Case Number: 1400977/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Elbourn	**v**	The Met Office (1)
		Qualserve Consulting Ltd (2)

OPEN PRELIMINARY HEARING

Heard at: **Bristol** **On:** **21 September 2018**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: in person
For the First Respondent: Ms Burton – Counsel
For the Second Respondent: Mrs Belgrave - Counsel

JUDGMENT

1. The Claimant's claim of unlawful deductions from wages is struck out, against both Respondents, as, he being neither an employee nor worker of either Respondent, the Tribunal has no jurisdiction to hear it.

2. The Claimant's claim of breach of the Agency Worker Regulations 2010 is dismissed, upon withdrawal.

REASONS

Background and Issues

1. The Claimant was engaged to work at the First Respondent (R1), offering consultancy services, via a contract entered into between a personal service company ('the PSC') of his, Equisoft Limited and the Second Respondent (R2). He did so for approximately six months, the arrangement terminating in January 2018. He considers that deductions were made from his wages, by way of improper deductions of National Insurance Contributions. He also initially claimed, as an agency worker that he was treated less favourably than employees of the Respondents, by not being given access to a pension scheme, contrary to the Agency Worker Regulations. However, days prior to this Hearing, he stated by email that he was no longer pursuing that claim and

he confirmed that to be the case at this Hearing. That claim is accordingly dismissed, by way of withdrawal.

2. The surviving issue has already been discussed at a case management hearing on 7 June 2018 and is set out in greater detail in the Summary of that hearing. The Respondents contend that the Claimant is not an employee or worker of either of them and that accordingly the Tribunal does not have jurisdiction to hear the claim of unlawful deduction from wages, hence the listing of this Preliminary Hearing.

The Law

3. I was referred to s.230 of the Employment Rights Act 1996 as to the definitions of 'employee' and 'worker'. I note, in particular that s.230(3)(b) in respect of 'worker' status states:

> *(b) (a worker means an individual who has entered into works under) 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 of 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;'*

4. I was referred to a range of case law by both Respondent counsel, the most relevant of which I consider below:

   a. **James v Greenwich London Borough Council [2007] ICR 577 UKEAT** (per Elias J, as he then was). It is, I think, worthwhile setting out the essential background in that case (as set out in the headnote) and a particular reference by Ms Burton, as follows:

   The claimant was employed by the respondent council as an asylum support worker until 1997, when she ceased working for a short time. She subsequently began working again for the council through an employment agency, from about September 2001, and in 2003 she moved to another agency which paid a better hourly wage. There was no express contract between the claimant and the council, and the terms of her contract with the agency provided that it was a contract for services between the claimant and the agency and did not give rise to any contract of employment with the agency or with the council. Unlike those working directly for the council, the claimant was not entitled to sick pay or holiday pay and arrangements in respect of sickness and holiday were made with the agency. The claimant was absent from work due to sickness in August and September 2004 and the agency provided another worker in her absence. When she returned she was told that she was no longer required as the agency had replaced her. On the claimant's claim against the council for unfair dismissal, the employment tribunal found that, as there was no obligation on the claimant to provide her services to the council, or on the council to provide her with work, sick pay or holiday pay, there was no irreducible minimum of mutuality of obligation necessary to create a contract of service, and no facts from

which such a contract could be implied between the claimant and the council. The employment tribunal accordingly held that the claimant was not an employee, as defined by section 230(2) of the Employment Rights Act 1996*, and dismissed her claim.*

On the claimant's appeal—

Held , dismissing the appeal, that it was not particularly helpful to focus on the existence of the irreducible minimum of mutual obligation when the issue was whether a contract could be implied between an agency worker and the end-user; that in such a case the issue was whether the way in which the contract was in fact performed was only consistent with an implied contract between the worker and the end-user and was inconsistent with there being no such contract; that the tribunal had been entitled to find that no circumstances existed justifying inference of an implied contract between the claimant and the council; and that there was no necessity to imply a contract, given that there was an agency relationship regulating the position of the parties, and the mere passage of time was not sufficient to require any such implication.

