EMPLOYMENT TRIBUNALS

Claimant: Mr G Flanders

Respondent: Bury College

Heard at: Manchester (by CVP) **On:** 11 June 2021

Before: Employment Judge Phil Allen

REPRESENTATION:

Claimant: In person
Respondent: Miss L Quigley, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal does not have jurisdiction to consider the claimant's claim of unfair dismissal as the claim was not brought within the period required by section 111 of the Employment Rights Act 1996.

2. The claimant did not have the two years' continuous employment required by section 108 of the Employment Rights Act 1996 in order to be able to pursue an unfair dismissal claim.

3. The unfair dismissal claim is dismissed.

REASONS

Introduction

1. The claimant was engaged to undertake work at Bury College during the period from 14 March 2018 until 3 July 2020. From 14 March 2018 until 27 June 2018 he was engaged as a Lecturer in Further Maths via an agency. On 3 July 2018 he was offered employment directly by the respondent as a Lecturer in Mechanical Engineering to commence on 21 August 2018. On 5 July 2018 he attended the respondent's annual staff conference at the Macron stadium. From 21 August 2018

until 8 March 2020 the claimant was employed as a Lecturer in Mechanical Engineering. The claimant gave notice of his resignation from that role on 8 January 2020. The claimant worked on a separate fixed term contract of employment as a Lecturer in Maths from 3 February 2020 until 3 July 2020. The claimant alleged that he was offered a role on the respondent's bank of cover staff following the expiry of his fixed term contract.

2. The claimant brought a claim for unfair dismissal. The claim was entered at the Tribunal on 1 January 2021 following ACAS early conciliation between 27 and 30 December 2020. The respondent denied that the claimant was unfairly dismissed. The respondent contended that: the claim was brought out of time; and the claimant did not have sufficient continuity of employment to bring an unfair dismissal claim.

Claims and Issues

3. This was a preliminary hearing arranged to determine two issues identified in a letter sent to the parties on 30 March 2021 (31), being as follows:

(1) Whether the claim should be permitted to proceed having regard to:

(i) whether it has been brought within the applicable time limit; and

(ii) whether the claimant has sufficient service to pursue an unfair dismissal claim.

4. At the start of this hearing it was confirmed with the parties that those were the two issues which would be determined, and that I would consider only the evidence relevant to those issues.

Procedure

5. The claimant represented himself at the hearing. The respondent was represented by Ms Quigley, counsel.

6. The hearing was conducted remotely by CVP remote video technology. Both parties attended remotely and both witnesses gave evidence via video.

7. An agreed bundle of documents was provided in advance of the hearing. The bundle (including chronology and witness statements) was 184 pages. Where numbers are referred to in brackets in this Judgment, the number refers to the page number in the bundle.

8. In advance of the hearing I was provided with witness statements from: the claimant; and Ms H Turner, an HR Business Partner with the respondent. Prior to the start of the hearing I read those witness statements, the pages in the bundle referred to in those statements, and four other pages which were identified to the parties at the start of the hearing. I did not read any other parts of the bundle, save for those documents to which I was referred during cross examination and/or during the submissions of the parties.

9. I heard evidence from the claimant, who was cross examined by the respondent's representative, and asked questions by me. Ms Turner gave evidence and was cross examined by the claimant as well as being asked questions by me.

10. After the evidence was heard, each of the parties made oral submissions.

11. The hearing was listed for three hours. Almost the entire three hours was used in hearing evidence and submissions. Accordingly, judgment was reserved and I provide the Judgment and reasons outlined in this document.

Facts

12. The claimant is a lecturer in maths (and related subjects). He signed up with an agency, Edgware Associates. Via the agency, the claimant worked at another College. The agency informed the claimant about an available role with the respondent. The claimant was interviewed by the respondent. He provided information such as DBS checks and exam certificates to the respondent directly. In his witness statement the claimant stated that *"the role was initially through an Agency"*. There was no dispute that the claimant commenced an initial role working at the respondent and teaching its students as a Lecturer in Further Maths on 14 March 2018. That role ended on 27 June 2018.

