EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J. O'Brien	**v**	**NatWest Markets Plc**
Heard at: London Central (by video)		**On**: 2 November 2020
Before: Employment Judge P Klimov		

PRELIMINARY HEARING BY VIDEO

Representation

For the Claimant: In person

For the Respondent: Ms. Ahmed (of Counsel).

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant did not enter and did not work under a contract of employment with the respondent.

2. The claimant was not an employee of the respondent within the meaning of section 230 (1) of the Employment Rights Act 1996 (ERA) and therefore does not have the right not to be unfairly dismissed pursuant to section 94 of ERA.

3. For this reason the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction and Issues to decide

1. By a claim form presented on 04 July 2019 the claimant brought a complaint of unfair dismissal.

2. The respondent presented a response denying that the claimant was an employee of the respondent and therefore he does not have the statutory right not to be unfairly dismissed. It avers that at all material times the claimant was engaged as a contractor of a third party company under a contract for services between the third party and the claimant's personal service company and supplied to the respondent by the third party company. Further, and in the alternative, the respondent avers that the tribunal does not have jurisdiction to hear the claimant's claim as the claimant had not been continuously employed by the respondent for a period of two years ending with the effective date of termination.

3. The respondent has also pleaded that, in the event the tribunal finds that the claimant was an employee and had more than two years of continuous service, his dismissal was not unfair and that he had been dismissed for some other substantial reason, namely the expiry of his assignment on the cessation of certain internal functions, workflows and areas of responsibility in London, or, in the alternative, by reason of redundancy.

4. The case was listed for an open preliminary hearing by video to decide the following issues:

    (i) Did the Claimant enter into or work under a contract of employment with the Respondent?

    (ii) If so, when did the Claimant commence work for the Respondent under a contract of employment?

    (iii) If the Claimant was an employee, had the Claimant been continuously employed by the Respondent for a period of two years ending with the effective date of termination?

5. At the start of the hearing I discussed with the parties these three issues, and both confirmed that it was really the first issue that I needed to determine, as answers to the other two would flow naturally from that determination. That is to say, that if I decided that the claimant was an employee of the respondent, it was the common ground that he had commenced work for the respondent on 7 January 2015, and that since that date there were no periods which would have interrupted his continuous employment. If, however, I decided that he was not an employee, the other two issues would fall away.

6. However, as it transpired later during the hearing, the way the claimant argued his case could have called for the second issue to be determined, if I had found that he was an employee, but given my decision on the first issue the question does not arise.

7. The claimant represented himself and gave sworn evidence and was cross-examined by Ms. Ahmed, counsel for the respondent. Ms. Ahmed called sworn evidence from Mr. James Kennedy, who is an employee of the respondent. His role is the Report Processing and Oversight Manager, and from March 2017, when he started working for the respondent, he was the claimant manager's manager. Mr. Kennedy was directly responsible for deciding whether to extend the claimant's assignments. Until becoming a permanent employee of the respondent in August 2018, Mr. Kennedy had been working for the respondent as a contractor through essentially the same contractual arrangement as the claimant.

8. I was referred to various documents included in the bundle of documents of 385 pages and the mitigation documents bundle of 9 pages, which the parties introduced in evidence. During the hearing the respondent presented four additional documents related to the claimant's new personal service company and the third-party company (Allegis Global Solutions Ltd) through which the claimant's service had initially been provided to the respondent.

9. After the hearing, on 13 November 2020 the claimant emailed to the tribunal another document entitled "C*laimant's Response to Grounds of Resistance - updated 06112019.pdf"*, which was not included in the hearing bundle, but which the claimant had emailed to the tribunal on 6 November 2019. The claimant said that the document, in particular paragraphs 30-33, was material to his case.

10. The case management order of 7 January 2020 required the claimant by 4pm on 28 January 2020 to tell the respondent, who had the primary responsibility for preparing the bundle, what documents he required to be included in the bundle.

11. The respondent sent the final hearing bundle and the mitigation bundle to the tribunal and the claimant on 28 October 2020.

12. At the start of the hearing I asked the parties whether there were any other documents, than those in the two bundles, that I needed to consider at the hearing. Both parties said no.

