Case Number: 3300105/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Cassidy	**v**	Astrazeneca UK Limited

Heard at: Watford (Remote) **On:** 1st December 2022

Before: Employment Judge R Wood

Appearances
For the Claimant: In Person
For the Respondent: Miss J Shepherd, Counsel

JUDGMENT

1. The Claimant did not have two years continuous service with the respondent at the date of her dismissal.

2. Therefore, the Tribunal does not have jurisdiction to hear the claim of unfair dismissal, which is consequently dismissed. For the avoidance of doubt, this brings proceedings in the Employment Tribunal to an end.

REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal. The circumstances in which the claimant was allegedly unfairly dismissed are not relevant to the issues I have to determine on this occasion. I am asked to decide whether the claimant had the necessary two years of continuous service as an employee in order to bring a claim of unfair dismissal. The claimant asserts that she was employed by the respondent from around July 2017. Her employment with the respondent came to an end on 7th December 2021. It is the claimant's case, that she had the requisite qualifying period of service of 2 years in order to bring a claim of unfair

dismissal in the circumstances of this case.

2. The respondent disagrees. It alleges that she was an independent contractor working for the respondent through an employment agency until she was employed directly by the respondent in July 2020. If this be the case, then the Tribunal would not have jurisdiction to hear a claim of unfair dismissal.

Procedure, Documents and Evidence Heard

3. The Hearing took place on 1st December 2022. The claim was heard as a remote hearing in Watford. From the respondent, I heard evidence from Ms Sarah Durston (senior director). I also heard from the claimant, Miss Sinead Cassidy. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. I also had an agreed bundle of documents which comprises 290 pages, and written submissions from Miss Shepherd. At the conclusion of the hearing, I reserved my decision.

Findings

4. References to numbers in square brackets are references to pages in the main hearing bundle, unless otherwise stated.

5. There was limited dispute as to the basic timeline of this case. The documents in the bundle were agreed, and are, in my view, enlightening as to the issues I must determine for the purposes of the preliminary hearing.

6. The claimant is the sole director of a company called Chancegate Limited ("the company"). The company, and the claimant, specialise in the field of clinical research. On 23rd December 2016, Chancegate Limited entered into a contract with Clinical Professionals Limited ("CPL") [92]. This was a contract by which CPL agreed to supply services for the clients of CPL. It will be referred to hereinafter as the agency agreement.

7. The terms of the agency agreement speak for themselves, and I do not intend to repeat them all here. However, at paragraph 1.4, it states that the parties understand that there will be no contractual relationship between the company and any of CPL's clients. Further, that the company will operate as an independent contractor in relation to CPL. The claimant agreed in evidence before me that this reflected the reality of the relationships between the various parties. She agreed that neither the company or herself entered into an express contract withy any of CPL's clients, including the respondent. I accept this evidence.

8. At paragraph 3.3 of the agency agreement, the company undertook to assume a number of responsibilities, including providing equipment, devising works strategies, and rectifying at its own cost any defective services notified to it. At paragraph 3.7, the company agreed to take out various insurance policies, which the claimant confirmed had been done. The company had held this type of insurance cover for several years. I

accept this evidence.

9. At paragraph 4.3 of the agency agreement, it was specified that there was no guarantee of work, and no obligation to accept work on the part of the company. Mutuality of obligation was specifically excluded by this clause of the agency agreement.

10. At paragraph 8.1, it was stated that the company would invoice CPL on a monthly basis for payment of services provided. These invoices were to be be paid by CPL. The claimant confirmed that this is what happened in practical terms, including for work carried out for the respondent. It was agreed between the parties that the respondent paid a sum to CPL, which would have covered the cost of the company's services, amongst other sums. The claimant also agreed that the company was paid money which was gross of income tax and national insurance. The company was responsible for the payment of any tax liability to HMRC.

11. The claimant agreed that she was engaged under a similar contract to the one discussed above until she was eventually employed by the respondent in July 2020.

12. The claimant was first engaged under the agency agreement to carry out work for a company called Eisai Limited from 6th December 2016 [103]. The company was engaged to work for the respondent from 3rd July 2017 [106]. The claimant carried out the duties of a clinical research associate. It was field based, mainly at hospitals. She was required to carry out the review of data generated by the clinical trials being carried out by the respondent.

13. In 2018, the claimant was offered an employed role within the respondent company. She refused. When I asked her why, she stated that it was because of the salary package. She did not wish to use a company car as she had her own vehicle, and felt it would be financially prejudicial to sell it.

