EMPLOYMENT TRIBUNALS

Claimant: **Mr Marc Lyne**

Respondent: **Telmar Europe Limited**

Heard at: **East London Hearing Centre (by video)**

On: **19 January 2023**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: in person
For the Respondent: Ms C Davies - counsel

PRELIMINARY HEARING JUDGMENT

The Tribunal does not, subject to s.108(1) Employment Rights Act 1996, have jurisdiction to hear the Claimant's claim of unfair dismissal, because he had been continuously employed by the Respondent for less than two years and accordingly the claim is dismissed.

REASONS

(Written reasons having been requested subject to Rule 62(3))

Background and Issues

1. The Claimant worked for the Respondent/related companies, from April 2019, until his dismissal with effect 31 March 2022, as a Group Chief Technology Officer ('CTO').

2. The Respondent dismissed him for gross misconduct, which he denies. As a consequence, he brings a claim of unfair dismissal.

3. The claim has been listed for final hearing on 13 and 14 April 2023, but this open Preliminary Hearing was further listed to decide whether, subject to s.108(1) of the Employment Rights Act 1996 (ERA), the Claimant had sufficient qualifying service as an employee to make a claim of unfair dismissal.

4. The Claimant asserts that he was an employee of the Respondent throughout the above period. However, the Respondent states that from April 2019, until 28 February 2021, the Claimant's services were provided via a consultancy agreement ('the Agreement') between a company he had set up for the purpose, Lifelyne Dot Com Ltd (Lifelyne), of which he was an employee and one of their sister companies within the LiiV Group ('the Group'), Telmar Communications Ltd (TCL). They also state that from 1 March 2021, he then entered into a contract of employment with Telmar Europe Ltd (the Respondent), another company in the Group, which lasted just over a year, until his dismissal.

5. Therefore, the Respondent contends that the Tribunal does not have jurisdiction to hear his claim.

The Law

6. Section 108(1) ERA states:

> ***Qualifying period of employment.***
>
> *(1) Section 94* (the right to claim unfair dismissal) *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.*

7. Both parties referred to a range of authorities, to which I shall refer, as I consider appropriate, below.

The Evidence

8. I heard evidence from Mr James Ingram, the CEO of the LiiV Group and also from the Claimant, both of whom provided witness statements.

9. Mr Ingram's evidence can be summarised as follows:

   a. He referred to the Agreement [90], dated 17 April 2019, under which Lifelyne ('*the Consultant Company'*) agreed to provide the Claimant's services ('*the Consultant'*) to the Group.

   b. He said that the decision to provide his services in this way was mutually agreed between the parties and it was the Claimant's choice to suggest Lifelyne as the Consultant Company, on an accountant's advice, as it was beneficial in tax terms to do so. He said that the Claimant negotiated changes to the terms of the Agreement and referred to emails to that effect [75 & 78-89] and that it was clear to him that the Claimant clearly understood the nature of the Agreement. In cross-examination, the Claimant challenged the extent of Mr Ingram's engagement in (and therefore, by implication, his knowledge of) those arrangements at the time. Mr Ingram said that as Group CEO he had oversight and that while he may have delegated the detail to Mr Sam Williams, as Chief Information

Officer ('CIO'), Mr Williams reported to him. Mr Ingram disagreed with the Claimant's assertion that the email exchange prior to the completion of the Agreement '*made clear that I wanted to be an employee'*.

c. The Agreement stated that services were to be provided for a minimum of three days a week [91]. On questioning by the Claimant, Mr Ingram agreed that the Claimant did, on occasion, work more than that [145, invoice showing 14.5 days in November 2019], but he said that this was permitted by the Agreement. He agreed that working part-time did not imply a consultancy agreement *per se*, as an employee could be also be engaged part-time.

d. The Claimant, he said, had other commitments at the time, providing services to other companies and was also a company director of his own company and the consultancy arrangement therefore suited him. While he was a consultant, there was never any suggestion that he was limited to providing services to the Group. The Claimant challenged the extent of Mr Ingram's knowledge of his 'other commitments' and he said that he knew that the Claimant's '*previous start-up was active and that he was proud of it and that Sam had mentioned other commitments'*.