13. In any event, before coming to my judgment I did consider the claimant's additional document. On the issue of the claimant's employment status it largely repeats the claimant's witness statement. Paragraphs 30-33 of that document contain the claimant's arguments, in the context of his claim of unfair dismissal, that the respondent failed to offer him a suitable alternative position.

14. The question of the fairness of the claimant's dismissal was not an issue I needed to determine at the hearing. It would have become an issue for the tribunal to determine at a later date, but only if I had decided that the claimant was an employee of the respondent. I therefore did not delay this judgment by asking for the respondent's comments on the additional submissions from the claimant which I would have done had they been material to my decision.

Findings of Fact

15. The claimant was first engaged by the Respondent to provide services on 7 January 2015.

16. The engagement was structured in the following way:

    (i) Jontos Limited, a limited company, controlled by the claimant, in which he was the sole shareholder, the sole director and a PAYE employee (his personal service company (PSC)) entered into a contract with Allegis Global Solutions Ltd (Allegis), a global talent management business, for the provision of the claimant's consultancy services to Allegis' clients.

    (ii) Allegis, in turn, had a contract with the respondent for the supply of temporary contractors, under which contract the claimant was "supplied" to the respondent as a temporary contractor.

17. These contracts were not included in the bundle, but I was referred to the email exchange between the claimant and Michelle McDaid of Allegis (bundle pages 36-37), in which email Ms. McDaid confirms to the claimant his assignment to the respondent, subject to the claimant successfully completing pre-employment screening and signing a formal contract. The email says: "*as discussed you will be commencing this assignment via LTD CO. pay type*". The assignment was for the claimant to provide services for the respondent in the role of a GTR Middle Office Analyst.

18. The assignment was for six months with the possibility of either party terminating it earlier. The claimant accepts that when entering into this arrangement he understood that it was a temporary assignment via his PSC and Allegis.

19. The claimant's PSC charged Allegis for days or part-days worked by the claimant for the respondent at the agreed daily rate of £300. He was required to complete timesheets and present those to the respondent for approval. Prior to paying PSC, Allegis would verify with the respondent the correctness of the days claimed by the claimant. The claimant would invoice Allegis for his work based on the agreed rate and charge VAT on top of the service charge. The claimant would then pay himself a salary as a PAYE employee of his PSC and declare dividends as the director and get those distributed to himself as the shareholder.

20. Prior to the assignment being offered to the claimant by Allegis, he was interviewed by two employees of the respondent. The option of the claimant being directly employed by the respondent as an employee was not offered by or discussed with the respondent.

21. During the entire period of his work for the respondent the claimant did not seek to enter into a direct contractual relationship with the respondent, or otherwise change the contractual arrangement, through which he was providing his services to the respondent.

22. The claimant and the respondent or the claimant's PSC and the respondent did not have any direct written contract between them in relation to the provision of the claimant's services.

23. In June 2016 the respondent replaced Allegis with Alexander Mann Solutions Limited (AMS) as its preferred supplier of temporary workers' services, and the claimant's PSC's contract together with those of other Allegis contractors were transferred to AMS.

24. The contractual arrangements between the respondent and AMS with regard to the provision of temporary workers were governed by the Outsourcing Agreement (pages 38-119 of the bundle), which terms included the following provisions:

3.9 Employment Status of Temporary Workers

3.9.2 It is expressly acknowledged by the Parties that neither RBS nor any member of the RBS Group is intended to have a relationship of employment or worker status with any Temporary Worker. Supplier shall, and shall procure that its Subcontractors shall expressly state, in any contract between Supplier or its Subcontractors and all Temporary Workers, that there is no employment relationship between RBS, or any member of the RBS Group, and the Temporary Worker.

3.9.3 Supplier warrants and undertakes that all Temporary Workers shall be engaged on the basis of a contract for services and none of the Temporary Workers shall be engaged as employees of Supplier or any of the Subcontractors without the prior written consent of RBS.[ ].

