EMPLOYMENT TRIBUNALS

Claimant: **Mr J Brewer**

Respondent: **Serco Limited**

Heard at: **East London Hearing Centre (Via CVP)**

On: **22 July 2021**

Before: **Employment Judge Crosfill**

Representation

Claimant: **No appearance or representation**

Respondent: **Mr D Hogg, a Solicitor**

JUDGMENT

1. **The Claimant has less than 2 years' continuous service with the Respondent at the date of his dismissal and, pursuant to Section 108 of the Employment Rights Act 1996 the Employment Tribunal has no jurisdiction to entertain a claim of unfair dismissal as presented.**

2. **The Claimant's ET1 only includes a claim of unfair dismissal and accordingly the entirety of the ET1 is struck out on the basis that the claim included has no reasonable prospects of success.**

REASONS

1. The Claimant's claim had been listed for an open preliminary hearing by Employment Judge Burgher when vetting the file pursuant to Rule 26 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. He directed that the hearing would deal with two matters:

   a. whether the Claimant's claim for unfair dismissal should be struck out on

the basis of insufficient service; and

b. what claims the Claimant seeks to bring in the light of correspondence from the Claimant dated 21st of February 2021.

2. The hearing was due to start at 10 AM. At that time there was no appearance by the Claimant in the CVP room. At 10:05 I unlocked the CVP room and admitted Mr Hogg and Mr Jones who had attended to give evidence. I informed them that I had instructed the Tribunal clerk to telephone the Claimant and make enquiries as to whether he intended to attend. I then asked them to logout and return to the waiting room and that I would admit them when I had any further news. The Tribunal clerk to telephone the Claimant on the number that he had given on several occasions. The message given was the same in each case that provider was unable to connect the call. That may mean that the telephone was switched off, had no credit or that the Claimant had changed telephone number. The Tribunal clerk had also sent the Claimant an email reminding him of the hearing, but she got no response within the duration of the hearing. As a final check I instructed the Tribunal clerk to check the waiting rooms in case the Claimant had attended in person. He had not.

3. Mr Hogg told me that he was surprised that the Claimant did not attend as he had engaged with him in relation to preparing an agreed bundle and had a discussion about the apparent failure of the Claimant to provide a witness statement in accordance with a case management order made on 21 June 2021. He told me the Claimant said that he intended to rely upon the content of his ET1 rather than provide a witness statement.

4. Rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that where a party fails to attend be represented at a hearing the Tribunal may dismiss the claim or proceed in the absence of that party. Before doing so it is necessary for the Tribunal to consider any information which is available to it after any enquiries that may be practical about the reasons for the party's absence. I took the view that the Claimant's failure to attend was entirely unexplained. His interaction with Mr Hogg meant that he must have been aware of the hearing. Had he thought the hearing was either in person or by telephone or had he been having technical difficulties and I would have expected him to attempt to contact the Tribunal. I did not start the hearing until 10:20 as I consider that this gave the Claimant plenty of time to contact the Tribunal.

5. I considered whether I should simply postpone the hearing but decided that I should not. It would take many months before a further hearing could be listed. The effect of postponing a hearing always impact upon other tribunal users and the Tribunal system is overstretched at the moment. I took account of the fact that I could have regard to all the information provided by the Claimant in his ET1 and subsequent correspondence in making any decision. The first point that I needed to decide required an understanding of the circumstances in which a contract of employment could be implied. I am familiar with the legal test and do not feel that I would necessarily be assisted by any submissions on the law by the Claimant. There was nothing in the Claimant's ET1 which conflicted with the evidence of Mr Jones who was called on behalf of the

Respondent. In the circumstances I considered that it was in the interests of justice to proceed.

6. Mr Jones adopted his witness statement and other than clarifying the date upon which the Claimant was offered direct employment by the Respondent was not asked any additional questions.

My findings of fact

7. I am not at this stage concerned with the merits or otherwise of the claim of unfair dismissal and therefore restrict my findings to that which is strictly necessary to determine the question of whether the Claimant had sufficient continuity of employment to present a claim of "ordinary" unfair dismissal.

8. There was no dispute between the parties that the Claimant was directly employed by the Respondent from 15 April 2019 until his dismissal on 6 January 2021. The Claimant was employed in the position of a refuse collector.

