EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105424/2020 (V)

Final Hearing held remotely by Cloud Video Platform on 17 February 2021

Employment Judge A Kemp

Mr M Idowu	**Claimant** **In person**
Onorach Limited	**Respondent** **Represented by** **Ms McJannett,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal does not have jurisdiction to consider the claim of unfair dismissal by the claimant, and that claim is dismissed accordingly.

REASONS

Introduction

1. This was a Preliminary Hearing to address the issue of whether or not the Tribunal had jurisdiction to consider the claim of unfair dismissal, in particular whether the claimant had the necessary two years' continuous service with the respondent.

2. The claimant appeared for himself, and Ms McJannett appeared for the respondent.

3. The respondent accepted that the claimant was its employee from 25 April 2019, and the parties agreed that the effective date of termination of employment was 14 September 2020. The claimant alleged that he was an employee for the period from 7 August 2018, and the dispute therefore centred on the period 7 August 2018 to 24 April 2019, during which the claimant alleged that he was an employee and the respondent that he was a contractor offering his services through his limited company, and not an employee.

4. There had been an earlier Preliminary Hearing on 9 December 2020, after which case management orders were made on 17 December 2020. The claimant has other claims beyond that for unfair dismissal, and a further Preliminary Hearing for case management shall be arranged, to take place by telephone, as soon as practicable after the issuing of this Judgment.

5. Prior to the commencement of the hearing I outlined for the claimant how it would be conducted, the need to cover all points in evidence and in doing so to take me to the documents he considered relevant and explain why that was so, about cross-examination covering evidence that was given and contested, or not given but where the witness was expected to know of the matter, and about re-examination. I explained about the principle of finality of litigation, and that once evidence was concluded it could be added to only in exceptional circumstances. I also explained about making submissions as to the facts, the law, and applying the law to the facts.

6. The hearing took place remotely using the Cloud Video Platform. There were occasions when the audio quality was not good, and questions or answers had to be repeated or a re-connection established, but I was satisfied that the hearing had been conducted sufficiently and fairly. The evidence was heard until a little after 6pm, and parties given the choice at that stage between making very brief oral submissions then, making written submissions by 19 February 2021 or arranging a further date for submissions to be made remotely. They both wished to use written submissions, and they were duly exchanged on time.

The evidence

7. The claimant gave evidence himself. The respondent led two witnesses. The parties had prepared a Joint Bundle of Documents, not all of which was referred to in evidence. Prior to the hearing commencing the claimant identified that some documents he had sent had not made their way into the Bundle, and four pages were added to the Bundle by agreement.

The facts

8. The Tribunal found the following facts, material to the issues, established

9. The claimant is Dr Michael Idowu. He has a graduate degree and is a Doctor of Philosophy.

10. On 27 December 2017 the claimant incorporated a limited company called Data2AI Limited, of which he is the sole director and controlling shareholder.

11. The respondent is Onorach Limited. It is a limited company. Stephen Leiper and Professor Christene Leiper, his wife, are its directors.

12. The respondent has about seven employees in the United Kingdom, and three in Eastern Europe. It operates in the field of clinical trials for medicines and equipment.

13. The claimant and his supervisor from Abertay University where he was then studying, attended at the respondent's premises in 2011. In 2018 Mr and Professor Leiper met the claimant at a conference, and discussed the possibility of working together.

14. The claimant was invited to attend a meeting with Mr Leiper to discuss that possibility further, and it took place on or around 31 July 2018. No written record of that meeting was kept, and the outcome of it was not documented. The diary entry for that meeting by the respondent indicated that it was an "Interview for IT/Software position". The respondent did not have a vacant position that the claimant was being interviewed for, but wished to utilise his skills, and had an issue which required relatively immediate attention. The claimant sought a salary of £85,000 per annum,

but the respondent said that it could not afford more than £42,000 per annum. There was a discussion about the work required of the claimant by the respondent, which was broadly the equivalent of at least 80% of a full time working week of 40 hours. The claimant was not attracted by the proposal which he considered substantially below his worth, but the parties agreed that there be an initial contract whereby the claimant's services would be offered to the respondent for a monthly cost of £3,500 on a rolling monthly contract. There was a discussion about a potential source of additional funding in about three months' time which may have led to a higher payment level, and for the claimant to be employed directly by the respondent.

15. On 7 August 2018 the respondent and claimant concluded a confidentiality agreement in writing, which protected the confidentiality of information each provided the other.

