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THE EMPLOYMENT TRIBUNALS

Claimant: **Ms Lauri Anne Scott Cox**

Respondents: **(1) Financial Conduct Authority**
(2) Oakleaf Partnership Limited

Heard at: **East London Hearing Centre**

On: **14 and 15 June 2018**

Before: **Employment Judge Burgher**

Representation

Claimant: Mr B Grey (Counsel)

First Respondent: Mr O Holloway (Counsel)

Second Respondent: Mr T Sheppard (Counsel)

JUDGMENT

1. The Claimant was not an employee of the First Respondent. The Claimant's claims against the First Respondent are dismissed.

2. The Claimant's claim against the Second Respondent were withdrawn on the basis that the Second Respondent would not pursue any applications against the Claimant. The Claimant's claim against the Second Respondent is therefore dismissed.

REASONS

Issues

1 At the outset of the hearing the Tribunal identified and refined the issues which are as follows: The Claimant claims automatically unfair dismissal contrary to section 104 ERA against the First Respondent. This included consideration of whether the Claimant was an employee of the First Respondent for the purposes of section 230 of the Employment Rights Act 1996.

2 The Claimant, through her Counsel, confirmed that she was no longer pursing claims for increase compensation under section 38 of the Employment Act 2002 or for a declaration for contract terms under section 11 of the Employment Rights Act 1996.

3 During the morning of the first day of the hearing the Claimant withdrew her claims against the Second Respondent on condition that the Second Respondent would not pursue any applications against her. In these circumstances the claims against the Claimant's claims against the Second Respondent are dismissed.

4 It was initially planned to consider the issue of the Claimant's employment status as a separate preliminary matter but when the Claimant withdrew her claims against the Second Respondent and having read all the statements and relevant documents. I accepted Mr Grey's submission that all issues should be considered.

Procedural matters

5 The Tribunal was initially constituted as a 3 member Tribunal. However, there were practical difficulties which this created. Prior to the hearing the parties were informed that the case would be judge sitting alone and as such insufficient copies of the voluminous bundle had been prepared. Further, one of the initial members of the Tribunal would have only been able to sit for 1 and half days and she was required in chambers on another case. Both Counsel for the Respondents submitted that the case should be heard by judge sitting alone and Mr Grey, on behalf of the Claimant did not object. Therefore the Tribunal members were therefore released.

6 On the afternoon of the first day, I requested the remaining parties to sign consent under section 4(3)(e) of the Employment Tribunal Act 1996 requiring written consent to the case being judge sitting alone. Mr Grey was permitted to take instructions from the Claimant, who was still giving evidence, to facilitate this. The Claimant was not willing to provide her consent. Mr Holloway, on behalf of the First Respondent maintained that written consent to continue with Judge sitting alone was unnecessary as this was permitted under section 4(3)(c) of the Employment Tribunals Act, as this was a claim brought under section 111 of the Employment Rights Act 1996. Whilst there was some force to Mr Holloway's submission in view of the position taken by Claimant I decided that it was appropriate to convert the hearing into a preliminary hearing, pursuant to section 4(5) of the Employment Tribunals Act, to consider whether the Claimant was an employee of the First Respondent for the purposes of section 230 of the Employment Rights Act 1996. If I find that the Claimant was an employee the issue proper constitution of the Tribunal would be reconsidered.

Evidence

7 The Claimant gave evidence on her own behalf. The First Respondent called Ms Emma Dolan, Senior HR Business Partner and Mr Ben Davis of Resource Solutions Limited. I also heard evidence from Ms Sarah Alexander, Manager and Ms Dominique Seal, Senior Consultant employed by the Second Respondent. All witnesses provided signed witness statements and were subject to cross examination and separate questions from the Tribunal.

8 I was also referred to relevant documents in an extensive bundle of over 740 pages.

9 I make the following observations in relation to the witness evidence that was heard. I found the Claimant's evidence to be confused, inconsistent and incredible when viewed in the context of correspondence and documentation that she was party to at the relevant time. The Claimant volunteered that she was not paying proper attention when sending relevant emails and signing the relevant documents as she was busy working on other contracts and that she trusted the First Respondent to put in place what she thought she had agreed. I was unable to accept this and conclude that the Claimant's evidence in respect of the relevant documentation was contrived to seek to construct her claim against the First Respondent.