14. In January 2019, she changed roles with the respondent, becoming a study delivery manager [121]. As a result, she was responsible for managing the UK portion of certain clinical trials, and for overseeing clinical research associates. However, it was agreed that this was not a line manager role. It was not a field role. In practice, the claimant came into the office in Luton a few days a week. However, I find that the claimant was, in practice, in control of whether she worked at home, or in the office. She remained in this role until she was employed in July 2020.

15. In January 2020, the respondent wrote to the claimant notifying her of pending changes to the law dictating who was responsible for determining the income tax and national insurance obligations of those identifying as independent contractors ("IR35")[155]. There was a review of certain roles and the respondent decided that the claimant's position was "in scope" i.e. it was work carried out in a manner reflective of employment status. This was in part the result of the answers provided by Ms Durston in a document which appears at page 284 of the bundle. I accept Ms Durston's evidence

on this point that her answers had been about the post in a generic sense, and not about the claimant specifically.

16. The claimant appealed this decision Internally. The matter was reviewed by an independent organisation (QDOS), who determined that the claimant's role was "out of scope". They did so having been lobbied robustly to that effect by the claimant herself. In particular, I note the answers provided to the claimant in a questionnaire at page 160 of the bundle, in which she repeatedly identified herself (or the company) as an independent contractor, and not an employee of the respondent.

17. Amongst a number of answers, she stated that:

- She could engage helpers to provide the services (Q.11)
- She received no instruction or direction on her method of work (Q.13)
- There was no requirement for her to seek permission from the respondent to take time off (Q.18)
- No one dictated her working hours (Q.19)
- She could decline work not covered by the initial contract (Q.26)
- She had never been the direct employee of the respondent (Q.29)
- She had never had line management responsibilities for the respondent's staff (Q.30)
- If she delivered faulty work, she would be required to rectify such work in her own time and at her own expense, which she had done previously (Q.39/40).

18. The claimant was asked a number of questions about these answers when she was cross-examine by Miss Shepherd. In the first instance, she stated that the answers had been truthful at the time. I found this a troubling answer. As I stated to her, I could not see how the truth was time specific. Thereafter she attempted in various ways to resile from the positions that she had taken up in the questionnaire. By way of example, she eventually stated that she had needed permission to take annual leave, although her requests had never been refused by the respondent. She explained that she had been mistaken when she filled out the questionnaire.

19. In my judgment, the claimant's answers to this general line of questioning were vague, inconsistent and unconvincing. There were occasions when I found her approach to be evasive. In my view, it is likely that her answers to the QDOS questionnaire were truthful and accurate. They reflected her understanding of her status in relation to the respondent. It was clear that at the the time i.e. in March 2020, that she preferred the status of independent contractor. I am satisfied that there was no question in her mind at the time that she was employed by the respondent. Indeed, between the revision of her status as "out of scope" for IR35 purposes on 18th March 2020, and her eventual employment in July 2020, she continued to be responsible for her own income tax and national insurance contributions, reflecting her status as an independent contractor, at least as she viewed it.

20. I find that prior to July 2020 the claimant was not subject to performance reviews. What objectives that were discussed with her were always project based, and not of an personal nature. CPL paid the claimant's annual leave entitlement, as well as any sick pay. In my judgment, she was not subject to the respondent's employment policies e.g. the disciplinary policy. None were ever applied to her.

21. On 16th April 2020, the claimant was offered, and accepted, an employed position with the respondent as a local study manager [189]. I find that this was result of the uncertainty created by the IR35 process. In particular, the respondent was concerned about retention of independent contractors who were viewed as "in scope". The claimant was given a joining bonus of £2,000 [198]. I find that this reflected a general lack of enthusiasm for employed status so far as the claimant perceived it, which she viewed as less financially advantageous.

22. The terms and conditions of employment were different in significant respects from those upon which she previously carried out work for the respondent. The claimant accepted that it was the first time she had received a contract of employment from the respondent. She was given access to the respondent's 'My Rewards' scheme, which allowed employees to enjoy certain 'perks'. She was give goals to achieve in relation to her professional and personal development. She was also subject to appraisals. In other words, she was line managed in a way that had not been appropriate previously. She was required to book any annual leave through the respondent's 'workday' system. She was no longer able to self certify absences from work. Moreover, her tax and national insurance contributions were deducted at source, i.e. by the respondent. Put bluntly, her status had clearly changed.