9. I accept the evidence given by Mr Jones that in addition to directly employed individuals the Respondent regularly employs agency workers. In order to do so it has an arrangement with a company called Comesura Ltd. When an agency worker is required the Respondent contacts Comesura Ltd and asks them to source an agency worker. Comesura Ltd then use a network of employment agencies to supply a worker.

10. I have seen a spreadsheet which sets out the number of hours worked by the Claimant. From that spreadsheet I find that the Claimant first worked as a Refuse Operator from 10 June 2018 and that he worked regularly right through until his direct employment. The spreadsheet gives a booking reference for each week and notes the Parity Date for the purposes of the Agency Worker Regulations. The second to last column lists the supplying agency as Black Point Recruitment Ltd. It was Mr Jones evidence that this was the agency through whom the Claimant had been supplied. He said that the Respondent would pay Comesura Ltd and in turn that company would pay Black Point Recruitment Ltd.

11. I find it more likely than not that when the Claimant did his work alongside directly employed Refuse Operatives what he did in practice was under the direction and control of the Respondent's employees. In particular I consider it more likely than not that the Respondent provided him with PPE and gave him instruction on how to carry out his job. As such on a day-to-day basis he would be indistinguishable from a directly employed Refuse Operative. I find that he was paid by Black Point Recruitment Ltd. I note with some concern that he does not appear to have taken any annual leave.

12. When the Claimant was recruited directly the terms and conditions of his employment included a declaration that his start date was 15 April 2019. When the Claimant presented his ET1 he included a start date of 14 April 2019. There is nothing in the narrative section of his ET1 that seeks to go behind that apparent concession.

The Law

13. The right to claim unfair dismissal is provided by section 94 of the Employment Rights Act 1996. However, that right is qualified by Section 108(1) which states that section 94 does not apply to a dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

14. Part XIV of the Employment Rights Act 1996 sets out the statutory scheme for calculating continuity of employment. Section 212 provides that the weeks that count are those weeks where the employee's relations with his employer are governed by a contract of employment.

15. Section 230(1) of the Employment Rights Act 1996 defines an employee as a person who works under a *'contract of employment'*. Absent a contract a person cannot be an employee.

16. A contract may be express or, depending on all the evidence it may be implied. A useful analysis of the proper approach to the question of whether a contract can be implied is set out in the judgment of Elias LJ in ***Tilson v Alstom Transport*** **2011 IRLR 169, CA**. The following passages review the authorities:

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

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

"…correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213 , 224:

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

As Bingham LJ went on to point out in the same case it was insufficient to imply

a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."
9. If an employment tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the tribunal's decision.

10. It is important to emphasise that if these principles are not satisfied, no contract can be implied. It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him. 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. As HH Judge Peter Clark observed in Heatherwood and Wrexham Park Hospitals NHS Trust v Kulubowila and Others UK/EAT/0633/06 :

"..it is not enough to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated as an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment."

11. Nor is it legitimate for a tribunal to imply a contract because it objects to the practice of employers entering into arrangements of this kind in order to avoid incurring the obligations they owe to their employees. In many cases that is undoubtedly the reason why employers enter into agency arrangements, although certainly not all. Some employees prefer these arrangements because they are perceived overall to be more beneficial to them, as this case demonstrates. But even where employers are seeking to avoid liabilities with respect to workers who would prefer to enter into an employment relationship, if as a matter of law the arrangements have in fact achieved the objective for which they were designed, tribunals cannot find otherwise simply because they disapprove of the employer's motives. Section 203 of the Employment Rights Act 1996 renders void contractual terms under which employees contract out of their statutory rights, as the employment judge in this case rightly observed. But if there is no contract in place, then the rights do not arise in the first place and the section has no bite.

17. When ***James v Greenwich BC*** was before the EAT Elias J (as he was) suggested that the following matters may assist a tribunal in determining whether the test of necessity is met (that guidance being undisturbed in the Court of Appeal):

    a. the key issue is whether the way in which the contract is

performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end-user

b. the key feature in agency arrangements is not just the fact that the end-user is not paying the wages, but that it cannot insist on the agency providing the particular worker;

c. it will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be inconsistent with the relationship;

d. it will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. 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;

e. 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 two;

f. it will be more readily open to a tribunal to imply a contract where, as in Cable and Wireless plc v Muscat, the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user.