and, at paragraphs 20 and 58:

20. The third situation is where there is an agency relationship, as exemplified in this case. Typically, as here, there is a contract between the agency and the worker, under which the worker agrees to provide his or her services to the ultimate client or end-user, and a contract between that client and the agency. Normally there is no express contract of any kind between the end-user and the worker. In those circumstances, unless some contract can properly be implied according to established principles, it will not exist at all. Rights which are dependent on there being a contract of some kind will then simply not arise.

58. When the arrangements are genuine and when implemented accurately represent the actual relationship between the parties-as is likely to be the case where there was no pre-existing contract between worker and end-user-then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end-user. If any such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end-user which are incompatible with those arrangements.

b. **Smith v Carillion (JM) Ltd [2015] EWCA Civ 209** (again per Elias LJ) which indicated that:

22. It is also important to bear in mind that it is not against public policy for a contractor to obtain services in this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed: James *para 56 – 61;* Tilson *paras 10-11. That will frequently but by no means always be the reason why the employer enters into a relationship with an agency. A contract cannot be implied merely because the court disapproves of the employer's objective.*

c. **Pimlico Plumbers Ltd v Smith [2018] UKSC 29**, as to the test to be applied as to whether, provided a contract existed between the parties, it could be either a contract of service (as, in that case, a worker), or one of contract for services, as a self-employed contractor.

The Facts

5. I heard evidence from the Claimant and for R1 from a Mr Rossiter, a manager with responsibility for setting up and managing supply contracts and a Mrs Rudd, an analyst responsible for overseeing contractors. For R2, I heard evidence from a Mr Chaudhuri, a director of that Company.

6. Many of the principal facts in this matter were not substantively in dispute. I summarise them below, recording any dispute and making findings, as necessary.

7. The Claimant has operated as a consultant/contractor now for approximately twenty years, having previously been an employee. He set up his PSC fifteen years ago. He is clearly, in this context, a sophisticated and knowledgeable individual, with extensive experience of entering into such arrangements and an active awareness of his tax affairs, in respect of which he was used to taking professional advice. Prior to his engagement, he wrote to Ms Rudd [126a], stating:

'*Hiya. I had a quick word with my accountant last night. As my previous employment was taxed offshore it does not count towards my UK earnings under the double taxation rule, so I can squeeze in another 3 months at the Met before hitting the 40% do-not-pass barrier, which would take me to mid-Feb. So, I'm available if you want me.'*

8. He had heard from a friend in R1 that there was a vacancy there and approached R1 direct. He attended a '*chat'* [47 – his words] on 3 August and following discussions with R1 as to day rates and appropriate tax liabilities (to include reference to IR35), he was referred on 14 August 2017, following a request from him as to '*the contractual position for this engagement'*, to R2 [58], who could advise him '*on contracting, they will also be able to answer any IR35 questions'*.

9. On or about 16 August, the Claimant completed (at his own instigation) an HMRC 'employment status test' [69], to which he said that his '*honest answers'* [66] were:

a. As to whether he could be moved to a different task or project, he '*yes, but only with the worker's agreement'*.

b. As to whether the 'end client' (R1) had the right to decide how the work was done he said '*no, the worker decides how the work needs to be done without input from the end client'*.

c. In answer to the question as to whether the end client could decide working hours, he answered 'no', as it was for him to decide.

d. As to the worker choosing the location of the work, he said '*no – the task determines the work location'* (in this case, obviously, the Met Office).

10. The Claimant accepted, in the same document [70] that he would have no entitlement to sick pay, holiday pay, pension, paternity pay etc. and would have no managerial role involving 'hiring and firing', or deciding pay levels or delivering appraisals.

