is not in dispute that the claimant went on maternity leave on 14 February 2016, and was paid statutory maternity pay until 14 December 2016. She wished to return to work, but it would appear that at this point JSA did not have any suitable assignments for her with any of their clients (the tribunal makes no formal finding on the point).

Conclusions

(1) Who was the employer?

33. The claimant's case, both in respect of the unfair dismissal, and of the pregnancy/maternity discrimination, is based upon her having three employers simultaneously in respect of the same work.

34. Although I am not, of course, bound by the remarks made by Employment Judge Reed in the Case Management Orders of 15 June 2017, there is plainly much merit in his initial analysis that "*as an employee of JSA, all the claims other than discrimination can be brought only against that party*". That is indeed the most obvious conclusion to draw from the facts, and I would expect the claimant, if she sought to argue the contrary, to explain why Judge Reed understanding of the case was mistaken. She has not done so.

35. It is clear that this is *not* a case where the claimant has three potential employers which each deny they were the employer, and who is unable to identify which of the three was genuinely the employer. It is a case where the claimant accepts that she was employed by the first respondent, JSA Services Ltd, and does not dispute that she voluntarily accepted the terms and conditions of the contract of employment with JSA. JSA accepts that it was indeed the employer, but the claimant asserts that over the same period the other two respondents were also her employers. This proposition was never properly developed, and I would expect cogent evidence, or at the very least some coherent analysis, before such an argument would have any prospect of succeeding. As it is, the claimant's case as to how she was simultaneously employed by three separate legal entities is somewhat incoherent.

36. The claimant's argument is rather undermined by the following. She accepts that she was employed by Conduit People Management Ltd until 2015, when her employment transferred to the first respondent, JSA Serviced Ltd. She accepts that she was then employed by JSA Services

Limited. It is uncontentious that she has an express contract of employment with JSA Services Ltd. She does not dispute the respondents' case that she voluntarily accepted the terms and conditions of the contract of employment with JSA. She had no written contract of any sort with Huntswood CTC Ltd or Lloyds bank PLC (or indeed Lloyds banking Group or any other iteration of Lloyds), and there is no suggestion that there was any express oral agreement as to a contract of employment. One would have to be implied or deduced from the facts. She confirmed at the preliminary hearing that the unauthorised deductions claim (which has been dismissed for want of jurisdiction) was brought *only* against JSA Services Ltd. She confirmed that her claims for holiday pay and breach of contract are brought *only* against JSA Services Ltd, which appeared to be a tacit acceptance that it was JSA Services Ltd which was in reality the legal entity which employed her. However, when it comes to unfair dismissal, she was insistent that at the effective date of termination (said by the claimant to be 14 December 2016), and at the time of the alleged discrimination (said to be 14 December onwards, and in fact apparently covering a period after employment was said to have ended), she had three employers, namely all three respondents.

37. As far as express contracts were concerned, at the relevant time (certainly from May 2015 up until at least 14 December 2016) the arrangements were as follows:

    37.1. The claimant had an express contract of employment with the first respondent, JSA Services Ltd (a commercial Company).

    37.2. The first respondent had a commercial contract to provide services/staff to the second respondent, Huntswood CTC Ltd.

    37.3. The second respondent had a commercial contract to provide services/staff to the third respondent, Lloyds Bank PLC.

    37.4. The claimant had no express contract with either the second or third respondents.

38. As the respondents have pointed out, this is a relatively commonplace arrangement, with a large commercial organisation (the bank) needing to engage a contractor (the second respondent) to provide specified support services, and that contractor using its own staff and also contracting with other Companies (including the first respondent) to provide additional services as a sub-contractor, or additional staff. The first respondent, as sub-contractor, had employees who could be assigned as required to meet its contractual commitment to the second respondent. I accept that it is not unusual for a Company such as the first respondent, often described as an "umbrella Company" to employ staff for this purpose. Under such arrangements, the fact that staff such as the claimant do not work at the Company's premises, and spend all their paid working time on assignment to third parties, does not in itself mean that the third party, or the commercial Company to whom the employer is providing services, in

some way assumes the identity of "the employer". Whilst, in some circumstances, employment could transfer to a new employer, this is a logical contractual arrangement which makes good sense without needing to find that some other body becomes employer for the purposes of the Employment Rights Act or the Equality Act.

39. I agree with Mr Randle and Mr Margo that a legal analysis of this factual situation, or something very similar, was considered by the EAT (per Elias P) and Court of Appeal (with the leading judgment by Mummery LJ) in the *James v Greenwich London Borough Council* cases.[1] The legal principles, as confirmed by the Court of Appeal at paragraph 23 of the *James* judgment, include that "*in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user*". In the case before me, it is clear that the end-user is Lloyds bank PLC (albeit the same argument would apply to Huntswood CTC Ltd). I am confident that it is not necessary to imply any contract of employment between the claimant and the second or third respondent.