e. The Agreement provided for an initial term of six months and thereafter, unless terminated by either party, a rolling six-monthly renewal.

f. He pointed out that the Claimant worked from his own home office, used his own equipment and determined his own hours of work (disputed by the Claimant), subject to meeting his commitments under the Agreement. Nor (as was accepted by the Claimant) did he receive normal employee benefits, such as paid holiday, pension or private medical insurance.

g. On questioning by the Claimant, Mr Ingram accepted that the Claimant was responsible for managing seventy employees of the Group but said that that was envisaged in the Agreement and that that responsibility expanded when the Claimant became an employee.

h. Over time, the Group's business developed, and it was decided that a full-time employed CTO was needed. Mr Ingram said also that due to this increase in business, the funding was now available for such a position. The Claimant suggested to him that the true reason was that the Group feared that the Agreement may have become seen by HMRC as invalid and that they would become liable for tax and NI and that he became an employee to avoid that possibility, which assertion Mr Ingram denied. Accordingly, he was offered and accepted an employment contract [112] ('the Contract'), effective from 1 March 2021. He subsequently provided the Respondent with his P45 from Lifelyne [128], indicating that he had therefore been in that Company's employment until then, but had now resigned. Mr Ingram said that at that point the Claimant made no assertion as to previous employment by TCL/the Respondent, or if he felt that was the case, queried why any new employment contract was necessary. He referred to the 'period of employment' clause 5 in the Contract which stated the Claimant's start date/continuous employment date to be 1

March 2021 and that no period of employment with a previous employer counted as part of that continuous employment [113].

i. (As was not disputed by the Claimant) during the lifetime of the Agreement, Lifelyne invoiced TCL for the Claimant's services [158]. Following his entering into the employment contract, he was paid through PAYE. He continued to use his own equipment but became eligible for a monthly 'technology allowance' to purchase such equipment. He was provided paid holiday, enrolled in a pension scheme and received private healthcare insurance.

j. As an employee, the Claimant was obliged to work 40 hours per week, on workdays, but was permitted to continue to work (predominantly) from home. Mr Ingram said that he took a more active role in managing the Claimant.

k. Mr Ingram disagreed that the services provided by the Claimant, either under the Agreement or the Contract, were identical. He said that the Claimant's responsibilities increased, he became more involved in building strategy, was given more intense work and was required to have greater involvement in meetings.

10. The Claimant's evidence can be summarised as follows:

a. He was excited about the opportunity of working for the Group. He accepted that he had other opportunities at the time but chose the Group.

b. Both his and TCL's intention was that the Agreement would be temporary, perhaps no more than three months and be then converted to a full-time employment contract [84]. As he felt that this '*was just a temporary scenario'*, he '*did not hesitate to sign the Consultancy Agreement'* and felt that he was '*doing Telmar a favour by agreeing to this method of working and remuneration.'* When it was suggested to him in cross-examination that this arrangement also benefitted him, he said that he '*didn't think so'*. When it was further suggested that it conferred tax benefits on him, he said that account needed to be taken of the administrative costs in that respect. He agreed that the earnings shown on his Lifelyne P45 (£28K for eleven months) were much less than that Company invoiced for his services (at £1500 per day) and that the balance of the payments were paid to him in a more tax-efficient way, through dividends.

c. He was informed that the Agreement would be terminated '*immediately when we convert to Employment Contract'* [84]. He agreed, however, in cross-examination that while it was clear that he might become an employee in the future, at that stage he was only a consultant, stating that this was a short-term arrangement, of three months or less. He also agreed that he had previous experience of working as a consultant, for two years with BUPA.

d. He was told that the reason TCL/the Group could not issue him with an employment contract straightaway was because they awaited the

appointment of a new HR Director who would update contracts and arrangements for health and life insurance and pensions.

e. He said that he '*was amongst people I trusted, and I trusted Sam and James to be good to their word.'* In cross-examination, when it was put to him that while the intention may have been that at some point he would become an employee, he was initially a consultant, understood those terms and agreed them, he said that he was being '*can do, will do'*.

