



EMPLOYMENT TRIBUNALS

Claimant: Mrs. G. Statkute

Respondent: Syft Online Limited T/A Indeed Flex

Heard at: London Central (by CVP) **On:** 24 March 2022

Before: Employment Judge J Galbraith-Marten

Appearances

For the claimant: Mrs. G. Statkute, in person
For the respondent: Mr. T. Goodwin of Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is the claim of Unfair Dismissal is struck out on the basis the Tribunal has no jurisdiction to hear it.

REASONS

1. This is a claim of Unfair Dismissal which is denied. It was listed for an open Preliminary Hearing to determine two matters; (a) was the Claimant an employee of the Respondent at the effective date of termination and, (b) did she have two years' service to bring an Unfair Dismissal claim.
2. The parties prepared two separate bundles for the hearing. The Claimant produced a 56-page bundle and a 11-page written argument. The Respondent produced written submissions and a 109-page bundle.

Preliminary Matters

3. At the commencement of the hearing the Respondent raised two issues regarding the documentation produced by the Claimant. The Claimant's bundle contained without prejudice correspondence, and she also referred in her written argument to documents that she had shared with the Tribunal but not with the Respondent.
4. The Respondent's position was the without prejudice correspondence should not be considered by the Tribunal. Also, any material that had not been shared with the Respondent, was a breach of the Tribunal's rules and placed the Respondent on an unfair footing. The Respondent requested the Tribunal to only refer to its bundle of documents and not the Claimant's.
5. The Tribunal explored these issues with the Claimant. She was asked why the without prejudice correspondence with ACAS was relevant to the two matters to be determined by the Tribunal. The Claimant could not provide a response. In respect of the alleged material shared with the Tribunal and not the Respondent, that material could not be identified but in any event, the Claimant stated it related to other employment, it was not relevant, and she would not be relying upon it. She only sought to rely on her written argument and her bundle of documents (not including any material she had shared with the Tribunal alone) and the Respondent had sight of that material albeit the Claimant had supplied it later than expected.
6. The Claimant's internet connection was intermittent during the hearing, and she kept dropping out and it was difficult to follow her representations. It was also extremely difficult to engage with the Claimant as regards the format of the hearing and the requirement for her to provide sworn evidence to the Tribunal. The Claimant's position when asked was that she would prefer the Tribunal to decide the two preliminary matters on the material she had provided. The Claimant dropped out of the hearing again at that point.
7. Considering the difficulties, the Tribunal enquired whether a hearing in person would be feasible for the parties. However, the Claimant informed the Tribunal that it would take her at least half a day to travel to the hearing centre.
8. The Claimant did not re-join the hearing again and the Tribunal asked the Respondent whether the matter should be relisted for a hearing in person. The Respondent's position was that it should proceed. The hearing was adjourned so that point could be considered. During the adjournment, the Claimant sent an email to the Tribunal at 11.18am and she stated, "*Can the judge decide using the argument and the bundle?*"
9. Considering the Claimant and the Respondent's positions, the hearing proceeded in the Claimant's absence.

10. The Respondent called Mr. Danny Downing who confirmed the evidence set out in his witness statement dated 17 March 2022 and the Respondent provided supplementary oral submissions.

Findings of fact

11. The Respondent is an online recruiting platform which provides short term flexible working opportunities. It is an employment business that engages workers and supplies them to third party end user clients to undertake temporary and ad hoc work assignments.
12. Workers, known as flexers, sign up to the Respondent's platform via its website or mobile phone app. They are required to accept the Respondent's terms and conditions to obtain work and they were included in the Respondent's bundle at pages 50-56.
13. The terms and conditions expressly state it is a contract for services and no contract exists between assignments. Section 6(2) also states, "*Flexers are engaged by flex as workers within the meaning of 230(3) of the Employment Rights Act 1996. Flex is not an employment agency and no flexer is or shall be deemed to be an employee of Flex.*"
14. The Claimant was engaged by the Respondent and undertook her first assignment on 3 August 2019. In total she completed 31 assignments for the Respondent with a variety of end users. The Respondent removed the Claimant's access to its site on 28 June 2021.
15. The Claimant's position was set out at section 4.4 of her written argument, and she believed she commenced employment with the Respondent on 14 June 2019 when she attended an onboarding session. The email the Claimant referred to in support of her start date confirmed she became a verified Syfter (Flexer) on 28 June 2019 and not 14 June 2019. However, the Claimant's first shift did not take place until 3 August 2019. As stated above, the Respondent's terms and conditions are clear that no contract exists between assignments. Therefore, the Tribunal finds the Claimant was first engaged on 3 August 2019.
16. The Claimant's access to the Respondent's platform was disabled on 28 June 2021. The Respondent's notification to the Claimant was included in its bundle at page 74 and set out that access had been disabled as the Claimant had reached the limit of three strikes or had not turned up for shifts. It is that decision the Claimant seeks to challenge by way of her Unfair Dismissal complaint.