"**Supplier Indirectly Sourced Temporary Worker**"

means a an individual engaged on either a PAYE basis or through a limited company structure to provide services for the benefit of RBS and who has been recruited or sourced or supplied by a Subcontractor (other than a Master Vendor) acting as a contractual intermediary including where the Subcontractor is acting in that capacity as an employment business defined In the Conduct Regulations and for the avoidance of doubt, shall exclude any individual who becomes a permanent employee of RBS from the moment such individual becomes a permanent employee;

2 SERVICES

2.1 Overview

2.1.1 Supplier shall provide a fully managed recruitment outsourcing solution for the provision of temporary or contingent labour, made up of the following services:

(b) a temporary resource hiring service to RBS whereby Supplier will act as a managed service provider to source Temporary Workers that are either:

(ii) Supplier Indirectly Sourced Temporary Workers

as set out in more detail in Section 4 of this Schedule;

25. The Outsourcing Agreement required that AMS to use pro-forma terms for temporary workers on assignments to the respondents. These were the terms the claimant (on behalf of his PSC) signed with AMS for each period of his assignment to the respondent.

26. The payment and the time reporting structures remained essentially the same as under the contract with Allegis.

27. Every assignment was for a specified period of time. The first, through Allegis, was for 6 months. The initial assignment through AMS was from 6 July 2016 to 6 January 2017. It was subsequently extended five times to 6th July 2017, 6th January 2018, 5th July 2018, 4th January 2019 and finally to 30th June 2019. The daily rate was increased to £350 per day on 1 June 2017 and to £400 on 1 September 2017. There were no gaps between the assignment periods.

28. For every extension and rate increases the claimant (on behalf of his PSC) and AMS signed a new agreement for the supply of services on the AMS standard terms, which contained the details for that assignment. Except for the start and the end dates and the rate of pay, the rest of the terms remained the same.

29. The terms of the agreement included, *inter alia*, the following provisions [**my emphasis**]:

1. INTERPRETATION AND DEFINITIONS

"Consultant" the Consultant identified in the Assignment Specification **and any replacement pursuant to Clause 10.2**;

"Location(s)' **the location(s) at which the Client requires the Services to be supplied** as set out in the Assignment Specification or any other location as may be requested by the Client from time to time;

"Services" the services provided by the Consulting Company as set out in this Agreement and in particular In the Assignment Specification;

2. CONSULTING COMPANY'S OBLIGATIONS

The Consulting Company shall:

2.1 **undertake and carry out such services as may be requested by the Client in the performance of the Services at the Location(s)**;

….

2.3 **provide the Services in accordance with those standards and methodologies as may be agreed with the Client**, and in any event in accordance with Best Industry Practice and all applicable laws and regulations, and shall at all times take responsibility for the way in which the Services are performed;

…

2.5 while at the Client's sites or otherwise performing the Services **comply with all policies, guidelines and regulations issued by the Client from time to time** to the extent that they are reasonably applicable and will co- operate with the Client, any employee, officer or agent of the Client Group and employees of third parties to the extent reasonably necessary to provide the Assignment;

…

2.10 **be covered by and shall maintain at its own cost with a reputable insurer the following insurances**: (i) public liability insurance (with an indemnity to principals extension) with a minimum level of £1 million (one million pounds sterling) per claim; (ii) professional indemnity insurance with a minimum level of £1 million (one million pounds sterling) per claim; (iii) employers' liability insurance in accordance with minimum statutory requirements; (iv) any other insurances (such as travel insurance or business car insurance) as may be required from time to time to cover any joint or several liability of the Consulting Company and/or the Consultant arising in the United Kingdom in connection with the provision of Services under this Agreement (and/or arising in any other country In which the Services (or any part thereof) are to be provided). The Consulting Company shall further supply AMS with evidence of cover on request.

3. PAYMENT OF FEES

3.1 **The Consulting Company shall record all time worked In the time recording system specified by AMS on a weekly basis** and in any event within 3 Business Days from the end of the week worked (as applicable) and **shall obtain the appropriate authorisation from an authorised representative of the Client verifying the time worked by the Consultant**. **AMS shall only be liable to pay the Consulting Company in respect of time actually worked by the Consultant** and in particular shall not be liable to make any payment to the Consulting Company for travel time to the Location specified In the Assignment Specification, or if the Client suspends its requirements for the Services for the whole or any part of the period of this Agreement.

