EMPLOYMENT TRIBUNALS

Claimant Respondent

v

AB Centrica Storage Limited

Employment Judge JM Wade in chambers on 15 February 2021

JUDGMENT

The claimant's application dated 18 December 2020 for reconsideration of the Judgment sent to the parties on 20 November 2020 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. The claimant seeks a reconsideration of the Tribunal's finding that he was an employee of the respondent for less than two years (which resulted in the dismissal of his unfair dismissal complaint).
2. Over six close typed pages he seeks reconsideration on two grounds: that the Tribunal "made a mistake in the way it reached its decision". This is developed as: 1) "not enough time was devoted to the issue of continuous employment and I did express my preference on 24 September for a Preliminary Hearing on this matter".
3. Secondly that, "there is new evidence that was not available at the time of the hearing but has since come to light and potentially has an impact on the judgement".
4. He further sets out in a document headed "Timeline", further information which may well have formed his witness evidence had he amassed further documents on the issue before the final hearing; information headed "relevant factors to consider for continuous employment", and a section headed "Evidence not disclosed by the respondent" which lists nine documents or categories of documents not provided to him.

<u>The preference for a preliminary hearing on the point.</u>

5. The Tribunal's reasons explain that there had already been a number of "bite size chunk" hearings to determine discreet issues in the case, before this four-day hearing in October 2020. Those hearings had been consistent with the claimant's mental health condition and wish to address matters in that way. The final four-day hearing was then arranged as part of those case management discussions.

6. A month before the final hearing, when requesting additional disclosure from the respondent, the claimant said, "I would prefer that the final hearing be converted to a preliminary hearing to determine the issue of continuous service and the final hearing rescheduled". This was refused after the claimant had said, the following day: "I did not intend to make a late application to postpone the full hearing, I was merely expressing a preference should it be enforced. I wish the hearing to go ahead as planned on 26 – 29 October 2020. I have now agreed the bundle with the respondent …My witness statement will be submitted on 5th October as scheduled". The claimant's disclosure application was refused.
7. In these circumstances there are no reasonable prospects that the Tribunal would decide that the issue of continuous employment should be re-visited because it could have been addressed as a preliminary issue, but wasn't. That seeks, in effect, to overturn previous case management decisions.

<u>The new evidence point</u>

8. The Tribunal's note of the claimant's relevant oral evidence when responding to Mr Boyd's questions was this:

   The paras between 5 and 8 – mr franks – of mr coley – yes – set out a number of facts – appear to be non-controversial – relating to your position as a contractor – and what occurred during the course of your time as a contractor

   Did you look at them and say factually they are wrong

   Err – I agree I was not a direct employee- of csl – I have not said that I was -

   I say for my employment rights – I was agency and I moved onto employment without a break –

   Same working hours – same job after June 12th as I was before it

   And I was using the company's facilities – I was told what work I did -

   So page 191 – okay

   So if I put to you – you were not an employee of csl – you would accept that – I was a contractor and there was a continuity of work –

   I believe – that csl paid the agency a finders fee – I did have an issue I had with working for the agency – and Richard knew that

   But clarify one final point if I may

   So you were on one month's notice - in or around that period

   I was approached by that agency – when working somewhere else – and morgan mckinley – were the recruiter -I accepted the role – I believed I was getting paid - £200 a day through pay as you earn

   Quickly emerged that wasn't the case

   They didn't have their own payroll system

   I asked what are you talking about

   So it is as a contractor – so I had to set up through an umbrella company –

   And had to set up an umbrella company to get paid - and then

   You were asked weren't you to provide disclosure – I have supplied everything I could supply

9. His witness statement had said this:

   On 31st October 2016 I commenced working at Centrica Storage Limited on a 12 month Fixed Term Contract as Business & Reporting Analyst/Coordinator. I was covering this role for Victoria Smith whilst she herself covered a role in another department (maternity cover). [Page 190 to 198 & 384]

10. It is apparent from the above that the claimant had provided some documentation relating to his commencement via an agency and that was before the Tribunal. The new evidence that he says he has been able to provide by a data protection request to Morgan McKinley, the agency, and from his own archived emails, adds more detail but little substance to his oral evidence to the Tribunal and is consistent with it and with the Tribunal's findings. An example is the use of psychometric testing before the claimant took up his 12 months agency assignment. This is information which if added to the factual matrix adds very little to the picture. It is consistent with the Tribunal's finding that the respondent also interviewed the claimant before this agency appointment.

