



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Rees-Clough

**Respondent:** Arthouse Limited

# RECORD OF A PRELIMINARY HEARING

**Heard at:** Liverpool (by CVP) **On:** 28 July 2021

**Before:** Employment Judge Buzzard (sitting alone)

## Representatives:

For the claimant: In person

For the claimant: Mr person

# JUDGMENT

JUDGMENT having been sent to the parties on 28 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

## 1. Preliminary Issue

1.1. In this case the claimant has brought a claim of unfair dismissal. No other claim is pursued.

1.2. The issue to be determined at this preliminary hearing was whether the claimant was eligible to pursue her claim of unfair dismissal. Specifically whether the claimant had the required continuous service for such a claim.

## 2. The Basis of the Dispute regarding the Preliminary Issue

- 2.1. The claimant first began doing work for the respondent on 5 March 2018. This is not in dispute.
- 2.2. The respondent says that at that point the claimant was working as an agency worker and was not an employee. It is the respondent's position that the claimant did not become an employee until 1 October 2018.
- 2.3. The parties at the outset of this hearing were agreed that if the claimant did not become an employee of the respondent until 1 October 2018, then she would not have the necessary period of continuous service to pursue her claim of unfair dismissal.
- 2.4. Accordingly, the issue at this hearing was whether the claimant was an employee of the respondent in the period from 5 March 2018 up to 1 October 2018.

## 3. The Law

- 3.1. A claim of unfair dismissal is made under the Employment Rights Act 1996 ("ERA"). Accordingly, the relevant definition of 'employee' for the purposes of this hearing comes from the ERA. This states:

*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.*

- 3.2. A core requirement under this definition is that there has to be a contract of employment between the claimant and the respondent at the relevant time. For it to be found that there was a contract of employment, it first has to be found that there was a contract between the claimant and respondent.

- 3.3. If there is such a contract then it falls to analysis of that contract and of the practicalities of the working relationship that existed to determine whether that contract amounted to a contract of employment.

- 3.4. In the absence of an express contract of employment (whether written or oral) it is still possible for there to be an implied contract. For there to be an implied contract, it must be necessary for a contract to be implied. This means that where a claimant seeks to argue that there is an implied contract of employment in an agency worker situation, such a contract can only be implied when the relationship is not consistent with an agency worker relationship.

3.5. In this case at that stage of analysis did not prove necessary. There was no contract found to exist between the claimant and the respondent.

#### **4. Evidence and Findings**

4.1. The claimant gave witness evidence on her own behalf. For the respondent evidence was given by Gillian Roscow. In addition to this evidence the parties produced a bundle of documentary evidence.

4.2. Although it appeared initially that there were substantial factual disputes between the parties, as matters transpired there were very few relevant disputes of fact.

##### **4.3. Was there an express written contract?**

4.3.1. The Tribunal were provided with copies of paperwork relating to the claimant's status prior to 1 October 2018.

4.3.2. The claimant accepted that this paperwork appears to establish a employment agency status. It reflects that the claimant had entered into agreement with a business ("RH"). RH had then some weeks later supplied the claimant to the respondent as a worker.

4.3.3. There was no written contract between the claimant and the respondent that covered the period prior to 1 October 2018.

4.3.4. There was what appeared to be a written contract expressed to be between the claimant and RH for that period. There was also a written contract between RH and the respondent for that period.

4.3.5. The written contracts before the Tribunal that related to the period prior to 1 October 2018 are entirely consistent, in all respects, with what one would expect to see where a worker is an agency worker rather than an employee. The claimant in her submissions expressly accepted that that was the case.

4.3.6. Accordingly, there was no basis to find that there had been any written contract between the claimant and the respondent prior to 1 October 2018.

##### **4.4. Was there an express oral contract?**

4.4.1. The claimant in her cross examination conceded that at no when she was taken on, or prior to 1 October 2018, did anyone expressly tell her that she had been taken on as an employee.

4.4.2. Accordingly, there is no evidential basis to find that an oral contract of employment had been expressly entered into.

4.5. Was there an implied contract of employment?

4.5.1. *Discussion on Day one*

- 4.5.1.1. Taken at its highest, the claimant's evidence was that at the conclusion of her first day when placed with the respondents she had been asked by Ms Roscow how she felt the day had gone, whether she was happy to continue and return the next day. This did not appear to be denied.
- 4.5.1.2. The claimant suggests that this indicates that she was considered an employee.
- 4.5.1.3. This suggestion is not persuasive. It is a logical and sensible step for any business to take if they are engaging, via an agency, the services of an agency worker, to check if they intended to return the following day. There is no reasonable way to infer this suggests that there was a contract between the parties, never mind a contract of employment. It would be a strange agency worker relationship where the client business, on the first day of a worker was placed with them with the intention of that worker hopefully remaining for a significant number of weeks, not to check that that worker was indeed content that they were willing to continue for that period of time.
- 4.5.1.4. Further, informing the agency worker that the client business was content for them to continue, in effect, that they were an acceptable worker for that business, is equally logical and sensible.
- 4.5.1.5. Nothing in these conversations could lead to an inference that a contract existed, or that the claimant was an employee.

4.5.2. *Extension of Agency placement*

- 4.5.2.1. The parties were agreed that the claimant was initially placed as an agency worker for a period due to end in April 2018. Her engagement was extended to continue beyond that date.
- 4.5.2.2. This appears to reflect the fact that the claimant, and the respondent, were both content with the arrangement and the respondent had an ongoing need for work to be done.
- 4.5.2.3. This does not suggest she was not an agency worker.