3.2 Subject to the Consulting Company satisfactorily performing the Services in accordance with this Agreement and complying with the provisions of this Clause 3, **AMS shall pay the Consulting Company a fee in respect of time worked** at the appropriate Payment Rate as specified in the Assignment Specification. Payment of such fee is subject to submission of properly authorised time in accordance with Clause 3.1.

4. CONSULTING COMPANY'S STATUS

The parties acknowledge that this **Agreement is a contract for professional consultancy services between independent businesses and neither the Consulting Company nor the Consultant is or shall hold itself/himself out to be the employee, worker, agent, partner or servant of AMS (or the Client)**. Accordingly:

4.1 this Agreement is not an exclusive arrangement and (subject to Clauses 15.1.S and 15.1.6, if applicable) **nothing in this Agreement shall prevent the Consulting Company or the Consultant from engaging in any other services for any third party**;

4.2 **the Consulting Company and the Consultant are responsible for making its/his own sickness, disability, insurance and pension arrangements**;

……

4.5 no party wishes to create or imply any mutuality of obligation between themselves either in the course of, or between any performance of, the Services or during any notice period; accordingly, **neither AMS nor the Client is obliged to offer any work to the Consulting Company or the Consultant, nor is the Consulting Company or the Consultant obliged to provide services to AMS or the Client beyond the termination or expiry of this Agreement**;

4.10 **all documentation, software, equipment and other property made available to the Consulting Company or to the Consultant by AMS and/or the Client shall remain the property of AMS or the Client** as the case may be and the Consulting Company and the Consultant hereby agree to return forthwith, upon request, all such documentation, software, equipment and property, to AMS or the Client.

10. DETAILS AND IDENTITY OF CONSULTANT

10.2 In the event that the Consulting Company is unable to use the Consultant to perform the Services on its behalf **the Consulting Company may, with the prior written consent of the Client, arrange at its own expense (including the cost of any handover period) a**

replacement consultant to perform the Services, provided that the replacement has the necessary skills, experience, training, qualifications and authorisations.

30. The contract also contained Additional Client Terms specific for the assignments to the respondent. These included the following terms:

2. Obligations of the Consulting Company and the Consultant

The Consulting Company will procure that the Consultant:

C. **acknowledges that there is no relationship of employment or worker status with the Consultant or the Consulting Company and the Client or any member of the Client Group**

D. **shall comply with all relevant statutes, laws, regulations and codes of practice** from time to time in force in the performance of an Assignment and **applicable to the Client's business**;

E. **shall comply with the requirements of a Client specific Operations Manual and Brand Guidelines**;

F. **shall complete Client learning Modules as may be scheduled by the Client from time to time**;

G. **shall comply with all applicable RBS Policies** (including, without limitation the RBS Group Ethical Code for Suppliers set out at http://www.rbs.com/about/contact/supplying-goods-and-services.html) and any procedures reasonably required by the Client.

3.Termination/Suspension

C. **AMS shall have the right to suspend the Services during the currency of this Assignment**, if so requested by the Client. In such event, the Consulting Company shall ensure that the Consultant shall stay away from the Client's premises and shall cease providing the Services, For the avoidance of doubt, the Client/AMS shall not be liable to make any payment to the Consulting Company/Consultant for any period of suspension.

31. As a condition for his assignments to the respondents, the claimant was required to maintain professional indemnity and public liability insurance, which he did. The insurance policies were taken in the name of his PSC.

32. The claimant worked in the regulatory reporting team together with other 25 team members, some of whom were employees of the respondent and other contractors, either engaged by the respondent directly or, as in the case of the claimant, through a third party-supplier (AMT). There was no segregation of duties within the team based on whether a member was an employee or a contractor.

33. The claimant's role in the team was "Trade and Transaction Reporting Business Analyst".

34. The claimant was responsible for managing reports on exceptions and sending daily trade reports to the external repository for relevant trade data. The respondent, being a financial institution, is subject to certain regulatory reporting rules. If it fails to adhere to the rules, then an 'exception' or 'failure' is sent back by the external repository pointing out a failure in business validation. If reports were returned as 'exceptions' it was the claimant's role to triage and rectify exceptions. The exceptions process was about resolving issues/defects to fix the root cause of a problem.