18. In ***Cable and Wireless plc v Muscat*** **2006 ICR 975, CA**, the Court agreed with the decision of an employment tribunal that it was necessary to imply a contract between him and the Respondent in order to give effect to 'business reality'. In that case the Claimant had been previously employed by Cable and Wireless, he worked under the direction of the end-user's managers, arranged his holidays to suit the end-user, and was described as an 'employee' in company documentation.

Discussion and Conclusions on continuity of service

19. I find that for the period prior to 15 April 2019 there was no express contract between the Claimant and the Respondent. I am satisfied that such express contractual arrangements as there were, required the Respondent to pay an employment agency for the supply of the Claimant's services. The question then is whether it is necessary to imply a contract directly between the Claimant and the Respondent.

20. Applying the law above, the fact that the arrangement was relatively long term is not itself a factor which makes it necessary to imply a contract of employment.

Equally the fact that I have found that the Claimant was integrated into the Respondent's business and on a day-to-day basis was subject to its control are matters which I should take into account but are not determinative.

21. I find that the presence of the Claimant undertaking his work for the Respondent during the period before his direct employment is entirely consistent with the agency worker arrangements that were in place between the Respondent and the Employment agency that supplied the Claimant. It is not necessary to rely upon any implied contract in order to give business efficacy to that arrangement.

22. I should not be swayed by any view I may hold about the disparity of rights given to workers in the gig economy but must apply the law set out above. There is nothing in the arrangement that is in any way unusual. Agency workers are typically engaged to make up a shortfall of labour either on a short or long-term basis. Such arrangements give the end-user a considerable degree of flexibility. Such arrangements are, at present, entirely lawful.

23. I find there is no reason to imply any contract of employment between the Claimant and the Respondent at any time prior to 15 April 2019. This finding leads me to the conclusion that the Claimant has less than two years of continuous service. Whilst there are provisions in Part XIV of the Employment Rights Act 1996 which in certain circumstances could have led to the conclusion that the period of agency work should be treated as continuous none of them in my view apply in the present case. In particular there is no evidence that there is any connection between Black Point Recruitment Ltd and the Respondent that would bring this employment within section 218.

<u>Are there any other claims?</u>

24. Before dismissing the entirety of the claim, I have had regard to the existing content of the ET1 and to the Claimant's subsequent correspondence and in particular his letter of 22 February 2021. In his ET1 the Claimant does refer to his mental health and the fact that he has severe depression and anxiety. He refers to this in the context of the disciplinary investigation against him and suggest that he was targeted. The Claimant has not ticked the box in section 8 of the ET1 to suggest that he intended to bring any claim under the Equality Act on the basis of any disability at section 12 of the ET1 he has ticked the box saying that he does not have a disability. I am fully aware of the fact that many people are unaware of the low statutory threshold for establishing disability and would not necessarily acknowledge that they meet that threshold even if they do. However, I do not find that even on the most generous reading there is any reference in the ET1 to a claim under the Equality Act 2010. Some elements of such a claim might be present but it is impossible to discern what claims the Claimant might have made. In later correspondence the Claimant has not said that he wished to bring any claim under the Equality Act 2010, and it is only from an abundance of caution that I have questioned whether I should infer that he does so.

25. I come to the conclusion that the only claim that is included in the ET1 at present is a claim for unfair dismissal. That claim cannot succeed for the reasons given

above. I shall therefore strike out claim as having no reasonable prospect of success pursuant to rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

26. When the Claimant receives this judgment, it will be accompanied by a leaflet explaining that he can challenge the judgment either by way of reconsideration or an appeal (if there is any error of law). If the Claimant had good reasons for not attending the CVP hearing, then that would provide the basis for an application for a reconsideration. However, there would be little point in asking for a reconsideration of the decision that the Unfair dismissal claim cannot proceed unless the Claimant has some factual or legal argument suggest that my conclusions are wrong. I would therefore ask the Claimant to carefully consider what I have written above before thinking about making a reconsideration application even if his failure to attend was beyond his control.

Employment Judge John Crosfill
Date: 22 July 2021