10 In contrast, I found the evidence of the witnesses of First and Second Respondents to be clear, honest and consistent with the relevant documents that were sent at the time. Specifically, I had no difficulty in concluding that where there was a conflict of evidence between the Claimant and, in particular Ms Dolan, the evidence of Ms Dolan should be preferred.

Facts

11 I make the following findings of fact.

12 On 2 October 2017 Ms Dolan, Senior HR Business Partner contacted the Second Respondent stating the FCA required to fill an Interim HR Vacancy with someone who was a '*deep technical expert who is comfortable with taking the lead on legal/technical aspects*' with '*strong project management skills*.'

13 The Claimant is a very experienced Human Resources Consultant delivering high level change management services to organisations. She is a Fellow of the Chartered Institute of Personnel and Development, has an LLM in Employment Law, a MBA and was an Employment Tribunal member from March 2010 to July 2017.

14 The Claimant was contacted by the Second Respondent and informed of the Interim HR Vacancy opportunity at the FCA. The Claimant had worked closely with the Second Respondent over a number of years and was successful in securing positions with organisations to provide high level consultancy services through her personal services company Cox (Lilley) Ltd. The Claimant's CV demonstrates the extensive number of roles she has undertaken through her personal services company.

15 The Claimant was very interested in undertaking the Interim HR role at the FCA, through her personal service company, and was content to be put forward by the Second Respondent at the rate of £750 plus VAT per day. At this time there was no indication or expectation that the Claimant would be considered as an employee by herself or any other party.

16 Ordinarily, the Second Respondent would have facilitated all contractual discussions regarding contractual terms. However, on 2 October 2017 the Claimant informed Ms Seal of the Second Respondent that Emma Dolan is her '*friend and former colleague*' who had recently joined the FCA. The Claimant took advantage of this personal connection with Ms Dolan by contacting her directly. During the early text

exchanges Ms Dolan made it clear that the role was '*via Oakleaf*' and she believed the Claimant may be a good fit.

17 The Second Respondent, Oakleaf suggested 6 candidates for the role and 2 candidates, including the Claimant, were selected for interview. On 10 October 2017 the Claimant met Ms Dolan and Mr James Symon, project manager for an informal interview. The interview was not sufficiently searching or reflective of an interview that would be compatible with the offer of a contract of employment. The informal nature of the interview and how it was recorded did not reflect that a contract of employment was being considered. Indeed, at this stage the Claimant fully expected to be undertaking the role through her personal service company.

18 The informal interview went well and matters such as a start date and an anticipated 6 month duration of the contract were discussed. However, I do not accept the Claimant's evidence that she was actually offered the role by Ms Dolan immediately following the informal interview, although the Claimant may have reasonably assumed that she was likely to be offered the role.

19 On 11 October 2017 Ms Dolan contacted the Claimant to say that she would like to offer her the role but due to IR35 concerns the FCA had the role would not be through the personal service company but would have to be on payroll. The Claimant was unhappy with this change of approach and did not agree with the validity of the IR35 concerns. Nevertheless she was keen to do the role and the FCA was keen to use her services. Consequently, discussions about how the Claimant could undertake the role whilst maintaining the same level of income as proposed by her service company were progressed.

20 The discussions continued and the Claimant proposed sent an email sent to Ms Dolan and Ms Seal on 12 October 2017 at 10.17 stating that she would be prepared to work under a fixed term contract for the equivalent of £232,000 pa. It was agreed by all that this sum was inflated and wholly out of proportion with what the FCA would have been able to offer an employee of the Claimant's grade. The relevant rate offered for a comparable employee would have been between £75,000 and £110.000pa. Employees had additional benefits such as bonus eligibility, medical insurance, health insurance, pension contribution and statutory entitlements such as maternity/ paternity leave, sick leave, redundancy pay which were not open to non employees.

21 Later on 12 October 2017 the Claimant sent an email to Ms Dolan and Ms Seal stating that she had no real objection to a PAYE arrangement via a third party other than the tax and national insurance increase. She proposed a day rate of £1011 per day to reflect the tax she would have to pay under the PAYE on payroll. This day rate was based on 230 days worked as would have been the case had she been engaged through her personal service company. The Claimant drew a clear comparison with what she would be earning through her personal service company and stated that she would accept £999.99 or £1000 per day if it would be easier to get authorisation for this.