35. The claimant was required to work during normal office hours (a minimum of seven hours per day). The claimant was allowed to work from home two days a week, but otherwise he was expected to work from the respondent's office in London. That was consistent with the home-working arrangements applicable to all other employees and contractors in his team.

36. The claimant day-to-day's work was supervised by Mr. Alroy Barretto, an employee of the respondent. The claimant did not have any direct reports, but as part of his work on the project to transfer the running of the exceptions process to a vendor in India, the claimant had an oversight role for the work conducted by the external vendor's team in India.

37. That project, which had started in 2017, was initially unsuccessful, and as a result the claimant was asked to assume the responsibility for the process until the external vendor issues could be resolved. The process was eventually transferred to the Indian vendor in 2019.

38. The daily work of the claimant involved completing tasks assigned to him by Mr. Barretto, who was responsible for checking that the tasks had been completed correctly. In performing his work the claimant had to follow the respondent's procedure documents and where such procedure documents did not exist his work had to be vetted by another member of staff, under the respondent's "four-eyed-check" process.

39. There were weekly management meetings to deal with outstanding exceptions, reporting issues and breaches, in which the claimant took part. He was also invited to other team meetings and wider office functions.

40. Mr. Barretto was responsible for monitoring the claimant's performance. There were no issues raised by the respondent in relation to the claimant's performance or conduct.

41. The claimant was not subject to the respondent's formal performance review process applicable to the respondent's employees. He was not given formal performance objectives. He did not have a personal development plan, against which his performance was assessed. He did not have mid-year and end of year formal performance reviews or regular 1-to-1s performance review discussions with a manager.

42. The claimant was required to complete the respondent's mandatory quarterly compliance training and attestation.

43. The claimant performed his services personally. Although the contract between his PSC and AMS provided for the possibility of the claimant using a substitute contractor, subject to the respondent's consent (clause 10.2), that option was never explored.

44. The claimant was required to agree his days off in advance with Mr. Barretto. That was necessary to ensure that sufficient resources were available within the team to cover ongoing work. He was not required to

log his holiday requests into the respondent's HR system for prior approval by managers. His holidays were recorded as non-working days in his work timesheets, and he was not paid for those periods.

45. The respondent operated mandatory 'furlough' periods for contractors on a seasonal basis from time to time, usually the two weeks over Christmas. This did not apply to the respondent's employees. The mandatory furlough did not apply to business-critical contractors, and the claimant was exempt from taking furlough leaves on two occasions in December 2016 and in spring 2019.

46. The respondent did not operate a formal sick leave policy for contractors, including the claimant. Sickness absence was not recorded internally but contractors had to record it as a non-working day in their timesheets. Contractors, including the claimant, were not paid during sickness absences.

47. The claimant used the respondent's IT equipment when in the office and his own when he was working from home. He was provided with a security dongle so he could sign into the respondent's systems from any available workstation when in the office. He was also provided with a phone and used the respondent's email address when providing his services.

48. The claimant was required to wear an ID badge when on the respondent's premises. His ID badge, as all other contractors', was red, and the respondent's employees ID badge colour was blue. The difference in colour was used by the respondent to identify who were contractors and who employees.

49. The claimant was required to complete timesheets and submit them on a weekly basis into the respondent's online contractor management portal ("Fieldglass"). The respondent would review the submitted timesheets to verify the days worked by the claimant. Once approved the information was passed to AMS, which would invoice the respondent in accordance with the charging procedure agreed in the Outsourcing Agreement. The respondent did not make any payments directly to the claimant or his PSC. The claimant was not provided with pension or any other employment benefits by the respondent.

50. On two occasions, in July 2017 and in January 2018 the claimant's day rate was increased to £350 and then £400. The increases were negotiated by the claimant directly with Mr. Kennedy of the respondent. From March 2017 Mr. Kennedy was also responsible for deciding whether to extend the claimant's assignment. Mr. Kennedy would speak with the claimant directly about extending his assignment, however the contractual paperwork to extend the assignment was always done by AMS.

51. In 2019 the respondent transitioned the exceptions process, which the claimant was responsible for, to an external vendor in India and did not offer to extend the claimant's assignment beyond the then expiry date of 30 June 2019.