16. On or around 7 August 2018 the claimant commenced to work at the respondent's premises as a Data Analytics Manager. He was provided with access to the respondent's facilities including its computer equipment. He was provided with access to its servers, and had an email address at the respondent. He worked at the respondent's premises for a standard working week of about 9am to 5pm Monday to Friday.

17. Data2AI Limited sent invoices to the respondent for the period from and after 7 August 2018 for the services provided to the respondent by the claimant, in the sum of £3,500 per month. The invoices were paid by the respondent to the bank account of Data2AI Limited within 30 days of their date, although they were payable on receipt according to their terms.

18. The sums so paid to Data2AI Limited were then withdrawn from that company by the claimant. The claimant did not pay tax on them as he would have done if an employee. The precise amount of tax paid by the claimant, if any, on the sums withdrawn from Data2AI Limited were not before the Tribunal.

19. The respondent was the only client of Data2AI Limited, although the claimant informed the respondent that he wished to have the ability to work for its benefit outwith the standard working week referred to.

20. Employees of the respondent were generally paid in arrears on or around the 25th day of each month. They had benefits such as holidays and others which were not provided to the claimant in the period August 2018 to 24 April 2019.

21. On 17 October 2018 an Employee Privacy Notice was issued to the claimant, in relation to matters arising under the General Data Protection Regulation. On 18 October 2018 the claimant emailed Mr Leiper and Professor Leiper about an audit that was about to take place on which he suggested that a Job Description be placed on the personnel file for staff. A file was created for him, which was not a personnel file but recorded a Job Description for his role. That file was not in the documents presented to the Tribunal. Professor Leiper emailed the Job Description to him on 10 December 2018. (The Job Description itself was not in the Bundle.) At around that time discussions had started about the possibility of the claimant working as an employee for the respondent, but the parties were not agreed on the salary level appropriate for him. The parties' hope had been that that could have commenced within three months of 7 August 2018 and the claimant indicated increasing concerns in November and December 2018 about the time matters were taking to progress. The parties had discussions about seeking to commence the employment contract on 8 January 2019, but did not conclude an agreement.

22. In about early February 2019 Professor Leiper contacted Ms Elaine Leitch, the respondent's external employment lawyer by email, and said that the claimant had started as an employee on 8 January 2019 at a salary of £50,000 per annum, set out other basic terms, and asked her to draft a contract of employment. That email was not before the Tribunal. Ms Leitch drafted a contract over the next day or so, and sent it to Professor Leiper. She in turn sent it to the claimant by email on 19 February 2019.

23. The draft contract of employment included the following as clause 1:

> "The employee's start date with the Company is 8th January 2019. No previous employment with the Company and no employment with any previous employer will count as part of the Employee's continuous employment with the Company."

24. The claimant made some immediate comments on the draft in an email to Professor Leiper on 19 February 2019. He stated

> "Here's a list of terms conditions I find difficult to accept. I've included how those issues could be resolved and would like to know your opinion. Your response would enable me to work out if truly Onorach would like me to be one of its employees having worked with all the staff as a company owner/contractor for many months. Thanks for your understanding"

25. His list did not include any comment on clause 1.

26. The claimant sought to amend the terms of the draft in email correspondence. In relation to clause 2.4 which concerned working exclusively for the respondent he wrote "To be re-written as not disallowing the candidate from running his company outside the agreed working time as originally expected." In relation to clause 12.10 regarding intellectual property he commented "As a Company Director I might decide to create a design or develop a software for myself outside the working time. How would this be viewed?" He proposed restricting the rights of the respondent to that which had been "created for Onorach".

27. The draft included a provision for a three month probationary period which the claimant argued should be removed.

28. Professor Leiper said she had discussed matters with Ms Leitch in an email to the claimant on 20 February 2019. Professor Leiper emailed him about the working hours issue at that time.

29. On 11 March 2019 the claimant sent a lengthy email to Professor Leiper with proposed revisals to the draft contract of employment. He did not propose any revisals to clause 1.

30. On 15 March 2019 Mr Leiper wrote to the claimant offering him the position of Data Analytics Manager, referred to the contract of employment, and stated that the start date would be the Monday following its signature. It also referred to offering the claimant shares in a new company Onorach Innovation Limited after a restructuring expected to be no later than July 2019.