23. For reasons that I need go into here, the claimant was dismissed from her post on 7th December 2021. She later brought a claim of unfair dismissal arising out of the termination of her employment.

Decision

24. The leading authority relevant to this case is James v Greenwich London Borough Council [2007] ICR 577, EAT; and the Court of Appeal judgment:[2008] ICR 545, CA. The effect of both decisions was that in an agency relationship there is normally no express contract of any kind between the end-user (in this case, the respondent) and the worker (the claimant). In those circumstances, unless some contract can properly be implied according to established principles, it will not exist at all.

25. Furthermore, any rights which are dependent on there being a contract of some kind (such as the right to claim unfair dismissal) will then simply not arise. In agency cases, it was accepted that there is a relationship between the end-user and the worker. The question arises as to the nature of that relationship. Is the work done being provided pursuant to a contractual obligation between the end-user and the worker? Alternatively, is the

contractual relationship between the agency and the worker.

26. In James, the EAT went on to state: "*When the arrangements are genuine and when implemented accurately represent the actual relationship between the parties as is likely to be the case where there was no pre-existing contract between the worker and the end-user then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end-user…*"

27. In my judgment, the appropriate question in this type of case is whether it is necessary, in the tripartite setting of worker, employment agency and end-user, to imply a contract of service between the claimant and the respondent. Is it necessary in order to explain the provision of work by the claimant to the respondent. As stated in James, the question is to be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements.

28. Firstly, the scenario in this case was not a sham. There is no suggestion from either side that it was a sham.

29. It is apparent from the contractual documents, and others in the bundle, that this was a typical tripartite relationship involving the claimant providing services to the respondent, through CPL, an employment agency. The claimant (or more accurately, the company) entered into a number of agreements with CPL to this end, not all involving the respondent. The claimant had not previously been employed by the respondent. The agency agreements are clear in their terms in the sense that the contractual relationship involving the claimant's company was with CPL. It is also clearly expressed in these agreements that the claimant was engaged as an independent contractor and not as an employee.

30. What is more, and until she was dismissed from her employment in December 2021, the claimant clung to this status with a degree of tenacity. She had turned down the opportunity to be employed directly by the respondent in 2018. It was clear that for whatever reason, she preferred the terms upon which she was engaged as an independent contractor, through an agency. This is not uncommon. Of course, it has its downsides i.e. that there will often be no protection from unfair dismissal.

31. In early 2021 when the issue of IR 35 was raised by the respondent, the claimant again was adamant that she regarded herself as an independent contractor in a way which was entirely consistent with the tripartite arrangement mentioned above. I find her attempts to resile from her clearly expressed and reasoned assessment of her status in March 2021 as disingenuous and opportunistic.

32. I agree with Miss Shepherd that the question of the claimant's IR35 status is, to some extent, a 'red herring'. However, in fairness to the claimant, it is clear that there was some confusion as to the status of he role, even on the part of the respondent. I accept that evidence given by Ms Durston that the

respondent was concerned that, by reason of the heavily regulated environment in which the claimant operated, that her role might be viewed as being "within scope", as it was termed at the time. I accept that in these circumstances, the claimant's contractual entitlement to send a substitute in her place may have been, in practical terms, rather hypothetical. In turn, this may have affected the proper interpretation of the services carried out by the claimant' s company.

33. However, with respect of the claimant, this does not affect to any significant extent the issue which I have to decide. This is to dwell on the nature of the services provided. As the case of James makes clear, the relevant question is whether there was a contractual relationship between the claimant and respondent at all.

34. Having regard to all of the evidence in this case, there is insufficient justification for implying a contract of employment between the claimant and the respondent. The express agreements properly reflected the relationships between the three parties as they existed at the time. It is this tripartite scenario which was the business reality. There is no requirement under contractual law for this Tribunal to interfere with the arrangements made freely and transparently between the parties.

35. The claimant was therefore employed only from July 2020, and at the time of her claim of unfair dismissal, did not have the requisite period of service. The claim of unfair dismissal is therefore dismissed.

36. It was suggested that there might also be a claim for breach of contract. If this is the case, then this too is dismissed. A claim for breach of contract cannot be sustained in isolation of a parallel claim of unfair dismissal. The claims are therefore dismissed.

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Employment Judge R Wood

Date: 10th December 2022

Sent to the parties on: 3/1/2023

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For the Tribunal Office