52. The claimant applied for alternative positions within the respondent but was unsuccessful. The claimant was informed on 27 June 2019 by email from AMS that his assignment would not be extended. The relevant part of the email read:

> "Further to our recent communications with RBS, we hereby confirm that your current assignment with AMS for services provided to RBS will not be extended beyond the current end date of 30/06/2019."

53. The respondent was out of work until 27 January 2020, which caused a great deal of anxiety, and financial and other difficulties for him and his family. He was able to secure a six months' assignment with Fidelity International at a daily rate of £400. The assignment was arranged by way of his new personal service company, Atacore Consultants Limited, registered in Ireland, contracting via a third party-supplier agency, Contracting PLUS Shares Services Ltd for the provision of his services to the end-user. As at the date of the hearing he continued to provide his services through that arrangement.

Relevant law and conclusions

54. In order to pursue his claim of unfair dismissal the claimant must establish that he was an employee of the respondent and that he had been continuously employed by the respondent for a period of at least two years before the effective date of termination.

55. Section 230(1) of the Employment Rights Act 1996 (ERA) defines an employee "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*."

56. Section 230(2) of ERA defines "*contract of employment"* for the purposes of ERA as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*."

57. Over the years several legal tests have developed to identify relationship between parties, which should be regarded in law as being under a contract of employment, and how these should be distinguished from those falling outside that category. In making such determination a tribunal must consider all relevant factors. The irreducible minimum for employment relationship to exist requires control, mutuality of obligation and personal performance, but other relevant factors also need to be considered.

58. The claimant argues that applying those tests to his position vis-à-vis the respondent clearly demonstrates that he was an employee: the respondent controlled his day-to-day work, his was closely integrated in the respondent's organisation, he was obliged to perform work personally, in performing his work he used the respondent's tools (desk, computer, phone). He says he was indistinguishable from the respondent's

employees, and therefore, in all but name, was an employee of the respondent. Accordingly, he argues, that if the realty of the situation is such that he exhibited all the characteristics of an employee, it follows that he worked for the respondent under a contract of employment.

59. He further argues that the contracts for the provision of services he entered into on behalf of his PSC with Allegis and later with AMT were merely a "façade", and they did not reflect the reality of the situation. However, during cross-examination when asked whether he considered those contracts to be a sham, his answer was: "No, I would not use such terminology".

60. The essence of the claimant's argument is that while the contractual structure involving his PSC and the third party-suppliers (Allegis and AMT), through which the respondent sourced his services was genuine and proper at the beginning, the passage of time made that structure no longer reflecting "the reality of the situation" and therefore not determining the true relationship between him and the respondent.

61. He accepts that there were no material changes in the way his work for the respondent had been organised and managed throughout the entire period of his assignments, and that each assignment period was covered by express contractual arrangements between his PSC and a third party-supplier (Allegis and AMT), and that the express terms of those contracts were not inconsistent with how he was required to do his work for the respondent.

62. However, he argues, the passage of time by itself turned his relationship with the respondent into an employer-employee relationship, because this was an uninterrupted relationship extending over four and a half years, and having all characteristic features of employment (personal service, control, integration, provision of tools).

63. The claimant also submits that the assignment extensions, although requiring him each time to enter into a new contact with AMT, were "more or less automatic" and there was an "ongoing assumption" that his contract would roll on until it came to an end. I observe here that, on his own case, the claimant accepts that there was an end date to his assignments.

64. The respondent disagrees with this characterisation and says that each extension was decided upon each time. That decision was taken based on the respondent's business needs at that time, and the claimant's assignments were extended only because the respondent positively decided to extend them, while being under no obligation of any kind to do so.

65. The claimant relies on various authorities in support of his contention that the tribunal must look at the reality of the situation and if necessary disregard the express terms of the contract if these do not reflect the reality (*Ferguson v John Dawson and Partners (Contractors) Ltd 1976 3 All ER 817, CA, Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC,*

Motorola Ltd v (1) Davidson (2) Melville Craig Group Ltd 2001 IRLR 4, EAT, Airfix Footwear Ltd v Cope 1978 ICR 1210, EAT, Franks v Reuters Ltd 2003).