40. The EAT in *James* (paragraphs 53-61), endorsed by the Court of Appeal's judgment, provided guidance as to when a contract of service might be implied. I agree with Mr Margo's argument (adopted by Mr Randle) that the "irreducible minimum of mutual obligations" did not exist between the claimant and the second or third respondents. Mutual obligations existed between the claimant and the first respondent, and between the first and second respondent, and second and third respondent. There was no mutual obligation between the claimant and the second or third respondent. The end user did not pay directly for work done, but paid a sum to its contractor, of which a proportion was eventually received by the claimant from the first respondent. There is no evidence that the third respondent was aware of what sums were actually received by the claimant. The contractual and oral evidence suggests that there would be no basis for the end-user to insist upon a particular worker. The most obvious, and perfectly logical, explanation for the relationship between the claimant and the end-user was by reason of the agency arrangements, and express contractual agreements: there was no need to explain them by a contract of service between the claimant and the third respondent, or the claimant and the third respondent. It was also, correctly, pointed out to me that paragraph 59 of the EAT judgment in *James* made it clear that "*the mere passage of time does not justify any such implication* [of a contract of service with the end-user] *to be made as a matter of necessity*".

41. Overall, I have no hesitation in concluding that there is no need to imply any contract of service between the claimant and the second or third respondent. The contractual relationships are entirely explained by her being employed by the first respondent, and then assigned via the second respondent to work for the second respondent as end user. It is wholly unnecessary to find any implied contract between the claimant and any

[1] EAT: [2007] ICR 577, Court of Appeal: [2208] ICR 545, [2008] EWCA Civ 35.

commercial organisation other than the first respondent.

42. For the purposes of section 230(1) I have no hesitation in concluding that the claimant was employed only by the first respondent, JSA Services Limited. In those circumstances the claims of unfair dismissal must be dismissed against the second and third respondents, for want of jurisdiction.

43. Although it is not necessary to go into greater detail, I would also observe that I agree with Mr Randle and Mr Margo that even absent the *James* analysis, there is simply insufficient evidence to imply any contract of employment with any employer other than the first respondent (quite apart from the highly significant point that the claimant does in fact accept that she was employed by the first respondent at all material times, with whom she had an express contract of employment).

44. Applying the various tests, there is not enough to be able to imply any other contract of employment, let alone the tripartite employment which the claimant seeks to rely upon. The second respondent may have managed the claimant's work tasks on a day-to-day basis, and confirmed arrangements for matters such as when leave might be taken, but I see this as a necessary aspect of ensuring that they are able to comply with the terms of their contract to provide services to the third respondent. The proper management of the claimant's case load would necessarily involve a degree of management control and monitoring, regardless of the identity of the employer, and I would expect the third respondent to need to give instructions as to deadlines and priorities, again regardless of the contractual relationship with individual staff. Day to day control does not, in these circumstances, mean that the second respondent has taken on the identity of employer, especially as all the arrangements for hours, pay, holiday and disciplinary/grievance procedures (for example) remained subject to the claimant's express contract of employment with the first respondent. There was little or no day-to-day control by the third respondent, even if (unsurprisingly) they required adherence to specific case-handling standards and specific training to be completed. Although the claimant points out that the framework agreement between the agreement between the second and third respondents specified that staff should not be removed from the project without the third respondent's written consent, I do not see this as indicating that there was a contract of employment between the claimant and third respondent. I do not see this as evidence of mutuality of obligation or a degree of control indicating an employment relationship, but rather a commercially sensible clause enabling the end-user to ensure continuity of the service their contractor was providing, and to be informed of any staff changes which might affect the short-term delivery of the service. There is no suggestion that consent was ever withheld.

45. It was the first respondent who notified the claimant as to her place of work, who she was working for and the nature of the work for each assignment. Significantly, there was no mutuality of obligation between the

claimant and the second or third respondents, and under the contractual arrangements between the first and second respondent, the first respondent could have substituted another employee for the claimant. It was clear that the third respondent was not really interested in the identity of individual staff assigned to the task for which the second respondent was contracted to provide services. The mutuality of obligation existed between the claimant and the first respondent, with whom she had an express contract of employment.

46. The claimant refers (paragraph 14 of her witness statement) to being "promoted" by the second respondent in June 2012, and this has not been challenged by any of the respondents. The claimant did not argue that this had any particular bearing on the nature of her relationship with the second respondent. I would observe that this was three years before her employment transferred from Conduit to JSA, and it appears to have little bearing on her work in 2016. In any event, the document in the bundle referring to this does not in fact refer to a promotion by the second respondent, but to a modification of the contract between Conduit and Huntswood as to the role for which the claimant was supplied. I do not find that this has any impact as to the nature of the employment relationship at the material time.