13. I was shown emails between the respondent and the agency in which the agency negotiated a particular rate of payment for providing the claimant's services to the respondent (50). The Tribunal was provided with a contract dated 7 March 2018 under which the agency provided technical services in the education sector to the respondent (53). That contract included an assignment schedule (62) which identified: the claimant as the initial contractor; a named company as the service provider; the total contract rate as an hourly amount; the commencement and end date of the contract; the consultancy services as being Further Maths Lecturer; and the standard hours for performing the services as being 15 hours per week.

14. It was the claimant's evidence that throughout this period payment was made by the agency not the respondent. The claimant completed timesheets which he submitted to the agency. The payments from the agency ceased when the contract ended on 27 June 2018. The claimant's evidence was that during this engagement he: was directed by the respondent about the provision of teaching; had occasional supervisions of his lessons undertaken by the respondent; and (in his view) in practice worked for the respondent. At the start of the engagement the claimant was shown around the respondent's premises and introduced to other staff.

15. The claimant's evidence was that he was not paid directly by the agency. He was paid via an umbrella company. The precise umbrella company used changed during the claimant's engagement with the agency. It remained the same throughout the period for which he provided services to the respondent. The claimant chose the umbrella company used and he chose to change that company. From the claimant's evidence it appeared that he was not entirely sure about the exact reason why an umbrella company was used, nor did he really understand what the use of the company meant. In broad terms the claimant believed that the umbrella company was used for tax reasons. I was not referred to any documentation whatsoever which

recorded: the claimant's arrangement with the umbrella company; the umbrella company's arrangement with the agency; or what impact the arrangement had upon the deductions made to payments to the claimant.

16. The claimant's evidence was that Ms Walker of the respondent had informed him that it was very likely that his role would become a permanent role. In his evidence he accepted that there was no guarantee of a further role with the respondent, but he said he was told that if things went well there would be a job. The claimant's evidence was that he was very confident that there would be a job, and indeed his confidence was borne out by the fact that he was offered a permanent job to follow in the subsequent academic year after the end of his engagement via the agency.

17. For the period between 27 June 2018 and 21 August 2018 the claimant received no payment from the respondent or his company from the agency. He did not undertake any work for the respondent (save for attending the conference explained below). The claimant's evidence was that this was the same period of time during which the respondent's permanent staff did not undertake any work, or at least were not required to undertake any work, it being the period from the end of the final term of the academic year until the staff returned for the start of the following academic year.

18. On 3 July 2018 the claimant was offered the role of Lecturer in Mechanical Engineering. That was a role in which the claimant was directly employed by the respondent. The role was a part-time role, being 0.4 full-time equivalent. There was no dispute that the claimant was required to apply for the role and attended an interview for it. That interview was a traditional interview with questions and answers asked of the claimant. The claimant believed his appointment to have been a foregone conclusion. It was not in dispute that he was the only candidate who applied for the role at the time.

19. The offer letter for that role was sent on 3 July 2018 and stated that the claimant's start date would be 21 August 2018 (67). The offer letter made clear that the appointment was contingent upon the provision of certain information including: a copy of the claimant's DBS certificate; immigration documents; production of two satisfactory references; and verification of qualifications. That letter also said that a contract of employment would be prepared and would follow. A contract of employment was subsequently provided, which was signed by the claimant on 2 October 2018 (78-92). The contract stated that the claimant's continuous period of employment began on 21 August 2018. There was no evidence that the claimant ever disputed that statement. The contract included, as an appendix, a professional academic contract (90) which addressed inventions, patents and restrictions. The terms of that appendix/contract applied to the claimant only as an employee, it had not applied to him when he had been engaged via the agency.