f. Under the Agreement, he had to provide personal service, with no possibility of substitution and had to do so for a minimum of three days a week (although he frequently worked more than that). In cross-examination he was referred to an email of his, of 13 March 2019 [75], in which he offered his '*thoughts on contractual arrangement as promised'*, suggesting that his '*current employment be converted to day rate … looking to average 3 days per week … a 6 month notice period/rolling contract … target being full time …'*. He said that this proposal of his was based on Mr Williams' guidance. He reiterated that by agreeing to this he was '*doing the Respondent a favour'*, but agreed that he did have separate interests as a director of his own business.

g. Although the Agreement required Lifelyne to have liability insurance, obtaining it proved too difficult and that clause was not adhered to, with no-one from the Group/TCL checking it. He agreed that it was his decision to set up Lifelyne and when it was suggested to him that this was not a requirement of TCL's, he said that '*Sam may have suggested it'*, but when pushed further on this point, as to whether he was simply speculating, he said he couldn't remember.

h. He agreed that Lifelyne invoiced for his services and was registered for VAT. The payments were initially made to his own bank account, but later into a commercial account. While he also agreed that his email of 4 April 2019 [84] could indicate that by discussing how VAT should be charged he understood that he would be a contractor and was thus negotiating to protect his interests, he said that this '*was on a short-term basis'*.

i. He also agreed that he sought legal and accountancy advice on the Agreement [85 & 87], describing this, however, as '*feedback'*.

j. He was fully integrated into the Group, with internal email addresses. He had control of a team of thirty (later sixty) employees and Mr Williams was his line manager. It was suggested that this was no more than was expected of him by the Agreement, as set out in Schedule 1 [107] and he agreed, but it was the same requirements as under the Contract.

k. His freedom to choose his hours of work was curtailed by the scheduling of meetings.

l. He used his own laptop as it was a higher-performance machine than that offered by TCL.

m. He attended meetings and visited Group facilities in several countries and attended 'team bonding' sessions but agreed that such travel was envisaged in the Agreement.

n. He '*asked Sam repeatedly (at least every month, either casually or during our weekly calls) between April 2019 and February 2021 about the progress of the … employment contract.'* and was told that it was '*in progress'*, but delayed due to a lack of competent HR leadership and Mr Ingram's resistance as to appropriate employee benefits.

o. Eventually, in February 2021, he was offered the Contract, which he said was because of the Group's concerns about tax liability for 'employees', not labelled as such.

p. After signing the Contract, nothing changed in respect of his work or responsibilities. While he agreed that the Agreement excluded the possibility of employment [90], he said that the '*reality was different'* and that was '*just what it said on paper'*. He did not answer directly a question as to whether he was saying that he knew that the Agreement was a sham, from the outset, but said that it was a '*makeshift scenario'*, until the Contract was available. He agreed that he did not query the continuity of employment clause at the time. He also agreed that he was thereafter paid via PAYE, given private health insurance, pension benefits, paid holiday and was subject to disciplinary and grievance policies. He disagreed that the commitment to attend work, five days a week, or to be bound by post-termination restrictions was any different than under the Agreement.

Submissions

11. On behalf of the Respondent, Ms Davies made the following submissions:

a. She referred to her skeleton argument as to the law.

b. There are two questions for the Tribunal: firstly, is there any contract between the Claimant and his alleged employer (TCL) and secondly, if so is it a contract of employment?

c. It is necessary to identify the intentions of the parties and to determine if the written Agreement reflects reality.

d. There is a tripartite agreement here: Lifelyne was the contracting party, at the Claimant's request, supplying his services to TCL, akin to an agency contract.

e. Does the Agreement explain the arrangements fully, or is there a need to determine them? There is no need to do so. The Agreement explains everything.

f. The Claimant's approach seems to be to ignore Lifelyne, suggesting that it was not his idea, but done for the Respondent's advantage. However, this is not the case and it is clear that any contractual obligations are

between Lifelyne and TCL, only and that there is no contract of any kind between the Claimant and TCL/the Group. He now seeks to convert the Agreement to one between him and TCL.

g. The role he fulfilled as a consultant matches that required in the Agreement.

h. It was to his financial benefit and advantage to do so, as evidenced by the low PAYE salary Lifelyne paid him.