47. It is also clear that there was an intention by the claimant and the first respondent that they should create legal relations by entering into a contract of employment, but no evidence suggesting any such intentions in respect of the claimant's involvement with the second and third respondents. Indeed, the respondents' intentions are plainly set out in the contract for services between the three companies. The fact that the second respondent took the precaution of including an indemnity provision in relation to tribunal claims rather confirms that intention, and I do not read it as any sort of admission that in reality there might be an employment relationship (which is evidently what the claimant believes).

48. The above points add weight to my conclusion that the only contract of employment was between the claimant and the first respondent.

49. In respect of the ability to bring discrimination claims, the definition of "employee" in the Equality Act 2010 is of course wider that that set out in the Employment Rights Act. Sections 39 and 83(2) make it clear that employers must not discriminate, and that "employment" means "*employment under a contract of employment, contract of apprenticeship or a contract personally to do work*". The analysis above applies equally to these provisions: the claimant's contract was with the first respondent. There was no contract of employment, between the claimant and the other respondents, or a contract "personally to do work", only a contract between the commercial companies in respect of the supply of staff and services.

50. For the purposes of the Equality Act, I also have no hesitation in concluding that the claimant was employed only by the first respondent,

JSA Services Limited.

51. Indeed, notwithstanding the fairly detailed analysis above, it does appear to me that the facts point very clearly in only one direction. An impartial bystander, applying commonsense, would firmly come to the conclusion that of course the first respondent, JSA Services Ltd, was and remained the claimant's employer. That is what it looked like, and that was the true situation. The rather unclear argument that in some way the claimant (rather uniquely) had three employers at once, does not have any merit.

52. In those circumstances the tribunal has no jurisdiction to hear any claim of discrimination against the employer in respect of any party other than the first respondent, and any such claim must therefore be dismissed for want of jurisdiction.

53. No other basis for discrimination claims having been argued, it follows that the only basis for pursuing claims against the second or third respondents would be as a "contract worker" under the provisions of section 41 of the Equality Act 2010.

54. Whilst the claimant may pursue her unfair dismissal and discrimination claims (in respect of claims against the employer) against the first respondent, JSA Services Ltd, she is not permitted to pursue them against the second or third respondents.

(2) <u>Against whom can discrimination claims be pursued under section 41 of the Equality Act 2010?</u>

55. This issue does not apply to the first respondent, who would in any event be liable for any acts of discrimination for which an employer would be liable, taking into account the provisions of Part 8 of the Equality Act 2010, as applicable.

56. I repeat, as set out earlier, that the claimant does not argue that the second and third respondents might be liable for discrimination on any basis other than as employer or under section 41 of the Equality Act 2010. The claimant has also not made any submissions expressly upon section 41, albeit I have carefully considered all the material before me, before reaching any conclusions.

57. As for the third respondent, Lloyds Bank PLC, Mr Margo does not, in principle, dispute jurisdiction under section 41 of the Equality Act 201, because it is not challenged that the claimant was a contract worker, and that for at least part of the period ion question the third respondent was a "principal". He was at pains to point out that the claim against his clients had not been properly particularised, and the concession should not be seen as open-ended: once the claim has been clarified, it may well be that Lloyds Bank PLC would indeed seek to argue that there was no reasonable prospect of success, or that there was no jurisdiction to hear the claim as particularised. As quoted previously in these reasons, his

submissions put it as follows in respect of section 41: the claimant "*could, in principle, bring a discrimination claim against the third respondent, although particularisation of that claim is required*". I endorse that approach, and do not seek to make further findings or reach conclusions which would prevent future tribunals from making any determination in respect of whether such a claim may be pursued.

58. Whilst the tribunal has ruled that it has jurisdiction to hear the claimant's pregnancy/maternity discrimination claims against the third respondent (Lloyds Bank PLC), solely by virtue of section 41 of the Equality Act 2010, that ruling must be seen in the light of my comments in the previous paragraph. .

59. The remaining issue to be determined is, therefore, whether there is jurisdiction to hear a claim of discrimination against the second respondent (Huntswood CTC Ltd) by virtue of section 41 of the Equality Act 2010. Mr Randle, on behalf of the second respondent, submits that there is no basis for such a claim. Mr Jeffcoate, on behalf of the first respondent (JSA Services Ltd) has chosen not to make submissions on the point. Although Mr Margo, on behalf of the third respondent has not directly addressed the issue, it is perhaps implicit in his submissions that by conceding his client's position as "principal", the second respondent would be unlikely also to be "principal". The claimant has made no express submissions upon the point, albeit I start from the proposition that if the second respondent cannot be liable as employer, and if the section 41 point is in issue (as an alternative basis of claim), the claimant would wish the tribunal to rule that the second respondent could in principle be liable for discrimination under section 41.