20. On 5 July 2018 the respondent held their annual staff conference at the Macron stadium. The conference was open to employees but not agency staff. Ms Turner's evidence was that new starters (that is those due to start in the next academic year) were invited because part of the focus of the conference was to share good practice. There was no dispute that the claimant's attendance related to

the engagement to the role of Lecturer in Mechanical Engineering. In cross examination the claimant accepted that it was optional for him to attend. I saw no evidence that the claimant had been promised payment or time off in lieu for the time spent at the conference, in advance of attending the conference.

21. In July 2018 there was an exchange of emails about a revised offer letter (75). The claimant in response to the revised offer letter, stated *"I have already been working at Bury College through an agency"* (75).

22. Prior to starting the new role in August 2018, the claimant was required to provide a DBS certificate to the respondent and copies of certificates. The claimant's evidence was that he had already done so, but nonetheless was required to provide the documentation again. The certificates were chased up by the respondent when not provided in full (77). The respondent's position was that the offer made to the claimant was conditional on such checks being completed.

23. From 21 August 2018 the claimant was paid salary by the respondent directly (with deductions made for tax and national insurance). The claimant no longer had to submit timesheets to the agency, or at all. The claimant was enrolled in the respondent's pension scheme. The claimant was entitled to claim expenses, albeit in fact he did not do so.

24. The claimant was provided with a new ID badge in August 2018. The claimant was not provided with the tour or introductions as he had in March 2018. The evidence provided about, and the claimant's recollection of, his induction in August 2018 was unclear and uncertain. There was evidence in the bundle that suggested that the claimant was told he should undertake an HR induction process (76), but the claimant's evidence was that it never actually occurred.

25. I was provided with an exchange of emails between the claimant and an HR Business Partner at the respondent dated 3 October 2018 (130). The claimant asked "*I was wondering if my most recent wages included going to the Bury college conference at the Macron stadium. This was after the period I was paid when I was working for an agency and before my contract with the college began. Alex my CM said she would get it included in my first monthly wage, and I'm wondering if she* remembered". The respondent's HR Business Partner subsequently responded to say that the claimant could claim the day for the conference as time off in lieu (128). The claimant confirmed in his evidence that he did so.

26. The claimant worked in his role as Lecturer in Mechanical Engineering from 21 August 2018. He resigned giving notice on 8 January 2020 (137). That notice was effective on 8 March 2020.

27. The claimant was offered and accepted the role of part-time Lecturer in Maths on a fixed term basis. The role was initially 0.2 FTE between 3 February 2020 and 8 March 2020, before changing to 0.4 FTE between 9 March 2020 and 3 July 2020. The role was due to end on 24 June 2020, but it was extended to 3 July. The contract expired on 3 July 2020.

28. The reason why the claimant resigned and why he accepted the alternative roles, was not material for the purposes of the issues being determined at this preliminary hearing. It was accepted by the respondent that the claimant maintained continuity of employment during this period.

29. The extension of the fixed term contract to 3 July was confirmed in a letter from Ms Turner on 23 June 2020 (170). That letter confirmed that the claimant would be provided with a P45 together with his final payslip, and also explained that the claimant needed to make arrangements to return the respondent's property, including his ID badge. The claimant's evidence was that he did so.

30. The final payslip of 31 July 2020 (172) showed that the claimant was paid in lieu of his accrued holiday. The claimant's P45 was dated 31 July 2020 and recorded that the claimant's leaving date was 3 July 2020 (173). There was no evidence that the claimant had not received the P45.

31. The claimant's evidence was that on his last day at work (which was 3 July 2020) he had met the curriculum director, Mr Fordham. Mr Fordham had thanked him for the work that he had done and had been quite apologetic that the claimant had not been offered a continuation of his role into the next academic year. The claimant's evidence was that he was told by Mr Fordham that he would like to put the claimant on the bank of cover staff, if he was in agreement. The claimant said that was fine. The claimant's evidence was that Mr Fordham had said he would contact the claimant in due course.