31. The claimant sent a further email with additional comments on 25 March 2019. The proposed changes he suggested did not seek to amend clause 1. There were discussions held between the claimant and Professor Leiper, and a conference call between them that included Ms Leitch. Ms Leitch spoke to the claimant by telephone, and on one or two occasions advised him to seek independent legal advice. The claimant did not do so.

32. Ms Leitch prepared a further draft contract and sent that to Professor Leiper on 9 April 2019. It included many of the revisals proposed by the claimant, and did not have a probationary period. Professor Leiper sent it to the claimant on 11 April 2019. He met her the following day and both signed it, having one copy each. It continued to have as the start date 8 January 2019 although in the period from that date to 12 April 2019 the invoices from Data2AI Limited had continued to be sent by that company, and paid by the respondent, for the months of January, February and March 2019.

33. About a day after the contract was signed, Professor Leiper asked the claimant for his version of the contract of employment. She took it away, and returned with a new first page for it, which had as the start date 25 April 2019. She explained something to the effect that the contract required to start from that latter date.

34. Data2AI Limited sent an invoice to cover the period of the services provided by the claimant up to 24 April 2019 at an amount equivalent to £3,500 per month. It was paid by the respondent.

35. The claimant commenced working for the respondent on the basis of a salary of £50,000 per annum with related benefits in accordance with the

written contract of employment on 25 April 2019. He was paid under the PAYE scheme from and after that date, on the basis of that annual salary of £50,000, with payment made to his own bank account. The invoices from Data2AI Limited to the respondent ceased with effect from 25 April 2019.

36. No grievance or other complaint was made by the claimant that he was not paid salary of £50,000 from 8 January 2019.

37. The claimant's employment with the respondent terminated on 14 September 2020.

The Law

38. A claim for unfair dismissal may be made under section 94 of the Act. In order to claim unfair dismissal, a person must have two years' continuous employment as provided for by section 108 of the Act. In other words, the person must be an employee throughout a continuous period of two years prior to the dismissal in order to be able to claim unfair dismissal. If not, that is not a claim within the jurisdiction of the Employment Tribunal.

39. Section 211(1)(a) provides that a period of continuous employment begins with "the day on which the employee starts work."

40. The definition of "employee" is found in section 230 of the Employment Rights Act 1996 ("the Act") which provides:

> "**230 Employees, workers etc**
>
> (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.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or

(b) 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 or 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;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract

and "employed" shall be construed accordingly."

41. The statutory test in section 230 does not specify when someone is working under a contract of employment, however.

42. There is much case law on the matter of whether or not someone is an employee for the purposes of section 230 of the Act, and its predecessor provisions. There is no simple test for it. No one factor is determinative. There requires to be at the least mutuality of obligation, and a sufficient degree of control exercised by the employer over the employee to amount to a contract of employment. That may however not be sufficient.

43. The classic statement of the law in relation to who is an employee (using the terminology of master and servant which is broadly equivalent to employer and employee) was given by Mr Justice McKenna in ***Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance [1968] 2 QB 497*** as follows:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

44. That broad definition has been followed generally in subsequent cases. Guidance was given in the Court of Appeal case of ***Quashie v Stringfellow Restaurants [2013] IRLR 99*** in which Lord Justice Elias stressed the need to consider all of the circumstances to assess whether or not the person was an employee. The definition of an employee was also reviewed recently by the EAT in the case of ***Varnish v British Cycling Federation [2020] IRLR 822.*** The facts in these cases were very different to those in the present case.

45. There has separately been consideration of whether the relevant written terms of contract represent the true intentions or expectations of the parties, not just at the inception of the contract but, if appropriate, thereafter in the Court of Appeal case of ***Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365.*** The Supreme Court in ***Autoclenz Ltd v Belcher [2011] IRLR 820*** held that a written contract, containing two clauses which were not consistent with employment but where neither of which bore resemblance to reality, did not prevent there being an employment relationship.

