



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr F Rowland

v

**Respondent**

London Underground Limited

**Heard at:** Watford, in person

**On:** 28 September 2022

**Before:** Employment Judge Hyams, sitting alone

**Representation:**

**For the claimant:**

Ms K McCarthy, representative

**For the respondent:**

Ms Safia Tharoo, of counsel

## JUDGMENT

The claimant was an employee of the respondent within the meaning of section 230(1) of the Employment Rights Act 1996 (“ERA 1996”) only after 23 June 2019. Accordingly, the claimant did not have sufficient continuous employment to be able to claim that he had been dismissed unfairly within the meaning of section 98 of that Act. That claim is therefore dismissed. As a result, so is the claim of unpaid wages and holiday pay, as that claim was dependent on the success of the claim that the claimant was an employee before 24 June 2019.

## REASONS

### Introduction

- 1 In a claim form presented on 19 October 2021, the claimant claimed that he had been dismissed unfairly. The parties agreed that the effective date of the termination of the claimant’s employment within the meaning of section 97 of the Employment Rights Act 1996 (“ERA 1996”) was 10 June 2021.
- 2 In addition to claiming that he had been dismissed for making a protected disclosure within the meaning of section 43A of the ERA 1996, the claimant claimed that he had been dismissed unfairly within the meaning of section 98 of that Act. As a result of section 108 of that Act, the latter claim required a minimum of two years’ continuous employment. It was the respondent’s case that the claimant was employed continuously for less than two years and that his continuous employment had started on 24 June 2019. It was the claimant’s

case that he had been employed continuously by the respondent from 7 November 2017 onwards until 10 June 2021. He also claimed unpaid wages and holiday pay, but only in relation to the period before 23 June 2019 and only on the basis that he was in fact an employee within the meaning of section 230(1) of the ERA 1996 between 7 November 2017 and 23 June 2019.

- 3 The claimant's case that his continuous employment (i.e. as an employee within the meaning of section 230(1) of the ERA 1996) with the respondent started on 7 November 2017 was dependent on the proposition that he had worked only as an employee for the respondent after being interviewed in October 2017. The respondent accepted that the claimant had done work for the respondent between 7 November 2017 and 23 June 2019 inclusive. It was the respondent's case that the claimant was supplied as a worker by Morson International Limited ("Morson") to do that work during that period and that during that period the claimant had worked as a self-employed contractor, via an "umbrella company and/or a limited company".
- 4 A preliminary hearing was listed on the direction of Employment Judge M Warren to determine "whether the claimant has sufficient service to bring a claim of unfair dismissal". The hearing was listed to take place on 28 September 2022. I conducted that hearing. The claimant did not attend it. He was represented by Ms McCarthy at it. She attended late because, she said, she had been contacted by the claimant during the early morning of 28 September 2022. She had sent the tribunal and the respondent an email at 03:27 on that day, in the following terms.

"URGENT ATTENTION

Dear Tribunal

I apologise for the time in which this email is sent. The hearing is due to commence at 10am today I have been on the phone most of the early hours with the Claimant whom is currently in the hospital with his father whom has been in a serious accident.

Surgery has taken place and his spleen has been removed from what I was able to gather albeit is in critical condition in intensive Care . Obviously the Claimant is and will remain at the hospital by his side As I' have only been notified i email urgently to address the situation and seek advice as to if the Tribunal would seek to continue proceedings In his absence. I have not been in such a situation and not certain what is the process.

In light of the circumstances I would ask that if the matter is to proceed if the start time would kindly be put back until 11 am given the early hours of which I communicate

Again I do apologies for the early hours of this message but felt it imperative to update and seek assistance to avoid delay and so forth

The Respondents have been cc into this email.”

- 5 After some discussion, I ascertained that Ms McCarthy was applying for the postponement of the hearing to a time when the claimant could attend it.
- 6 I discussed with her what the claimant’s case about his employment relationship with the respondent was. I referred to the fact that the question whether a person is an employee within the meaning of section 230(1) of the ERA 1996 is determined by reference at least mostly to the objective phenomena of the relationship, and I suggested that I determined the question here despite the claimant’s absence on the basis that if I determined it against the claimant and he were after the hearing able to put before me some material evidence which was not already before me on 28 September 2022, then he could apply for a reconsideration of my decision.
- 7 The claimant had made a witness statement, and I had read it. It said so far as relevant only this:

“I entered into an employment contract with the Respondent in September 2017 as seen in the email attached in my disclosure whereby I applied directly to respondent was interviewed and required to attend and pass exams which I did. Following which I was offered a contract commencing in November 2017 until May 2018 I have been working with the Respondent since such time.”
- 8 The email exchange in question was at pages 300-318 of the bundle created for the hearing of 28 September 2022. (Any reference below to a page is to a page of that bundle.) In the exchange, emails were sent on behalf of the respondent to the claimant about an interview for the role of “Train Maintainer-Ruislip Depot”, but the emails did not in any way refer to the basis on which the claimant would, if successful in the interview, be engaged to do work for (ultimately) the respondent. The emails were sent by Ms Hayley Bitmead as a “Recruitment Consultant (Non Permanent Labour)”.
- 9 I asked whether there was in the hearing bundle before me any document recording the relationship between the claimant and the respondent before 24 June 2019, or any records of payment made to the claimant in respect of the period before then, and Ms McCarthy said that there was no such document, and that she and the claimant had sought copies of such documents from the respondent but the respondent had not provided them. As I pointed out then, however, it was the respondent’s case that until 24 June 2019, the claimant was engaged (in whatever way he was in fact engaged) in a contractual relationship only with Morson, and not the respondent, and if the claimant was

in fact engaged by Morson rather than the respondent then it was hardly surprising that the respondent had no copy of any documents recording the relationship between the claimant and Morson, or stating the claimant's pay (as paid by Morson).

- 10 In addition, the claimant had himself written (in a grievance on which he relied as containing a public interest disclosure statement; the grievance was dated 12 March 2021 and was at pages 339-342) about him having worked "as a sub-contractor" via his own "private limited company". The relevant passage was on page 339 and was this (with the word "where" plainly being meant to be "were"):

"I have been suspended in respect of an allegation that has allegedly risen from my previous service with Morsons international LTD. as a sub-contractor from my private limited company, Which relate to work in 2019. It has been alleged that I have submitted time sheets or work orders that where not accurate. There has been no explanation provided at any time from the investigating manager as to how these false allegations have come to the Companies attention which would be a reasonable expectation in order to provide information and answers to assist in the matter. At all times I have made it abundantly clear that I do not accept that I have submitted any time sheets or work orders that where inaccurate."

- 11 As I pointed out to Ms McCarthy, the burden of proving that the claimant was an employee of the respondent at all material times, i.e. from 7 November 2017 onwards, was on the claimant, not the respondent, and the claimant had put before me no document which in itself showed that the claimant was an employee of the respondent before 24 June 2019. In addition, all that the claimant had done in this regard in his witness statement was make an assertion that he was an employee.

- 12 The only document in the bundle which referred to the claimant as being an employee of the respondent was the letter containing an offer of the post of "Train Maintainer (TM42)" "on a permanent basis" with the appointment being "effective from a provisional start date of 24 June 2019". That letter was dated 18 June 2019 and was at pages 198-200. It was signed by the claimant (it appeared) on 18 June 2019 (the signature was at page 200), and it was accompanied by a statement of terms and conditions at pages 201-210, in which, at page 201, this was said:

"Your employment as a Train Maintainer will commence on 24 June 2019".

- 13 Ms McCarthy said that she had seen, and had had in her possession, a document sent to her by the claimant which supported the proposition that he was an employee of the respondent before 24 June 2019, but that it had been

in effect locked (my word, not hers) in the memory of a mobile telephone to which she had inadvertently lost the ability to gain access. I asked her how the document had come to be on that telephone and she said that the claimant had sent it to her. I therefore pointed out that the claimant could have been asked to send it to her again, or to the respondent if she still could not access the document. Ms McCarthy then said that she was trying to contact the claimant to get him to send the document to her and the respondent again, but he was not responding, probably as he was in hospital with his father.

- 14 I then said that I would determine the question whether or not the claimant was an employee of the respondent before 24 June 2019 at the hearing of 28 September 2022, and that if I determined that the claimant was not such an employee before 24 June 2019 then he could, if he had good reason to do so, apply for a reconsideration of that determination under rule 70 of the Employment Tribunals Rules of Procedure 2013. As I said then, such a good reason would exist if (1) the claimant had some material evidence which he could put before me which was not already before me and (2) that evidence might have caused me to come to a different conclusion.
- 15 I then considered the matter carefully and came to the conclusion that I could not on the evidence before me lawfully conclude that the claimant was an employee of the respondent before 24 June 2019, but that if I could have done so then I would not have come to that conclusion. That was because in my judgment all of the written evidence before me (including the claimant's own document, from which I have set out an extract in paragraph 10 above) pointed towards the conclusion that the claimant was not employee of the respondent before 24 June 2019.
- 16 I then announced that decision, and after a short discussion about the rest of the hearing, adjourned for an hour and 20 minutes, both for lunch and to permit Ms McCarthy to contact the claimant so that he could put before her and therefore me the document which she had said that she had seen and which might have changed my conclusion.
- 17 After resuming the hearing after that adjournment, Ms McCarthy said that the claimant had not sent her anything which was not already in the bundle before me. I therefore confirmed my previously-announced decision, and asked Ms McCarthy whether she wanted my reasons to be given in writing also. She said that she did. These are those reasons.

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Employment Judge Hyams

Date: 3 October 2022

**Case Number: 3322335/2021**

Sent to the parties on:

7/10/2022

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J Moossavi

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For Secretary of the Tribunals