32. The claimant's evidence was that he thought he would be contacted in the new academic year. There was no evidence showing the claimant contacting the respondent to enquire about the absence of bank work or lack of contact in relation to bank work. In answer to questions in cross examination, the claimant accepted that it was during the half-term holiday towards the end of October 2018, when he realised he was not going to be contacted following his conversation with Mr Fordham. The claimant's evidence was that he had come to the conclusion, during that half-term break, that he would not be further employed by the respondent.

33. The claimant first spoke to ACAS shortly before entering into ACAS early conciliation, in late December 2020. The claimant did not seek any other expert advice. He did not undertake research into Tribunal claims or time limits. When asked about the reasons for the delay in entering his claim, the claimant emphasised his conversation with Mr Fordham as being the reason why he had not claimed earlier. The claimant is clearly an intelligent man and he would have been able to research matters, such as time limits, in the same way as anyone else.

34. The ACAS Early Conciliation certificate recorded that the claimant had undertaken ACAS Early Conciliation between 27 and 30 December 2020 (1). The claimant entered his claim at the Tribunal on 1 January 2021. His claim form stated at box 5.1 that his employment with the respondent had ended on 9 July 2020 (5) and recorded that the job which the claimant did was Lecturer in Mechanical Engineering. The response form at box 4.1 (18) stated that the employment ended on 3 July 2020 and that was repeated in the detailed grounds of response (26).

The Law

35. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

Jurisdiction/time limits

36. The starting point for time limits in an unfair dismissal claim is the wording of section 111 of the Employment Rights Act 1996. Section 111 (2) provides:

> *(2) Subject to the following provisions of this section an employment tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –*
>
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*

37. The three month period is, of course, extended by any period of ACAS Early Conciliation.

38. Whether or not it was not reasonably practicable for the claim to be entered in time, is a question of fact for me to decide. Key to the question is why the primary time limit was missed. I must apply the words of the statute, that is whether it was not reasonably practicable. That does not mean: whether it was physically possible; or (simply) whether it was reasonable. Asking whether it was reasonably feasible to present the claim in time, is an alternative way of expressing the test.

39. **Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379** said:

> *"In my opinion the words 'not practicable' should be given a liberal interpretation in favour of the man. My reason is because a strict construction would give rise to much injustice which Parliament cannot have intended."*
>
> *"Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the* [time limit] *to pass by without presenting the complaint. If he was not at fault, nor his advisers - so that he had just cause or excuse for not presenting his complaint within the* [time limit] - *then it was 'not practicable' for him to present it within that time. The Court has then a discretion to allow it to be presented out of time, if it thinks it right to do so…"*

40. Underhill LJ provided guidance in **Lowri Beck Services Ltd v Patrick Brophy [2019] EWCA Civ 2490** at paragraph 12 where he summarised the

essential points in the correct approach to the test of reasonable practicability as follows:

> *(1) The test should be given a liberal interpretation in favour of the employee (Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).*
>
> *(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119. (I am bound to say that the reference to "feasibility" does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)*
>
> *(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.*
>
> *(4) …*
>
> *(5) The test of reasonable practicability is one of fact and not of law (Palmer).”*

Length of service and employee status

41. Section 108 of the Employment Rights Act 1996 provides that the right to claim unfair dismissal does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years.

42. Section 210 of the Employment Rights Act 1996 says at (4):

> “*.. a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.”*

43. Section 210 (5) provides:

> “*A person’s employment during any period shall, unless the contrary is shown, be presumed to have been continuous”*

44. Section 212(1) of the Employment Rights Act 1996 says that any week in which an employee’s relations with his employer are governed by a contract of employment, count towards computing the employee’s period of employment.

Section 212(3) provides that any week counts towards computing the period of employment where the employee is:

> "*(b) absent from work on account of a temporary cessation of work, or*
>
> *(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for that purpose."*

45. An employee cannot waive statutory continuity of employment and section 203 of the Employment Rights Act 1996 provides that any provision is void in so far as it purports to exclude or limit the operation of any proceedings in that Act.