46. An express agreement that a relationship is solely between limited companies is a factor to be considered in deciding whether a contract of employment exists. In ***Winter v Westward Television Ltd EAT 589/77*** the claimant arranged to work for the respondent and a detailed agreement was drawn up. It included a clause providing that he would give his exclusive services and abide by the company's staff rules but that his remuneration was to be paid to S Ltd, a limited company owned by the claimant and his wife. The EAT held that the claimant was not an

employee. In ***Catamaran Cruisers Ltd v Williams and ors 1994 IRLR 386,*** the Employment Appeal Tribunal held that the fact that the worker had formed a limited company and supplied his services through that company did not affect his employment status. The EAT stated that there was no rule of law that the importation of a limited company into the relationship prevents the existence of a contract of employment. If the true relationship was one of employment under a contract of service, putting a different label on it would make no difference. The formation and existence of a company had to be evaluated in the context of all the other facts found. In that case the claimant was obliged to provide the services himself and worked under the same terms and conditions as the rest of the workforce, including terms relating to sick pay, holiday pay and disciplinary procedures — the only difference was that his 'wages' were described as 'fees' and were paid gross to the service company. The employer conceded that, had it not been for the existence of the service company, the claimant could not be anything other than an employee. The EAT considered that this was a case falling within the general rule that a true relationship of employer and employee cannot be changed simply by putting a different label on it.

47. In ***Massey v Crown Life Insurance Co 1978 ICR 590,*** Lord Denning MR stated that 'when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be'.

48. Payment of tax and national insurance on a 'self-employed' basis is not conclusive proof of a contract for services — ***Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423,*** but that case concerned a self-employed person contracted directly, and not through a limited company.

49. What matters accordingly are all the facts of the case, and an assessment is carried out to determine whether the claimant has shown that he met the statutory test of being an employee for a continuous period of at least two years.

Claimant's submissions

50. The claimant provided as indicated above a written submission and in light of that I shall provide a very basic summary only. The claimant had been invited to a job interview. The respondent needed him to start immediately. There was a discussion about his being an employee, and about an increase in three months' time when funding would increase. A Confidentiality Agreement was drawn up, and the claimant wished to help the respondent but there was a difficulty over the proposed salary of £42,000 which the respondent said was as much as it could afford. The arrangements for payment to Data2AI Limited was an afterthought, and because the employment contract anticipated required three months to be forthcoming. There was a Job Description for Data Analytics Manager with a version dated in December 2018. He was treated as if an employee, having a GDPR form. When it came to later discussions the start date of 8 January 2020 was a plan to change the history of the agreement that had been made. The claimant had been an employee from 7 August 2018.

Respondent's submissions

51. The respondent also provided a written submission and the following is again a very basic summary of it. Reference was made to sections 94, 108, 211(1)(a) and 230 of the Employment Rights Act 1996, and to two authorities commented on below. I was invited to hold that the claimant had not been an employee until 25 April 2019, and that until that date he had been a contractor contracted through his limited company.

Discussion

52. I considered that both the claimant and Mr Leiper were seeking to give honest evidence. They had different perceptions of what had been discussed at the meeting on or around 31 July 2018, and some matters thereafter. I required to assess which evidence I considered to be the more reliable, and address that further below. Ms Leitch who is an employment lawyer, and had been instructed by the respondent to prepare the contract of employment, gave brief evidence, and I considered her an obviously credible and reliable witness.

53. The claimant's position was that there was what he referred to in his evidence as a "special agreement" that he was to be an employee throughout the period, and that payment via his limited company was an "afterthought" which did not detract from that. He explained that the contract of employment he signed had a start date of 8 January 2019, but that the page had been changed by Professor Leiper after it had been signed to give the date of 25 April 2019. Mr Leiper said that that date had been changed at the claimant's request. That however had not been put to the claimant in cross examination, and it did appear to me to be highly unlikely as the claimant would have had the benefit of a salary of £50,000 per annum from that earlier date if it was maintained. It would have involved a measure of unwinding the invoices that had been issued after 8 January 2019, but what was instructive is that that did not happen. The invoices were issued at the rate of £3,500 per month for the period up to 24 April 2019 (that not being disputed although only one invoice dated 3 September 2018 was before the Tribunal). There was no evidence of any challenge at the time by the claimant, who was paid salary from 25 April 2019 at the amount of £50,000 per annum and not before then, and on the contrary he acted consistently with that amount starting on 25 April 2019 by issuing the invoices through his own limited company at the equivalent of £42,000 per annum for the period up to that date. It is a matter I comment on further below.