i. It is accepted that there can be occasions that despite the contents of a written contract, other terms could be implied, as in **Autoclenz v Belcher [2011] UKSC ICR 1157**, but this is not such a case. Instead, as in **James v Greenwich Council [2008] EWCA ICR 545**, the situation that applies here in that the absence of an express contract between a claimant and an 'end-user', the Tribunal must ask whether it is necessary to find an implied contract between them in order to make sense of the arrangements: if not, there can be no contract. It is not necessary in this case. The Agreement makes absolute sense and expressly states at clauses 2.3 and 15 that it excludes the possibility of an employment relationship.

j. The Claimant sought and was provided with legal and financial advice. He negotiated some of the revised terms of the Agreement, giving the detail of it detailed consideration. It is not correct for him to argue that he had no active role in such negotiation.

k. While the Claimant now seeks to argue that he wished to be an employee from the outset, such a claim is somewhat dubious, when the correspondence from the time indicates otherwise. It is clear that he envisaged being an employee, but only at some point in the future.

l. The Agreement indicates that the genuine relationship was that of consultant because that it is how events worked out, matching the Agreement, with invoices being raised by Lifelyne for the Claimant's services; him working a minimum of three days a week, although sometimes more and doing the tasks envisaged.

m. The Claimant now alleges that the Agreement was a 'sham', although it's not clear whether he asserts that this was the case from the outset, or at some later point. However, it is far from being a sham, having taken weeks to negotiate, with the Claimant taking legal and financial advice. He played his part fully in its construction and this is not a case, as in **Enfield Technical Services v Payne [2008] UKEAT ICR 30**, where there was some form of misrepresentation or concealment of the true facts, to render the Agreement illegal. If anything, he presented his P45 for his employment by Lifelyne and therefore, if the Agreement was a sham, then he was misleading HMRC.

n. The Claimant seeks to rely on the case of **Protectacoat Firthglow Limited v Szilagyi [2009] EWCA IRLR 365**. This is one of the 'stable' of

cases that culminated in the **Autoclenz** judgment (and was referred to in that judgment). However, the stark difference between that case and the one before this Tribunal is that in the former there was a deep inequality in bargaining power, which was not a factor in this claim. The Claimant is an experienced and sophisticated individual, with access to legal advice. He had other options open to him and was therefore in a position, as he did, to re-negotiate the first drafts of the Agreement. His suggestion to the contrary is not credible.

o. The Claimant's argument therefore falls at the first hurdle – there is no direct contract between him and TCL.

p. In the alternative, if such a contract were implied, what were its terms and were they ones of employment? Clearly, any such contract would have to be the same as contained in the existing Agreement, less the involvement of Lifelyne.

q. Applying the guidance in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] UKHC 2 QB 497**, the following factors apply:

    i. There was mutuality of obligation, as the Claimant was required to attend for a minimum of three days a week, for which, if he did, he could invoice.

    ii. As to 'control', the Claimant had much greater control than any employee: he could work half days, spread over a week and was free to arrange his time to suit himself.

    iii. He was paid via invoicing, by Lifelyne, not PAYE, received no benefits and if he didn't work, wouldn't have been paid.

    iv. In comparison, when he did become employed under the Contract, he was paid via PAYE, received benefits, pension, health insurance, could access an incentive scheme and received more oversight from Mr Ingram.

r. The move to the Contract was because of a change in the Respondent's/Group's funding.

s. The Tribunal is invited step back to take the 'big picture' view, as in **Hall (Inspector of Taxes) v Lorimer [1993] EWCA ICR 218** and conclude that even if it could be that there was an implied contract between the Claimant and TCL, it was still a consultancy agreement.

t. Finally, while the Claimant may have been correct in thinking the Agreement would be only a temporary arrangement (as it proved to be), there was no 'promise' to him in Mr Williams' email of 29 March 2019 [84] that it be converted into an employment contract within three months or less, but as Mr Williams said '*we are hoping'* to do so. Despite this, the Claimant carried on with the Agreement, knowing full well that TCL could not be held to such 'hope' and he knew this was the case, as he requested an initial six-month term and for that to be auto-renewed.