46. The definitions of employee and contract of employment are in section 230 of the Employment Rights Act 1996. They say:

> *"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."*
>
> *"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."*

47. The key starting point in determining whether someone is an employee is the Judgment of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433**, where he said (using slightly old-fashioned language):

> *"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 ….*"

48. The right approach to determining whether or not someone was an employee is to weigh up all the factors. None are necessarily determinative. The key relevant factors include:

- How the parties themselves describe the relationship, which is potentially a significant factor, but is not determinative;
- The amount of remuneration and how was it paid – regular wage tends to point towards a contract of employment;
- Was the worker tied to one employer or free to deliver work for others;

- What were the arrangements for income tax and NI;
- What were the arrangements re risk;
- Is the individual required to work set hours;
- What is agreed re sick pay and holiday pay;
- Is it a contract which the individual must fulfil personally – the ability to send a substitute indicates strongly that it is not an employment relationship (and an unfettered right to do so is inconsistent with it); and
- Is the individual integrated into the organisation and how is he presented to the outside world?

49. Where the provision of services involves an agency and an individual, as well as an end-user, the issue to be determined is somewhat different. Both parties placed reliance upon the leading authority of **James v Greenwich Borough Council [2008] IRLR 302**. That case, like this one, involved an individual whose services were provided to an end-user as an agency worker. The Court of Appeal highlighted that the key question is whether the individual has an employment contract with an end-user, it being possible for an individual to have both that type of engagement and for there to be a contract-agency agreement. The question to be determined is whether it is necessary to imply a contract of employment between the individual and the end-user? The Tribunal in that case found that there was no basis for implying such a contract, and the decision was upheld by the Court of Appeal.

50. The claimant also cited **Cable and Wireless plc v Muscat [2006] IRLR 354,** a decision which pre-dated **James**. That was a case in which the Tribunal had found that the claimant was an employee of the end user, notwithstanding that he had entered into a contract for services with an employment agency and it was the agency which paid him. The Court of Appeal confirmed that the Tribunal was able to do so.

51. The respondent contended that Muscat was no longer good law and relied upon **James**. The respondent's representative also relied upon **Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila [2007] UKEAT/0633/06.** That is a case in which it was observed that the relevant test presents a high hurdle to the claimant who asserts that a contract is to be implied, and in which the EAT said:

> *"In my judgment it is not enough (Reasons para 22) to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated like an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment"*

52. The respondent also relied upon **Tilson v Alstom Transport [2011] IRLR 169**, a case in which the Court of Appeal upheld the Employment Appeal Tribunal's decision to overturn a decision that there was an implied contract between worker and end user (on the facts of that case). In particular the respondent placed

emphasis on that as showing that the worker's integration into the end user's organisation did not mean there was evidence that there was an implied contract in place with the end user (and was a factor to be given little, if any, weight).

Conclusions – applying the law to the facts

Time limits/jurisdiction

53. The first issue which I considered was the question of whether the claim had been brought within the time required.

54. The claimant's employment ended on 3 July 2020. The primary time limit for bringing a claim under section 111 of the Employment Rights Act 1996 was therefore 2 October 2020. The claim was not entered until 1 January 2021, being just under three months late. ACAS early conciliation was undertaken between 27 and 30 December 2020, but the date when the claim was due had passed before the conciliation period commenced. Accordingly, the claimant's Tribunal claim was entered outside the primary time limit.

55. In the course of the preliminary hearing, the claimant appeared to effectively contend that his conversation with Mr Fordham meant that his employment with the respondent continued after 3 July 2020. If that was what was contended, I do not find that was the case. It was clear from the evidence that the engagement concluded on 3 July 2020, see the documents detailed at paragraphs 29 and 30 above. Both the response form and, importantly, the claim form, recorded the date of termination as being in July 2020 (albeit the claimant recorded on the claim form that the employment ended on 9 July).