22 Matters progressed and Ms Dolan spoke to the Claimant later on the 12 October and then sent the Claimant a text at 22.37. The text stated that there was agreement on the basis of a daily rate of £990 on payroll with the Claimant individually as opposed to through her limited company. Ms Dolan stated that if the Claimant was ok with this then

she would let the Second Respondent and the First Respondent's resourcing team know.

23 The following morning Ms Dolan sent an email to Ms Seal and the Claimant confirming the offer of £990 per day, on payroll with the Claimant as an individual rather than through her limited company for a six month duration. Ms Dolan explicitly stated that the First Respondent was not able to proceed down the fixed term contract employee route.

24 The Claimant responded to Ms Dolan's email at 08.13 stating that stating her agreement and indicating that Ms Dolan should contact someone else at Oakleaf as Ms Seal was not working that day. When questioned why she did not object to Ms Dolan's expression that the Claimant was not offering a fixed term contract employee role, the Claimant maintained that she was busy, it was early in the morning, she was pressured working on two contracts and that she trusted Ms Dolan to give effect to what was agreed. I do not accept the Claimant's evidence in this regard. Ms Dolan did not offer the Claimant an employee role as suggested. The Claimant's agreement to Ms Dolan's email, combined with her subsequent actions of signing a temporary worker contract with Oakleaf on 19 October 2017 and attending an agency workers induction session at the First Respondent on 23 October 2017 completely undermines her assertion that she believed she had an express and direct agreement with Ms Dolan, and therefore the First Respondent, for a contract of employment. I do not accept the Claimant's evidence and conclude that she was not being entirely honest or helpful when giving oral evidence to me in this regard.

25 The Claimant signed the Oakleaf temporary workers contract in respect of her assignment to the FCA. She stated that at the time she signed this she was only concerned with objecting to the intellectual property clause, which she deleted, and the day rate expressed at £990. Importantly, the Claimant did not contend, as she did before me, that the contract was wrong and that she was an employee.

26 As far as the day rate was concerned, the Claimant had reflected on this and believed that she should be paid the annual equivalent of 260 days pay for 230 days work in order to provide for her holiday entitlement. The Claimant's assertion in relation to pay was difficult to fathom given the way in which she approached the previous discussions in negotiating the rate. The Claimant was being offered what was agreed but she subsequently wished to secure far more than if she was engaged under her personal service company. With the personal service company she would have happily accepted 230 days pay for 230 days work and stated that she would have budgeted accordingly for holiday. That was the premise upon which the £990 day rate was calculated. However, the Claimant was sadly mistaken in her assessment of the day rate and she required a far greater payment and ended what could have been a positive and mutually beneficial opportunity because of this.

27 The Claimant signed the induction pack on 23 October 2017 which confirmed that she attended the FCA temporary and contractor induction and that she had received the relevant paperwork. Again, the Claimant did not mention to the First Respondent, as she did before me, that she believed that was an employee or that she was on the incorrect induction program.

28 The Claimant maintained that she was unclear at the time whether she was an employee of the First Respondent. I do not accept this. The documentary evidence clearly demonstrates that the Claimant and the First Respondent had no intention or expectation, whether orally or in writing to engage in any contract with each other at all.

29 I was concerned that the Claimant's failure to refer to any of the clear documentary evidence against her position in her witness statement was an attempt to mislead. When the Claimant was confronted with the content of the documentation she acknowledged that she was foolish to have signed and assented to documentation that were contrary to her stated understanding of the contractual position. I find from the weight of evidence and the Claimant's experience in employment law, that she did not believe that she was contracting directly with the First Respondent and only maintained this as a possibility when she subsequently instructed solicitors in respect of the dispute about the payment of the day rate.

Law and conclusions

30 Section 230 of the Employment Rights Act 1996 states:

(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.

31 The starting point for my consideration is whether there is a contract, express or implied, between the Claimant and the First Respondent. If there is such a contract consideration of whether there is a contract of service is necessary.

32 In view of my findings of fact set out above, I do not conclude that there was an express contract between the Claimant and the First Respondent. The highest the Claimant can put her case is that there was an agreement between her and Ms Dolan of the First Respondent concluded on the evening of 12 October 2017 where an offer of £990 per day was to be paid.