66. The respondent contends that it had no contractual relationship with the claimant of any kind. Therefore, it could not have had employment relationship with the claimant, as for those to arise one needs to have a contract, and there was no contract of any kind. The only contract the respondent had was for the supply of temporary workers with Allegis and then AMT, but not with the claimant or his PSC.

67. It further submits that the contract that the claimant had with Allegis and AMT were not a sham, as the claimant admitted himself. The claimant acted in accordance with the terms of those contracts, including by providing timesheets, invoicing Allegis and AMT for his services, providing insurance cover in relation to his work. The arrangements were financially beneficial for the claimant as they allowed him to receive income from his labour in a more tax advantageous way than if he had been paid for his work as an employee.

68. The respondent points out that the claimant was fully aware of his contractor's status from the outset and during all his time working for the respondent and never questioned it. He did not even raise that as an issue when his assignment had not been renewed in June 2019, and it is only the difficulties he experienced in finding another assignment that caused him to bring his claim. Now that he has found another job, he continues to provide his services through the identical structure and accepts that structure as a genuine contractual arrangement.

69. The claimant says that he brought his claim because the respondent had showed a complete disregard to the employment law and took advantage of his trust.

70. The respondent contends that it never treated the claimant as an employee, he was not paid as an employee, he was not provided with the same benefits as its employees, he was subject to different processes in relation to sickness and holiday. The similarities with the respondent's employees in terms of his working time, location, tasks, supervision and use of the respondent's tools are not sufficient to make the claimant an employee, when there is a perfectly legitimate alternative contractual arrangement, which explains those similarities.

71. Finally, the respondent says that the passage of time alone cannot create employment relationship. That proposition is not supported by the case law. It argues that the tribunal's enquiry into the true nature of the relationship should start with the express contract governing the relationship, looking at how the parties viewed their relationship and how those were operated by them, and that is not for the tribunal to tell the respondent how to organise its work and source staff to cover it.

72. While I can see that looking at what the claimant says "the reality of the situation" without paying any regard to the contractual foundation upon which that reality rests, one could easily describe the relationship between the claimant and the respondent as those typically found between an employee and his employer. However, that would be the wrong way to approach the question. I agree with the respondent, the enquiry should start by looking at the express contractual terms that govern the relationship.

73. There were no written or oral contracts been the claimant and the respondent or between the claimant's PSC and the respondent. Accordingly, to follow the claimant's argument would require me to imply a contract of employment between the claimant and the respondent.

74. Section 230(2) of ERA does envisage that a contract of employment may be implied, however, in a tripartite situation involving a worker, an agency and an end-user, the case law (*James v Greenwich London Borough Council 2008 ICR 545, CA*) allows me to imply a contract of employment between an agency worker and an end-user only where "*it is necessary to do so to give business reality to the situation"*. The law says that there will be no such necessity where agency arrangements are genuine and accurately represent the relationship between the parties. The onus to show that it is necessary to imply a contract of employment is on the claimant.

75. If any such contract is to be implied, there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed. The mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the worker and the end-user.

76. The same principles apply when, like in this case, the contractor's services are provided to the end-user through two intermediaries (see *Tilson v Alstom Transport 2011 IRLR 169, CA*).

77. Although the authorities allow and perhaps even require the tribunal to "look behind" the terms of a written agreement between the parties to establish the true position between them (*Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC)*, this does not mean that the tribunal should "look away" from the written contract governing the relationship, unless and until it is satisfied that the contract is a sham.

78. The claimant accepts that his contractual arrangements were not a sham and yet he calls them a "façade". It is not clear what he means by that term, but in some sense, every contract is a "façade", behind which the parties' contractual relationship "live". The question is whether what one finds behind the "façade" accords with what the "façade" tells a reader they should be expecting to see there.

79. Reading the terms of the claimant's contract with AMT and comparing those with what the claimant calls "the reality of the situation", there do not appear to be any real gaps or inconsistencies, so that it cannot be said that the contract was a sham or that the reality lay elsewhere. This is not an inequality of bargaining power case, and the claimant went into these arrangements with his eyes open and to his benefit.