4.5.3. *Discussions leading to her transition to employee status from 1 October 2018*

- 4.5.3.1. The claimant gave evidence to the effect that there were discussions over the Summer of 2018 regarding making her position permanent. This appears to amount to a discussion about changing her status to one of an employee, employed directly by the respondent.

4.5.3.2. There was no denial from the respondents that there had been such discussions. There was no suggestion in the documents provided, or in the evidence presented, that the respondent had legally agreed in a manner that could be described as contractual, to change the claimant's status prior to 1 October 2018.

4.5.3.3. The respondent's evidence was that the organisation did not know what staff they would need. It was clear from the evidence presented that conversations did occur in the prior just prior to 1 October 2018 about offering the claimant a position as an employee of the respondent. These conversations occurred between the claimant and the respondent. In addition there was correspondence between the respondent and RH regarding what fee would have to be paid to RH to directly engage the claimant as an employee. The end result of this was that the respondent paid RH a fee and offered the claimant a contract of employment. The claimant signed this contract. This contract states her employment commenced on 1 October 2018.

#### *4.5.4. The claimant's contract from 1 October 2018*

4.5.4.1. The claimant sought to suggest in evidence that she had understood that to mean that her '*permanent*' employment commenced rather than her '*temporary*' employment. This is not found to be a credible position. The contract quite clearly repeatedly refers to the start date of her employment.

4.5.4.2. In addition, there were multiple tax documents, some completed by the claimant. The claimant's completion of formal tax documents carries some weight when determining what was in her mind at the time she completed them. In these tax documents the claimant clearly states that she commenced her employment with the respondents on 1 October 2018. They also clearly state that her employment with RH ended in late September 2018.

#### *4.5.5. The use of PDR forms referring to employee*

4.5.5.1. The claimant referred in evidence to a PDR form which had been completed by her at a meeting with Gillian Roscow some time in the Summer of 2018.

4.5.5.2. That PDR form appears to be designed for use with employees. It uses the word '*employee*' and was signed by the claimant in the box that referenced her as an employee.

4.5.5.3. It is noted that on a reading of the whole PDR form there are Sections completed which contradict the idea that the claimant was an employee of the respondent. This includes a section where her aspiration appears to have been described as becoming an employee.

4.5.5.4. Ms Roscow's evidence was that whilst she had supervised agency workers in the past, they had only been agency workers on a very short term basis. There had never been an agency worker on a longer term basis. Ms Roscow explained that she had wanted to treat the claimant in a way that was appropriate, reflecting the fact that she valued the claimant as an agency worker. It was for this reason that Ms Roscow included the claimant in the annual PDR process, and in doing so she simply used the PDR forms she had which she found a useful and helpful tool for having PDR type discussions.

4.5.5.5. This explanation is found to be credible and sensible. It is not correct that in an agency worker situation caution to avoid any utilisation of any formal document that uses the word employee must be exercised. What matters is the reality of the situation.

4.5.5.6. The mere fact that Ms Roscow did not amend a standard form to remove the word 'employee' and replace it with 'agency worker' does not result in an inference that there was a contract of employment between the claimant and the respondent.

#### *4.5.6. The claimant's integration into the respondent organisation*

4.5.6.1. The claimant's case was that she considered herself to be integrated into the respondent organisation such that she must have been an employee.

4.5.6.2. The claimant did not dispute that she was not, prior to 1 October 2018, subject to their disciplinary or grievance procedures. There was no evidence of the claimant having applied to the respondent for permission to take annual leave prior to 1 October 2018. The claimant was at all times prior to 1 October 2018, paid by the agency, RH. The claimant stated herself, in her documentation to the Inland Revenue, that she was employed by the agency prior to 1 October 2018.

4.5.6.3. The claimant at no time argued that the agency relationship was in any way a sham.

4.5.6.4. The claimant referred in submissions to the seniority of her work, and her management responsibilities prior to 1 October 2018. The claimant argued these suggest she was in fact an employee. Further, the claimant suggests she was given long term tasks which would only be consistent with her being an employee.

4.5.6.5. The fact that the claimant felt she had integrated with the respondent's workplace is not persuasive. There is no inconsistency in a finding that an agency worker who is on an assignment over months can develop a feeling of integration into the workplace.

4.5.6.6. The fact that the claimant's duties carried seniority and/or management responsibilities is not relevant to the determination of status.

4.5.6.7. The fact that the respondent had assigned tasks to the claimant that may have anticipated her continued work for a period of time is not relevant. There is no presumption that agency staff are only given tasks they can complete prior to their placement with a client business ending.

4.5.6.8. None of the above considerations suggest it would necessary for there to be an employment relationship for them to make sense. An agency worker relationship can, and often is, a long-standing relationship in which the worker becomes integral and valued member of the client business, carrying responsibility and contributing to long term tasks.

## 5. Conclusion

5.1. There is no evidence of an express contract between the claimant and respondent prior to 1 October 2018, either written or oral. There cannot, therefore, have been an express contract of employment.

5.2. The agency worker structure described in the documents is fully consistent with the reality of the relationship between the parties prior to 1 October 2018. There is no basis upon which to imply a contract of employment to describe that relationship.

5.3. It is found that the claimant was engaged as an agency worker prior to 1 October 2018. She was not an employee of the respondent at that time.

5.4. Accordingly, at the date of her dismissal the claimant did not have sufficient service to pursue a claim of unfair dismissal. For this reason her claim is dismissed.

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Employment Judge Buzzard

8 November 2021

ORDER SENT TO THE PARTIES ON

8 December 2021

FOR THE TRIBUNAL OFFICE

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