11. Following a request by him to R2 [86] as to the contractual options open to him, they replied [89-90], setting out three: firstly, working under an 'umbrella' company (called 'Paystream'), as a contractor; secondly, contracted through his PSC and thirdly, as a PAYE contractor, directly employed by R2. The various tax and NIC differentials in respect of each option were set out and it clear to me (while he denied it – stating that he did not wish his PSC to '*become dormant'*) that this factor was the driving issue for the Claimant in making his eventual choice of using his PSC (an arrangement he had used many times before) [110]. He did so following extensive further correspondence as to NICs and also raising concerns as to entering into a '*way of 'lock down' working that wasn't apparent in the interview and may not be suitable for me'* [94]. All of this was clearly, therefore, his own, educated and informed choice and there was no implication of any pressure or duress being applied to him, to exercise any particular choice.

12. Following final agreement, R2 and the Claimant's PSC entered into a contract on 5 September 2017 for provision of the Claimant's services to R1 [116]. This is the only express contractual documentation in this case. Clauses in that contract state:

'2.2 … (the PSC) *will be engaged on a contract for services by* (R2) *on the terms set out in this Agreement. For the avoidance of doubt this Agreement shall not be construed as a contract of employment between any Agency Worker or any representative of* (the PSC) *supplied to carry out the Assignment and either* (R2) *or* (R1) *and any of the liabilities of an employer arising out of the Assignment shall be liabilities of* (the PSC).'

3.3 Nothing in this Agreement shall render any Agency Worker an employee or worker of either (R2 or R1)*. The* (PSC) *shall ensure that the Agency Worker does not hold himself out as an employee or worker of either* (R1 or R2) *other than for the purposes of the IR35 legislation in respect of clause 8.5 …'*

13. The Claimant commenced working for R1. He submitted timesheets [46w] to R2, approved by R1 and then the PSC invoiced R2 [46x], who paid them. At no point was he ever directly paid by R1.

14. In November, all parties agreed to extend his contract, to January (again via his PSC) [126]. On that eventual termination of contract, he considered that he had had undue deductions of NICs from the payments made by R2 and presented this claim in March 2018.

15. The Claimant agreed that he had not been entitled to payments of sick or holiday pay during his engagement and nor could he have relied on R1's disciplinary or grievance procedure. He made several references to himself as a 'contractor' [example 47]. He agreed that if he needed to be elsewhere (such as, for example, a doctor's appointment) [126e], he did not need to seek permission, but merely to inform R1 to that effect, as a courtesy.

16. Mr Rossiter accepted that the Claimant had been provided with a Met Office encrypted laptop, rather than allowed to use his own, but said that this was because of the security procedures necessary at the Met Office and this requirement applied to all contractors. He also stated that effectively, due to the same security concerns (the Claimant having had to be security vetted before assuming the role), substitution was not generally possible.

17. The Claimant contended that he had '*in every way been treated'* like an employee, his advice being sought, being invited to meetings and having access to secure areas. He said that the contract did not reflect the reality of his role. While, he agreed, there was no express written contract between him and R1, one should be implied.

Submissions

18. Claimant. For the first time, in his submissions, the Claimant sought to argue that the contract between R2 and his PSC was a 'sham'. He had not pleaded this assertion in his claim, set it out in subsequent correspondence, or his witness statement, or in cross-examination of the Respondents' witnesses. Clearly, also, the Respondent counsel had been unable to cross-examine him on that assertion. He sought to rely on various items of tax legislation to support this contention, but which were not before this Tribunal, or had been provided to Respondent counsel. I was, therefore, unable to take such submission into account. Generally, in respect of those matters that had been dealt with in the Hearing, he said that the mere fact that he'd not been able to avail himself of such benefits as sick or holiday pay was irrelevant, as any inability to access such benefits was defined by his status, not the other way round.