12. The Claimant, by way of submissions, sought only to rely on his updated written submissions, which I summarise briefly below:

    a. He contended that reliant on **Ready Mixed Concrete**, the circumstances of his engagement with TCL indicated an employment relationship. (As agreed by the Respondent), there was a degree of mutuality of obligation. He was also obliged to provide his services personally. As to control, he was subject to direction of the CIO/Mr Williams as COO. He was obliged to attend scheduled meetings and had to comply with TCL's policies and procedures [92]. He was also bound by non-competition, non-solicitation and confidentiality clauses. The clause in the Agreement that excluded the possibility of employment was '*just legalese'* and it '*was a sham drafted by Telmar's lawyers to make it look like a consultancy arrangement.'*

    b. He was fully integrated from the outset and treated as an employee from the start, being given internal email addresses and invited to social events. He was offered a laptop but chose to use his own.

    c. He referred to **Protectacoat**, as to establishing the reality of the relationship.

    d. The true relationship was one of employer (TCL) and employee (himself), from the start, with the 'consultancy' only supposed to last three months, but that after that point he '*was fobbed off with excuses but had no choice but to carry on with the arrangement.'*

    e. (He sought to rely on the case of **Launahurst Ltd v Larner [2009] UKEAT/0188**, but, as correctly pointed out by Ms Davies that determination was subsequently overturned by the Court of Appeal. Similarly, he sought to rely on an Employment Tribunal judgment, but which sets no precedent for this Tribunal.)

    f. He disputed that he had taken an active role in negotiating the Agreement, or that it was his idea that Lifelyne enter into it (contradicted in his oral evidence). He was, instead, '*doing Telmar a favour*'.

    g. (He reiterated elements of his witness statement.)

Conclusions

13. Reliant on **MOD HQ Defence Dental Service v Kettle UKEAT/0308/06**, I have considered the detailed, written consultancy Agreement and find that it is, having looked at the facts, the exclusive record of those parties' agreement at that point. As that case stated:

    '… there may be a carefully prepared contract, appropriate to the circumstances of the parties, made available by one party to the other at the start of their relationship and signed without question. In such a case a Tribunal will no doubt readily conclude that it was the intention of the parties, objectively ascertained, that all the terms of the contract should be contained in it."

And I find that to be the case here.

14. That Agreement is one between TCL and Lifelyne, the Claimant's company set up, by him, for that purpose. The Claimant is not directly involved in that contract, his only contract (whether written or implied) being as an employee of Lifelyne (as evidenced by his P45).

15. It is clear from the evidence that the Claimant freely entered into this arrangement, taking both legal and accountancy advice before doing so. It was his choice to have Lifelyne contract with the Respondent, as it was clearly advantageous financially for him to do so, in respect of tax and it is noteworthy that when he subsequently provided a P45 at the end of his 'employment' with Lifelyne, his earnings were considerably lower than the amounts paid to Lifelyne by the Respondent.

16. Generally, in respect of the oral evidence, I preferred that of Mr Ingram over that of the Claimant. Mr Ingram was generally direct in answering questions and where he was unsure or didn't know, said so. The Claimant, however, was on occasion evasive, implausible, or contradictory. His oral evidence as to whether or not it was his idea to set up Lifelyne contradicted what he said in his written submissions. When challenged as to that point, he made a clearly unfounded and not previously raised assertion that Mr Williams may have suggested it, but when challenged that this was speculation, referred to a memory lapse. He also sought to downplay the significance of the legal advice he received by describing it as '*feedback'*. He also clearly sought to downplay the obvious financial benefits to him of the Lifelyne arrangement. As indicated below, I found his evidence as to badgering verbally Mr Williams monthly, over a two-year period as to when he might become an employee, highly implausible.

17. This is not an **Autoclenz/Protectacoat** type case, where low-paid workers, often desperate for employment, take what they're given by employers and have no bargaining position to demand anything else and perhaps little understanding of what they are entering into, or access to advice. The workers in **Autoclenz** were car valeters and the Claimant in **Protectacoat** was effectively a housepainter, applying protective coatings to the external walls of domestic buildings, with no previous experience of that role, learning 'on the job'. As recorded in that latter judgment, that Claimant was told by his manager that '… *he must sign some documents. These documents were not explained to him. Mr Squires just said: 'Mick get in here and sign this. You are looking for work, wife to support, men to pay, sign these.''* In contrast, the Claimant is clearly a well-educated, intelligent man, with a wide breath of previous employment, to include consultancy work, at a high level in various organisations and for which he was very well remunerated. While keen to explore new opportunities with the Respondent, he was not short of other work and entered into detailed negotiation with the Respondent as to the terms of the contract, with several of his proposals for changes being accepted. As already stated, he took both legal and accountancy advice while doing so.