60. Section 41 of the Equality Act 2010, headed "Contract workers", provides as follows:

> (1) A principal must not discriminate against a contract worker—
> (a) as to the terms on which the principal allows the worker to do the work;
> (b) by not allowing the worker to do, or to continue to do, the work;
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
> (d) by subjecting the worker to any other detriment.
>
> (2) A principal must not, in relation to contract work, harass a contract worker.
>
> (3) A principal must not victimise a contract worker—
> (a) as to the terms on which the principal allows the worker to do the work;
> (b) by not allowing the worker to do, or to continue to do, the work;
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
> (d) by subjecting the worker to any other detriment.
>
> (4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

> (5) A "principal" is a person who makes work available for an individual who is—
> (a) employed by another person, and
> (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
>
> (6) "Contract work" is work such as is mentioned in subsection (5).
>
> (7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

61. It is not in dispute, for the purposes of the PH, that the claimant would at the relevant time fall into the category of "contract worker" under section 41(7). Although there may be an evidential issue as to whether, as at December 2016, she was still a contract worker, I do not need to determine the point.

62. As indicated above, it is clear that none of the Companies was a "sham", and I accept that the chain of contracts was a bona fide commercial arrangement which was not attempting to circumvent the expressed intentions of Parliament. Clearly the claimant had a direct contractual relationship only with her employer, the first respondent, which in turn had a commercial contract with the second respondent, which had a commercial contract with the third respondent, who was the "end-user" of services.

63. Whilst it is reasonably clear that the third respondent would be capable of falling into the definition of "principal" under section 41(5), the wording of that provision is potentially, on the face of it, ambiguous insofar as it might apply to the second respondent, Huntswood CTC Ltd.

64. In his submissions, however, Mr Randle pointed out on behalf of the second respondent that there is case law, albeit based on equivalent predecessor discrimination legislation, making it clear that the "principal" should be interpreted as being the "end-user". This would be the third respondent, Lloyds Bank PLC, rather than his client, who was merely an intermediary between the claimant (as a "contract worker") and the entity who was the ultimate beneficiary, the end-user.

65. I agree with Mr Randle that the relevant principles, as to who the "principal" should be, are set out in *MHC Consulting Services Ltd v Tansell [2010] ICR 789*. The factual matrix in both cases is similar, but it is the practical application of the principles which is the key point.

66. At page 794A of *MHC Consulting*, Mummery LJ quoted (with approval), the EAT's formulation [after referring to the facts of the case] that:

> "Therefore, whenever there is an unbroken chain of contracts between the individual and the end user, the end user is, by definition, the 'principal'"

67. The above principle was echoed in the Court of Appeal's conclusions, at pages 797 and 798 of the judgment. The wording of section 12 of the Disability Discrimination Act 1995 [which essentially contains the same provisions as section 41 of the Equality Act 2010], when applied to the situation where a person is supplied to an end user through one or more agencies, where there is a chain of contracts, should be taken to mean that it is the end user which is the "principal".

68. I agree with Mr Randle that it is clear that the third respondent, as the end user, was the principal for the purposes of section 41. It was equally clear that the second respondent, as effectively the agency or intermediary who had contracts with the end user and the claimant's employer, falls outside the definition of "principal". The employer is usually liable for acts of discrimination by its employees (and sometimes by others, but this does not need to be analysed here). Parliament, by way of section 41 of the Equality Act 2010 (and processor legislation), has conferred extra protection upon contract workers such as the claimant, allowing discrimination claims to be brought against the end user (or "principal"). This means that the employer (JSA Consulting Ltd) can be liable by virtue of section 39, and the end user (Lloyds Bank PLC) can be liable by virtue of section 41. Neither of these provisions, however, extend the jurisdiction to an intermediate Company in the chain of contracts, such as the second respondent (Huntswood CTC Ltd).

69. In the circumstances, the tribunal has no jurisdiction to hear any discrimination claims against the second respondent (Huntswood CTC Ltd).

70. The tribunal having already determined, above, that the tribunal has no jurisdiction to hear an unfair dismissal claim against the second respondent, and the remaining claims having already been dismissed, all claims against the second respondent are therefore dismissed for want of jurisdiction.

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Employment Judge Emerton
Date 27 September 2017

JUDGMENT SENT TO THE PARTIES ON
28 September 2017
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FOR THE TRIBUNAL OFFICE