80. The claimant was required to perform tasks assigned to him by the respondent and perform such tasks in a particular way dictated by the respondent, and his contract requires him to "*undertake and carry out such services as may be requested by the Client*" and "*provide the Services in accordance with those standards and methodologies as may be agreed with the Client*" and "*comply with the requirements of a Client specific Operations Manual and Brand Guidelines*".

81. He was required to work from the respondent's office, and his contract says that he must provide Service "*at the location at which the Client requires the Services to be supplied*".

82. The claimant was required to follow the respondent's policies and procedures, including on booking time off and undertaking compliance training, and his contract requires him to "*comply with all policies, guidelines and regulations issued by the Client from time to time…*" and "*shall complete Client learning Modules as may be scheduled by the Client from time to time.*"

83. The claimant was not required to take a furlough leave in December 2016 and in Spring 2019, but the contract does not oblige the respondent to place the claimant on furlough, but gives AMT the right "*to suspend the Services during the currency of this Assignment, if so requested by the Client*".

84. The claimant says he was working alongside the respondent's employees, and for an outsider he was "indistinguishable" from the employees, and his contract says he "*will co- operate with the Client, any employee, officer or agent of the Client Group and employees of third parties to the extent reasonably necessary to provide the Assignment*". While on the respondent's premises, he was required to wear a different colour badge to those of the respondent's employees. So, in that sense, he was distinguishable from them to an outsider.

85. He claims he was required to perform work personally, and the contract says that the "Consultant" is the person "*identified in the Assignment Specification and any replacement pursuant to Clause 10.2*". The claimant was identified as such in each Assignment Specification. He claims that the substitution was not permitted, however provided no evidence of attempting to invoke his right to offer a substitute consultant under clause 10.2.

86. The claimant was provided by the respondent with a desk, access to computer workstations and a phone, and in the contract the claimant

acknowledges that "*equipment and other property [may be] made available to the Consulting Company or to the Consultant by AMS and/or the Client*".

87. The claimant was not paid during his time off due to holidays or sickness and was not provided pension or other benefits, and the contract says that "*AMS shall only be liable to pay the Consulting Company in respect of time actually worked by the Consultant*" and that "*the Consulting Company and the Consultant are responsible for making its/his own sickness, disability, insurance and pension arrangements*".

88. I find that the contractual arrangements pursuant to which the claimant was providing his services to the respondent were genuine, and the claimant admitted that himself. They accurately represent the relationship between the claimant and the respondent.

89. There were no other agreements between the claimant and the respondent and no material changes in the way the parties conducted themselves over the period of his work for the respondent.

90. The mere passage time is not sufficient to imply a contract. Time *per se* does not have the property of creating anything, it is what happens during that time that matters. Therefore, the passage of time by itself cannot give rise to a contractual relationship. That requires parties' words or actions from which such relationships could arise based on the usual contract formation principles.

91. Further, since the parties conduct throughout the entire period is perfectly explicable in terms of the contractual arrangements the claimant had via his PSC with AMT, which are genuine and were freely adopted by the parties, there is no need to look for a possible alternative explanation of the relationship between the claimant and the respondent. Therefore, I find that the claimant failed to prove that it is necessary to imply a contract of employment.

92. With regard to the parties' arguments as to the claimant's motive for bringing his claim, I do not consider this to be relevant one way or another for the question I have to decide. The following passage from LJ Elias in the case *Tilson v Alstom Transport 2011 IRLR 169, CA*, however demonstrates that, as genuine as it might be, the claimant's view is simply wrong in law, as it currently stands.

> *"It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him. Statute has imposed certain obligations on an end user with respect to such workers, for example under health and safety and discrimination legislation, even where no contract is in place between them. But it has not done so with respect to claims for unfair dismissal. It is impermissible for a tribunal to conclude that because a worker does the kind of work that an employee typically does, or even of a kind that other employees engaged by the same employer actually do, that worker must be an employee."*

93. For these reasons I find that the claimant did not enter and did not work under a contract of employment with the respondent.

94. It follows that he does not have the right to bring a claim of unfair dismissal under section 94 of ERA and for this reason his claim of unfair dismissal fails and is dismissed.

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Employment Judge P Klimov
24 November 2020

Sent to the parties on:

24/11/2020.

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For the Tribunals Office

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.