54. The real question was what was the status of the claimant in the period 7 August 2018 to 24 April 2019, which I shall refer to as the disputed period. There were certainly a number of matters that favoured the claimant's argument that he was an employee. He attended the premises generally for a standard 40 hour week. The confidentiality agreement was between the respondent and him as an individual, not Data2AI Limited, and if the sole agreement was with that company one would expect the confidentiality agreement to be with that company and not the claimant as an individual. There were no written terms of contract between the respondent and Data2AI Limited. There was reference to forms such as that for GDPR and in one email to a Job Description (with a December 2018 draft referred to but which was not before the Tribunal) that were indicative of employment. The claimant was part of the respondent's

organisation, working there, having an email address at that company and access to their equipment. In the draft contract of employment there was a clause as to probation which was removed on his argument, and that was on the basis, clearly, that it was not necessary in light of the relationship between the claimant, or his limited company if applicable, and respondent from 7 August 2018.

55. I considered that he did meet the first two limbs of the ***Ready Mixed Concrete*** test. Some of the evidence was entirely consistent with employment, such as having a Confidentiality Agreement with the claimant as an individual, and issuing him with a Job Description in December 2018, if not before then. Whilst the terms of that Job Description were not before the Tribunal, it was emailed to the claimant. He was paid a set sum per month, which is indicative of something akin to a salary although not always so. He worked at the respondent's premises, and was integrated to an extent into their organisation with an email address for example. He worked there for a standard working week generally.

56. On the other hand, there is the fact that the claimant's company Data2AI Limited invoiced for his services throughout the period 7 August 2018 to 24 April 2019. The claimant did not receive payment from the respondent directly, as it went to that limited company. The claimant did not have any PAYE or national insurance deductions as a result. He had the benefits accruing from such an arrangement, as in simple terms he paid less tax than otherwise he would have as an employee.

57. I considered that the terms of his email of 19 February 2019 were highly significant, as they were inconsistent with his argument that he was an employee from 7 August 2018. He accepted in that email that he was, in simple terms, a contractor, and was asking if the respondent wished to have him as its employee.

58. He also sought amendments to allow him to continue to carry out work, outside standard working hours, for the benefit of Data2AI Limited, and that he had wished to do so "as originally expected". That wording supports the other evidence from Mr Leiper that the claimant was seeking to develop the interests of that company, offering its services to the

market, within the disputed period as well as after the employment commenced, as the respondent claimed it did, on 25 April 2019. Although the respondent had been the main, indeed only, customer at that time the claimant acting as director of Data2AI Limited was seeking to increase the customer base, and had another customer been secured which offered higher remuneration than the respondent, Mr Leiper's evidence was that the claimant would have terminated the relationship with the respondent, and worked for that other customer, and was using that possibility in the negotiations. Alternatively, the claimant may have been able to secure work for Data2AI Limited and carried it out separately from work for the respondent during that disputed period. Whilst in fact he did not do so, the possibility of it and the claimant mentioning that supported the view that he was a contractor through his limited company, and not an employee.

59. I considered that the claimant's failure to seek to effect any change to the terms of the contract of employment sent to him on 19 February with regard to the start date in clause 1, given its wording, was highly significant. If matters were as he argued, he would or should have done so and sought the start date to be amended to 7 August 2018. He did not at any stage of relatively long negotiations on the draft contract seek to do so. The clause was clear that no previous employment was to count. That contractual provision with a start date either in April or January 2019 is not determinative, in light of the case law to which I have referred above, but I did not regard that in any way as either a sham arrangement or something not reflecting reality. As the quotation from Lord Denning makes clear, such an indication from the parties may be significant evidence.

60. The parties did both wish to have an employment relationship, they were seeking to negotiate terms for that, and did so over quite a lengthy period. The claimant was advised to seek independent legal advice and could have done so, but chose not to. He sought, and succeeded in achieving, a large number of variations to the draft contracts. He sent an email to the respondent asking in effect whether it was wishing to have him as an employee or not, indicating that if the terms were not to his liking he would not agree to be so. The overall picture is one where there was not a

materially unequal bargaining position between the parties. The claimant had his own limited company. He is very highly qualified, and was seeking to negotiate a reasonably high salary and related terms. Those circumstances all point to the contract that was signed not being in any sense a sham arrangement or not reflecting reality.

61. The respondent referred to two authorities, but they were not I considered of material assistance. They were ***Koenig Mind Gym Ltd UEAT/0201/12*** and ***O'Sullivan v DSM Demolition Ltd UKEAT/0257/19***. Their facts were in each case very different to those in the present case, and concerned more the issue of activities carried out prior to starting employment. The claimant here did not carry out some activities prior to starting employment in that same sense, he was carrying out essentially the same activities in say September 2018 as he did in say March 2019 and the last few days of April 2019. The issue is rather when he became an employee.