11. The question of whether a judgment should be re-considered because new evidence has come to light which was not reasonably available at the hearing is a high bar. There is no reasonable prospect of the Tribunal considering that the Morgan McKinley material and archive material could not reasonably have been sourced for the final hearing, either from the claimant's email archive or from Morgan McKinley. Furthermore, there is no reasonable prospect that the material would result in the Tribunal revisiting its decision because it adds very little to the claimant's oral evidence, which accurately summarised his position.

Too little time spent on the continuous employment issue

12. The extract from the claimant's oral evidence is accurately reflected in the findings and the way that the claimant addressed his argument as a litigant in person. The fact that he did not set up an umbrella company as the note records, but used an umbrella company service is a distinction without a difference in the context of the conclusions reached by the Tribunal. There is no reasonable prospect of the Tribunal considering that the decision should be revisited in a hearing because too little time was spent: the time spent was proportionate to the evidence and the arguments.

The Tribunal made a mistake in the way it reached its conclusion

13. To the extent that the claimant's application includes that he considers the Tribunal made an error of law or applied the wrong test in deciding whether he was in reality an employee of the respondent during the period where the documentation was clear (and he was clear) that there was no written or oral contract of employment between them, there is no reasonable prospect of the Tribunal agreeing with him. While its paragraph 97 is a summary, the law it summarises is below.

   *Section 230 of the **1996 Act** 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."

Section 83(2) of the Equality Act 2010 relevantly provides: ""Employment" means – (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work". The 1998 Working Time Regulations' definition of "worker" adopts almost wholesale the definition of worker at subsection (3) of the 1996 Act above.

The fundamental ingredients of a contract in law are: there must be an intention to create legal relations; there must be offer and acceptance of terms; and there must be "consideration" passing between the parties, that is, a mutuality of promises between the parties – "in return for this from you, I will do that".

In the judgment of McKenna J in Ready Mixed Concrete (South East Limited) v Minister of Pensions and National Insurance [1968] 1 QB 497 he summarised the essential elements of the contract of employment as follows (p.515):

"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."

In Stephenson v Delphi Diesel Systems [2003] ICR 471 (paras 11-14), this was said: "11. The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."

*In Snook v London & West Riding Investments Ltd [1967] 2 QB 786, CA a commercial case, Diplock LJ defined a '**sham**' transaction in terms of a common intention by both parties to misrepresent the true position to the outside world.*

*In Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98, [2009] IRLR 365 , an employment case, Smith LJ (giving the leading judgment) held that 'the case of Snook is not of uniform assistance in determining whether an agreement is in fact a '**sham**'. In Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] IRLR 820,[2011] ICR 1157 at paragraphs 34 -35 Lord Clarke said this:*

"I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. …"… and …

"So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description".

The Tribunal does not readily accept that adults with capacity to deal with their own affairs do not mean what they say in written terms agreed between them. There must by cogent and compelling evidence to suggest that their true intentions were different to those contained in the written terms; this can be derived from the way in which the parties operated in practice, taking into account the relative bargaining power.

14. The Tribunal's reasons included this at paragraph 99:

"*Nor was there anything close to duress in the claimant's entering into the original arrangement, albeit the claimant said he felt forced to set up the umbrella company by the agency. For reasons which will become apparent the Tribunal considers his feelings and perception have developed with hindsight. The claimant disclosed no documentation indicating his protest or objections at the time. He had an alternative at the time: if he had wanted to wait for a directly employed position he could have rejected the agency offer and continued with his search while remaining in the*

temporary position he then occupied. The claimant did not document any objections at the time; and he later signed a contract with the respondent acknowledging and agreeing the start of his continuous employment in 2017".

15. The claimant's application includes that he has found, from his own archive, emails indicating he was unhappy with the agency about a number of matters (which was in any event apparent from his oral evidence extracted above); those matters do not suggest that he raised protest **with the respondent** as to his true start date or status at the time, such that the Tribunal could conclude that the true intention of Mr Colley and the claimant was that there be a contract of employment between the respondent and the claimant from 31 October 2016 to 12 June 2017.

16. The claimant has devoted as great deal of time and effort since the Tribunal's decision, to secure additional evidence in relation to the continuity point. The principle that the parties are entitled to certainty and finality in litigation is rarely more brought into focus than by this application. It would be wholly wrong, when that material only confirms the salient points of his written and oral evidence, for his application to proceed to a further reconsideration hearing, putting himself and the respondent to further strain and uncertainty.

17. In communicating the reasons why this application has no reasonable prospects of success, it is to be hoped that the claimant can accept that there was a proportionate and consdieration of the issue, within the final hearing. The relevant underlying facts and principles of law to be applied would not have changed, nor would a different decision have been made, had the new material been available or lengthier written or oral arguments made.

Employment Judge JM Wade

15 February 2021

Sent to the parties on:

2 March 2021