The Law

17. **Section 94 Employment Rights Act 1996** provides: -

(1) *an employee has the right not to be unfairly dismissed by his employer.*

18. **Section 108 Employment Rights Act 1996** provides: -

- (1) *Section 94 does not apply to the 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.*

19. Section 230 Employment Rights Act 1996 provides: -

- (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” 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.*

20. Section 2 of the Agency worker Regulations 2010 provides the same definitions of employee and worker as the Employment Rights Act 1996.

21. Section 3 Agency Worker Regulations 2010 provides: -

- (1) *In these Regulations “agency worker” means an individual who*
- (a) *Is supplied by a temporary worker agency to work temporarily for and under the supervision and directions of a hirer and,*
 - (b) *Has a contract with the temporary work agency which is-*
 - (i) *A contract of employment with the agency, or*
 - (ii) *Any other contract with the agency to perform work or services personally].*

22. Agency workers also have a right to unfair dismissal as provided at Section 17 of the Agency Workers Regulations 2010: -

- (1) *An agency worker who is an employee and is dismissed shall be regarded as unfairly dismissed....*

23. However, the right is confined to an agency worker who is an employee. This accords with Section 94 of the Employment Rights Act 1996.

24. In addition to determining whether the statutory definitions above have been met, the Tribunal must also consider whether the necessary factors identified in case law are present to establish whether an individual is an employee.

25. *Autoclenz Limited v Belcher and Ors [2011] ICR 1157* and *Uber BV and Ors v Aslam and Ors [2021] ICR 657* require the Tribunal to determine the true agreement between the parties. In establishing the agreement between the

parties, the Tribunal must consider the “overall factual matrix” as set out in *Carmichael v National Power Plc [1999] 1 WLR 2042*.

26. *Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 1 All ER 433* is the leading case in respect of employee status. That specifies three core factors in determining whether an employment relationship exists. First, an employee is required to provide personal service. Secondly, there must be a sufficient degree of control for a “master” and “servant” arrangement to be present. Finally, there must be an obligation on an employer to provide work and an obligation on the employee to accept that work.

Submissions

27. In relation to the two preliminary matters to be determined, the Respondent’s position is the Claimant was never at any time an employee of the Respondent. The Claimant was engaged as an agency worker in the traditional sense and therefore she is precluded from pursuing an Unfair Dismissal claim by virtue of Section 94 of the Employment Rights Act 1996.
28. The Respondent submitted in respect of the *Ready Mixed Concrete* essential requirements, save for personal service, the other two elements were absent from its relationship with the Claimant.
29. In terms of her length of service, the Respondent submitted the Claimant’s service commenced on 3 August 2019 when she undertook her first assignment and it ended on 28 June 2021 when access to its platform was disabled. This was less than 2 years’ service. Furthermore, there were distinct breaks during this period and between the 31 assignments completed by the Claimant.
30. Therefore, even if the Claimant was an employee, the Respondent asserts she did not have the requisite service to pursue an Unfair Dismissal claim in accordance with Section 108 of the Employment Rights Act 1996.
31. The Claimant’s written argument and bundle of documents contained no evidence in respect of employment status and limited evidence in respect of length of service.

Conclusions

32. The Claimant was engaged as an agency worker by the Respondent as defined in section 3 Agency Workers Regulations 2010.
33. There was no contract of employment between the parties. The Claimant was engaged on a contract for services which consisted of separate assignments with reference to clear terms and conditions which reflected the reality of the arrangement. The Respondent asserted no control over the Claimant during those assignments and although there was a requirement on the Claimant to provide personal service, there was no requirement on the Respondent to provide work nor any obligation on the Claimant to accept work.

34. Therefore, the Tribunal finds the Claimant was not an employee of the Respondent. Accordingly, the Tribunal has no jurisdiction to consider the Claimant's Unfair Dismissal claim and it is struck out on the grounds it has no reasonable prospects of success in accordance with Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
35. Finally, and notwithstanding the above conclusion in respect of the Claimant's employment status, the Tribunal also concludes the Claimant did not have the required service to pursue an Unfair Dismissal claim as she was engaged by the Respondent on various occasions between 3 August 2019 and 28 June 2021 which is a period of less than 2 years.
36. In the circumstances the claim is dismissed.

Employment Judge J Galbraith-Marten

30/03/2022

REASONS SENT TO THE PARTIES ON

31/03/2022.

FOR THE TRIBUNAL OFFICE