62. This was therefore not by any means a straightforward case, with arguments for both parties, but I concluded on balance that the claimant had not met the third limb of the ***Ready Mixed Concrete*** test, in that the interposition of the arrangement for payment of monthly invoices to Data2AI Limited, with the tax consequences of not having payment to the claimant as an employee at that stage, was entirely inconsistent with his being an employee. Despite the claimant's arguments on that point, I could not accept them. I confess to having much sympathy for him, in that he did essentially work full time at the respondent's premises for that disputed period, and there were many of the aspects of an employment employment relationship, but that financial arrangement, not directly with him but with Data2AI Limited which he was aware of and participated actively in, deriving a benefit by paying less in the way of income tax at least, and which he did not seek to document differently as described above (and to the contrary wrote emails which supported the view that he was treated as a contractor not an employee, and acted in a manner consistent with that) was I concluded a set of circumstances that led me to conclude that the relationship was not one of employment during that disputed period.

63. I considered in detail the ***Williams*** case, which might have allowed me to reach a separate conclusion, but considered that the facts of that case were materially different to those of the present one such that it should be distinguished from the present case. Those facts, taken from the EAT decision, were as follows:

> "Mr Williams started his employment with the appellant company on PAYE. In 1984, he was given the opportunity to work on the pleasure boats but he was told that, if he did so, he would have to be self-employed. On 27 May 1988, the Inland Revenue wrote to the appellants:
>
> > 'As conveyed to you by telephone, I must reaffirm the Inland Revenue's view that PAYE/NIC is deductible from all journeymen including those whom both companies have hitherto regarded as self-employed.'
>
> The effect of this letter was to inform the appellants that all those, including Mr Williams, whom the appellants paid gross were regarded by the Inland Revenue as employees.
>
> On 14 June 1988, the appellants wrote to Mr Williams:
>
> > 'As you will see from the enclosed letter from the Inland Revenue, we have lost an 18-month argument regarding self-employed status for various crew members. It appears that we are allowed to only accept invoices from limited companies, which means that you should consult your accountant as soon as possible to seek his advice as to whether it is practicable and viable for you to do so.
> >
> > In the meantime, we will be happy to advance up to two-thirds of your weekly earnings pending your decision as to whether to form a limited company or accept PAYE.'
>
> Mr Williams took advice from his accountant, as a result of which he formed Unicorn Enterprises ('Unicorn') with his mother as the co-director. Thereafter, according to the finding of the Tribunal, Mr Williams was paid gross by the appellants and the money was paid by way of a fee for his services to Unicorn."

64. The EAT said this in relation to the facts in that case:

> "There is no rule of law that the importation of a limited company into a relationship such as existed in this case prevents the continuation of a contract of employment. If the true relationship is that of employer and employee, it cannot be changed by putting a different label upon it. In ***Massey v Crown Life Insurance Co [1978] IRLR 31***, Lord Denning MR observed at p.33, 13:
>
> > 'The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it.'
>
> In our view, it is a question of fact in every case whether or not the contract in question is one of service or a contract for services. We accept that the formation of a company may be strong evidence of a change of status but that the fact has to be evaluated in the context of all the other facts as found."

65. In that case therefore the claimant had commenced his role as an employee, but with agreement of both parties and in light of the facts overall a limited company was formed when he moved to a different role within the company. That is materially different to the present circumstances, which start with a first contracting relationship in which payment is made to a limited company, and with certain other facts not indicative of employment as I have described, and then move to employment on agreed terms with a start date beyond the commencement of the first contracting relationship.

66. ***Winter*** does not appear to have been cited in ***Williams***, and it is not easy to reconcile the two cases, although the distinction of having employment in the former case first of all is a material one. It appears to me that ***Winter*** is more consistent with the test in ***Ready Mixed Concrete.*** There are, however, a number of other matters that led me to conclude that the relationship in the disputed period was not one of employment beyond the simple fact that the payment of remuneration for the work of the claimant in the disputed period was to Data2AI Limited, and not the claimant himself, such that the claimant was not taxed as an employee.