19. R1 and R2. Ms Burton had provided a skeleton argument, upon which she relied. Mrs Belgrave made brief oral submissions (particularly in view of the Claimant having withdrawn his claim under the Agency Worker Regulations). She stressed that this case was very far from cases such as those of **Autoclenz v Belcher**, there being no duress placed upon the Claimant and who, unlike many in the 'gig economy', was a sophisticated individual, well able to negotiate to his own benefit and pick and choose what work he wished to undertake. He was presented with options and exercised a clear, informed choice. This was the reality of his situation, not what he now seeks to advance.

Findings

20. Relationship with R1. The Claimant was neither an employee of, nor engaged as a worker by R1, for the following reasons:

    a. He had no contract of any kind, express or implied, with R1. The only express contract in existence was between his PSC and R2 and that contract explicitly precluded the possibility of the Claimant relying on it to assert employment or worker status, with either R1 or R2. The Claimant is a sophisticated individual, with extensive experience of such arrangements and access to professional advice and entered, via his PSC, into the contract with R2, willingly and 'with open eyes', having weighed up all his options.

    b. I consider **James v Greenwich** to be a case in which the facts are 'on all fours' with this claim – less the additional difficulty for Mr Elbourn that instead of personally contracting with R2, as Ms James did, his PSC did so, thus placing him at an even further remove from the contractual arrangements. As indicated by that case, there is no necessity to imply a contract between a claimant and an 'end-user' when, as in this claim, there is a perfectly valid express contractual arrangement already in place: Claimant with his PSC; PSC with R2, to provide his services to R1 and arrangements between R2 and R1 for these steps to take place. Such contractual arrangements as these are entirely routine and lawful.

    c. There is no indication of '*words or conduct'* that would permit me to conclude that the R2/PSC contract no longer reflected reality. The Claimant carried out his role, indeed agreed to extend it, again via the R2/PSC route, he supplied his time sheets and his PSC invoices to R2 and they paid them. Even if the R2/PSC contract was somehow no longer valid (which is not the case) and there might be a need to imply a contract elsewhere, there is no substantive evidence to do so. He was not paid by R1; he was not entitled to any of the other benefits of being an employee (holiday and sick pay and access to a disciplinary and grievance procedure); he was able to absent himself without requiring permission and there was little or no day to day control over how he did his job. He was given a project and apart from a weekly meeting with Mrs Rudd, to check on progress, he was his own master. While he could not realistically substitute another to do his work, this is only one factor in many and not determinative overall, particularly when viewed in the context of R1's security requirements. The issue to him by R1 of an encrypted laptop is entirely reasonable and understandable in these circumstances and any attempt to rely on this to show an employment or worker status is a 'red herring'. He would of course, as a contractor, be expected to attend meetings and have his advice sought – this is, after all, why R2 required his services as a consultant/contractor. All of these factors indicate the reality of his status, i.e. a contractor engaged, via his PSC, by R2.

    d. Applying the same rationale, nor can he have been a 'worker', as, again, there was no contractual relationship between him and R1 and even if there had been, his services were being provided via a '*business*

undertaking carried on (by him)' (his PSC) and therefore s.230(3) is engaged and excludes the possibility of 'worker' status.

21. Relationship with R2. As should be evident from the analysis above, the Claimant had no direct contractual relationship with R2, only his PSC did. As I have found, the contract between the PSC and R2 was an entirely valid one (the Claimant providing no evidence or valid submission as to why it was not) and that contract expressly excluded the possibility of him claiming employment or worker status with either Respondent.

22. Conclusion. Accordingly, therefore, I find that the Claimant was neither an employee, nor engaged as a worker, by either Respondent and therefore, subject to s.23 of the Employment Rights Act 1996, does not have the requisite status to present a claim of unlawful deduction from wages to this Tribunal. His claim is therefore struck out, for want of jurisdiction.

Employment Judge C H O'Rourke
Bristol
Dated 21 September 2018

Sent to the parties on

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For the Tribunal Office