56. If the conversation with Mr Fordham occurred as the claimant evidenced, what was said fell a long way short of a formal commitment to retain the claimant in employment or any type of arrangement or custom which would bridge any gaps in continuity or suggest a temporary cessation of work. At most, it was a proposal that the claimant might be offered work in the future. It did not have the certainty of date, role or terms, which would have been required for the conversation to have the effect of extending the claimant's employment. I also note that the claimant did not correspond with the respondent to enquire about the absence of any work, something that he clearly would have done had he believed that the conversation had amounted to a formal commitment to provide work.

Was it reasonably practicable to bring the claim in time?

57. The second question I am required to determine is whether it was reasonably practicable for the claimant to enter his claim within the time required. In my view it was. As I have recorded at paragraph 33, the claimant was an intelligent man. He was able, the same way as any other individual, to research time limits and to enter his claim within time. As the respondent submitted, there is a wide range of available information about Tribunal claims and time limits. It was reasonably feasible for the claim to have been entered in time. The claimant's ignorance of the relevant time limit was not a reasonable one.

58. I do not find that the claimant's conversation with Mr Fordham meant that it was not reasonably practicable for him to enter a claim (or commence ACAS Early Conciliation) by 2 October 2020. For the same reasons as I have already explained at paragraph 57, that conversation did not mean it was not feasible for the claimant to have entered a claim. In addition, it would have been apparent to the claimant by early in September 2020, at the start of the new academic year, that there was no ongoing arrangement in place. It remained reasonably practicable to enter a claim in time.

Was the claim entered in such further period as was reasonable?

59. Based on his own evidence, the claimant knew by October 2020 that the relationship had ended and he was not going to be offered further work. The claim was not entered until January 2021. Even had I decided that the conversation with Mr Fordham had meant that it was not reasonably practicable for the claimant to enter his claim in time, the fact that the claimant did not enter his claim until over two months after he had concluded that the relationship was over, means that I would not have found that the claim was entered in such further period as I consider reasonable (even had it not been reasonably practicable for the claimant to enter his claim in time).

Conclusion - time limits/jurisdiction

60. It was reasonably practicable for the claimant to enter his claim in time. The claim was entered out of time. Accordingly, the Tribunal does not have jurisdiction to consider the claimant's unfair dismissal claim. As a result, the claim should be dismissed.

Employment status and continuity

61. My conclusions in relation to the timing of the claim are sufficient to resolve the case. It is not necessary for me to go on and determine the question of continuity of employment. However, as I heard evidence and submissions on the issue of continuity, I have nonetheless recorded my decision within this Judgment.

62. There was no dispute that the claimant was employed for the period from 21 August 2018 to 3 July 2020.

63. The key period in dispute was the period between 14 March 2018 and 21 August 2018. The claimant was engaged via an agency for the period from 14 March to 27 June, and the period between 27 June and 21 August was covered by the college's period of closure over the summer.

14 March 2018 to 27 June 2018

64. The claimant clearly knew that his engagement from 14 March 2018 to 27 June 2018 was through an agency. That is what he said in his witness statement and was the wording used in his email in July 2018 (75). There was a contract between the agency and the respondent (the respondent being the end user) for the provision of the claimant's services. It appears to be the case that there was a contract between the agency and the umbrella company for provision of the claimant's

services (albeit no document was provided). The claimant chose the umbrella company with which he personally contracted (although no document was provided recording that contract either). There was no documentation which evidenced a direct contract between the claimant and the respondent, the end user.

65. Following the case law, there is only a contract between the claimant and the respondent if one is implied. However, there is no need in the arrangements and circumstances described, to imply such a contract. The claimant's services were provided via a chain of contracts involving the umbrella company and the agency. It is not necessary to imply a direct contract between the claimant and the respondent. If there is no such direct contract, there is no contract of employment.