67. The claimant argued in his written submission that clause 1 of the contract of employment “should be viewed as a cleverly designed evil plan to change the history of the Claimant's relationship with the Respondent”. In other words the claimant argued that the terms of that clause, having reference to no previous employment counting for continuity and a start date of 8 January 2020, was a sham. If it was a sham, then according to authority it is not effective for purposes of considering whether or not the claimant was an employee, but I do not accept that argument. It would require me to disbelieve Ms Leitch and I did not. I was entirely satisfied that her evidence was credible and reliable, as stated above, and she explained that her understanding from Professor Leiper was that the claimant had commenced as an employee on that date. She prepared the draft on instruction. It is just theoretically possible that she was manipulated by the respondent, but that was not put to her or Mr Leiper and in any event I did not consider that there was any evidence that that had happened.

68. The wording of clause 1 is in entirely standard terms. The issue concerned the choice of the start date. Whilst what Ms Leitch had been told appears not correct, and Professor Leiper did not give evidence, the claimant did not at any stage make that start date of 8 January 2019 an issue in his discussions with Ms Leitch or the respondents directly. If his position had been that he was an employee from 7 August 2018 one would have expected him to have sought a revisal to that effect. He had been advised to seek independent legal advice by Ms Leitch, but he did not. One can only speculate on what advice would have been had he done so, but the fact is that he accepted a start date of 8 January 2019. By doing so, he accepted in that document that the relationship of employee and employer commenced on 8 January 2019 at the earliest (there is another issue on the later start date as I shall come to).

69. The terms of the claimant’s email of 19 February 2019 are also significant, in that they are not consistent with his having been an employee during the disputed period.

70. No single factor is determinative, but on balance I considered that the steps that the claimant himself had taken to direct the remuneration to his limited company, the terms of his email referring to his being a contractor, and his not seeking to amend clause 1 of the proposed drafts, together with the other comments on the revisals to which I have referred, in all the circumstances meant that he had not discharged the onus on him to show that he was an employee with effect from 7 August 2018 as he contended.

71. I concluded that the claimant's employment started on 25 April 2019. I was concerned at the evidence of the date being changed to that date from 8 January 2019, and noted that Professor Leiper who did that did not give evidence. Nor did Ms Leitch know it had been done. But firstly the claimant acted on the basis that it was agreed as his company continued to send invoices for the period up to 24 April 2019, secondly he did not seek payment of salary at £50,000 per annum from 8 January 2019 but continued to seek in the invoicing for the period to 24 April 2019 the monthly amount of £3,500 which is the equivalent of £42,000 per annum, and thirdly he did not raise any grievance or other challenge about the salary payment of £50,000 starting on 25 April 2019 and not on 8 January 2019. Separately, and more importantly for the purposes of the issue before me, even if the start date was held to be 8 January 2019 in accordance with the terms of the draft contract, and the one the claimant signed, the claimant did not have the necessary two years' service to claim unfair dismissal for a dismissal taking place on 14 September 2020.

72. I did not consider that the "special arrangement" that the claimant referred to in his evidence was established, or in any event sufficient to supersede the actual arrangements that were put into effect. There was no written record of what the parties had agreed on 31 July 2018. This case is perhaps an example of why having a written record helps both parties. The claimant's argument that it was agreed that he was to be an employee from 7 August 2018 is not one that is supported by such facts as there are, not only the financial arrangements that he put into place, including the invoicing referred to, but also firstly the terms of his email on 19 February 2019 and secondly his not seeking to record employment from 7 August 2019 in the contract of employment. I concluded that the evidence of

Mr Leiper on that issue was more reliable and that the parties had agreed that the contract be with Data2AI Limited with effect from 7 August 2018, but with the hope that as matters progressed and further funds which were anticipated would arrive, the claimant could be employed with a higher level of remuneration. That did duly take place, and the remuneration package included a suggestion of a shareholding in another related company, with written terms being concluded on 12 April 2019. The payment of salary at £50,000 per annum commenced on 25 April 2019, and the invoicing from the limited company and the level of £3,500 per month, equivalent to £42,000 per annum, ceased. The evidence as a whole favoured the conclusion that the employment contract had commenced on 25 April 2019.

Conclusion

73. I am therefore bound to conclude that the claimant does not have sufficient continuous service to claim unfair dismissal, and it follows that I must dismiss that claim for want of jurisdiction.

74. There shall separately be a Preliminary Hearing fixed for the case management of the remaining claims.

Employment Judge: **Alexander Kemp**
Date of Judgment: **03 March 2021**
Date sent to parties: **08 March 2021**