33 The Claimant accepted that there was no indication from Ms Dolan whether orally or in writing that she would be an employee of the FCA but she stated that she assumed she was an employee of the First Respondent from subsequent actions and discussions with Ms Dolan, who was acting on behalf of the First Respondent. In particular, it is submitted on behalf of the Claimant that the direct communication between the Claimant and Ms Dolan considered with the contents of the informal interview that specified the start date (to be as soon as possible), and the duration of the contract (of 6 months), meant that there was a definitive contract between the Claimant and the First Respondent.

34 Despite the tenacity of Mr Grey in making this submission, it is factually unsustainable. It was always accepted that the work would be done via a third party and not direct with the FCA. It was always accepted that the payment would be by way of a day rate. This is evidenced in the content of the email exchanges, the temporary worker contract that was signed with Second Respondent and the temporary worker induction. It is fanciful for the Claimant to now suggest otherwise.

35 I do not conclude that the Claimant can reasonably or sensibly maintain on the evidence that she was thought she was being offered employment direct with the FCA. Ms Dolan's involvement was expedient given their friendship and previous working relationship, all correspondence was being copied to the Second Respondent, the day fee comparison was always predicated on the requirement to make the Claimant get roughly the same take home as she would have through her personal service company; the Claimant was acknowledging that the engagement would be through a third party and the brief consideration of whether there could be a fixed term contract offered resulted in salary proposal so far out of the Respondent's pay scales that undermined the assumption of the Claimant that she could have been considered as having a direct contract with the First Respondent. The Claimant subsequently signed a temporary worker contract with the Second Respondent and attended a temporary worker induction before stating work at the FCA. There was no express contract between the Claimant and the First Respondent.

36 Having dismissed the submission that there was an express contract between the Claimant and the First Respondent, I then considered whether there was an implied contract between them.

37 Mr Holloway, on behalf of the First Respondent, referred me to the case of Tilson v Alstom Transport [2010] EWCA Civ 1308. In that case the worker was fully integrated into the business and it was clear that if there was no express contract and absent any agency arrangements, a contract would have been readily implied. Lord Justice Elias stated:

7. The principles for determining when such implication can take place are now well established and they were not in dispute before us. First, the onus is on a claimant to establish that a contract should be implied: see the observations of Mance LJ, as he was, in Modahl v British Athletic Federation [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.

8. Second, a contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in James v Greenwich London Borough Council [2008] ICR 545 which considered two earlier decisions on agency workers in this court, Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437 and Cable and Wireless plc v Muscat [2006] ICR 975. It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed: (paras 23 - 24). Mummery LJ stated that the EAT in that case had:

"… correctly pointed out, at para 35, 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, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213, 224:

> *"necessary . . . in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*

> *As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."*

9. If an employment tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the tribunal's decision.
10. It is important to emphasise that if these principles are not satisfied, no contract can be implied. It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him.
…

44. In my judgment, they are not, whether considered individually or cumulatively. First, the mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end user. Indeed, in most cases it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree, and this will inevitably involve control over what is done and, to some extent, the manner in which it is done. The degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service. But it is a factor of little, if any, weight when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows that in law he must be an employee.

38 There was a valid agreement between the Claimant and the Second Respondent dealing with her assignment to the FCA. It is not necessary to imply a different contract. The business reality of the transaction is addressed by the respective contract terms between the Claimant and the Second Respondent and the Second Respondent and the First Respondent and it is not necessary to imply a contract contrary to the contracts that do exist.

39 Therefore the Claimant has not established that a contract should be implied in the circumstances of this case. The detailed submissions of Mr Grey regarding the Claimant's integration in the FCA whilst she was working are not pertinent if there is not a contract in place at all.

40 I conclude that there is no express or implied contract between the Claimant and the First Respondent. Therefore there is no contract of employment between the Claimant and the First Respondent. The Claimant's claims against the First Respondent are therefore dismissed.

41 I found this case to be devoid of any real factual or legal basis. Whilst the Claimant could perhaps be forgiven for being initially confused about the contractual status of discussions, given her experience and qualifications any confusion could not be reasonably or sensibly maintained having properly reviewed the emails and contractual documentation.

42 The further proposed hearing dates of 1 and 2 November 2018 are vacated.

Employment Judge Burgher

19 June 2018