66. In reaching this decision I have accepted the respondent's submission that, based upon the case of **James v Greenwich Borough Council**, there is no need to imply into these arrangements a contract between the claimant and the end user, the respondent. I do not accept the respondent's submission that **Muscat** is no longer good law. It has not been overruled. A Tribunal can imply such a contract where the circumstances necessitate it. However, in the circumstances of this case there is no need to imply such a contract.

67. Indicative of the relationships were: the fact that the claimant submitted timesheets to the agency; how he described the nature of his engagement himself; and that he was paid by his umbrella company, which was paid by the agency. He was not paid by the respondent. There was no requirement to imply a contract between the claimant and the respondent to give business reality to what was happening or to create enforceable obligations between parties who were dealing with each other in circumstances in which one would expect that business reality and those enforceable obligations to exist. Such an implied agreement was not necessary in the facts of this case.

68. Without the existence of the arrangement with the agency and the umbrella company, it is entirely likely that the claimant's arrangements with the respondent would have constituted employment. The way in which the claimant was integrated into the respondent's organisation, took his instruction from the respondent, provided paperwork to the respondent directly, and taught the students as part of the College, would all have been indicative of an employment relationship. I can understand why the claimant has argued that it was a relationship which was employment. However, the existence of the arrangement and contracts between the claimant, the umbrella company, the agency and the respondent, mean that there was no direct contractual relationship between the claimant and the respondent, and it is not necessary to imply one. As **Tilson** shows, integration into the end-user does not of itself require an agreement to be implied between the claimant and the end-use (the respondent).

69. Accordingly, I do not find that the claimant's continuous employment with the respondent started at the time that he was engaged via the agency to provide services for the respondent.

The staff conference

70. The staff conference on 5 July 2018 did add some complexity to the case. However, in submissions, it was identified that even if the conference day on 5 July 2018 was the start of the claimant's continuous employment, he would not have two years' continuity at the date of termination of employment because his employment ended on 3 July 2020. The claimant did not offer any argument as to why those dates would enable continuity to be maintained. Accordingly, even if the claimant's continuous employment started on the day he attended at the Macron stadium, he could not claim unfair dismissal.

71. I have in any event concluded that the claimant was not an employee on 5 July 2018 when he attended at the Macron stadium. He attended voluntary as it was optional and there was no agreement in advance of his attendance about either payment or time off in lieu. I understand that the fact that the claimant was ultimately given time off in lieu for attending the event did support an argument that it was the start of employment, however a subsequent agreement cannot retrospectively alter whether or not the day was employment. In any event, the optional/voluntary nature of the claimant's attendance means that it was not employment in any event.

Temporary cessation of work

72. Had I needed to address the issue, I would have found that the period after 27 June 2018 or 5 July 2018 until 21 August 2018 was a temporary cessation of work as provided for by 212(3)(b) of the Employment Rights Act 1996. As an educational establishment which was closed for the summer, there was a temporary cessation of work in the summer period. However, that provision can only bridge what would otherwise have been gaps in continuous employment. The provision cannot back-date the start of employment.

The end of employment

73. For the reasons I have already given at paragraphs 55 and 56, I do not find that the conversation between the claimant and Mr Fordham had the effect of continuing or extending the claimant's contract of employment. The claimant's employment terminated on 3 July 2020 as evidenced by the letter of 23 June 2020 (170), and the P45 (173).

74. As I have found that the claimant's employment commenced on 21 August 2018 and terminated on 3 July 2020, the claimant did not have two years continuous employment as is required for an unfair dismissal claim under section 108 of the Employment Rights Act 1996.

Summary

75. For the reasons explained above, the claimant is unable to pursue his unfair dismissal claim. The claim was not entered within the time required and the Tribunal does not have jurisdiction. In any event, even had the claimant entered his claim in time, he did not have sufficient continuity of employment to claim unfair dismissal.

Employment Judge Phil Allen

Date 2 July 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
5 July 2021

FOR THE TRIBUNAL OFFICE

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