18. The Agreement worked precisely as it was meant to – Lifelyne provided the Claimant's services and invoiced for them and the Claimant carried out the services as envisaged in the Agreement. At his suggestion, its initial term was

for six-months, automatically rolling over thereafter, unless either party chose to terminate it. The Claimant clearly financially benefitted from the arrangement by being able to better manage his tax affairs, via Lifelyne, minimising his PAYE liability. He was also free, if he wished (and as he indicated during the initial negotiations) to limit his commitment to three days a week, to permit him to pursue other commercial and personal interests.

19. In those circumstances, I see no reason to imply any contract between the Claimant and the Respondent. The contract Lifelyne entered into was clear and the Claimant knew it. He would be an employee of Lifelyne, providing his services to the Respondent, who would pay Lifelyne for them. While there was reference to the possibility of future employment, it was clear to me that, firstly, on the evidence, the Claimant knew that he was not entering at the outset into a contract of employment but hoped to do so at some point in the future, so to now assert that that was not the case is irrational. He recognised that fact by himself stipulating an initial six-month term for the Agreement, with automatic roll-ever thereafter, clearly envisaging that any change would be later, rather than sooner. Secondly, there was no question, on the evidence, of any such 'hope' by TCL to employ him in the future as being contractually-binding or by way of an undertaking: it was simply an aspiration, which was in due course realised, but not as soon as either party might have initially envisaged. I don't believe the Claimant's evidence that he monthly chased Mr Williams as to becoming an employee, because despite almost two years having passed, he has been unable to provide a single written communication to that effect, when he clearly has no difficulty in putting his views in writing. While he asserts that he only did so verbally, I find that implausible without at least some written record, perhaps recording his dissatisfaction on this point, particularly after, as he said, many months of *'being fobbed off with excuses'*.

20. I don't consider therefore that the Claimant has got over the first hurdle of showing that it is necessary to look beyond the written consultancy agreement between Lifelyne and TCL, of which he was not a party.

21. However, were I incorrect in that finding and it was necessary to re-interpret the Agreement as between the Claimant and TCL, even then he would not have been an employee. I find that for the following reasons:

    a. The Agreement quite clearly expressly excluded the possibility of it being interpreted as a contract of employment. The Claimant had had advice and is, as stated, not the average employee and I see no reason why he would not have understood the import of such a clause. Also, the subsequent Contract of Employment made it clear that he had no continuity of employment, which he accepted, without demur. He cannot now simply seek to ignore these facts, as '*just legalese'*.

    b. While there was, as was accepted, a degree of mutual obligation, this is just one factor in a matrix of such factors and must be considered within the broad picture of the arrangement. It is the case that had he not worked his three days per week, or perhaps an average of that over a month,

Lifelyne would have been unable to invoice for such days and he, in turn, would not have been paid.

c. He was, of course, unable to substitute anyone else for his services, as the whole point of the Agreement was to secure his services, based on his expertise and experience. A comparison might be a hospital engaging the services of an agency specialist surgeon, for whom, for obvious reasons substitution could not be an option. Again, in that light, such a factor can hold little weight.

d. There was nothing abnormal about how this consultancy agreement proceeded. Being a consultant does not preclude management or direction of staff, being obliged to attend meetings, being invited to social events, having internal email addresses or being obliged to abide by restrictions on competition and confidentiality etc.

e. There was, despite the Claimant's protestations to the contrary, a distinct contrast between being a consultant and an employee. He ceased to be an employee of Lifelyne; he was paid via PAYE; was entitled to pension and other benefits, to include annual paid leave, and he also had fixed hours and days of work.

Judgment

22. For these reasons, therefore, I find that the Claimant did not have at least two years' continuous employment by the Respondent (or any sister company), necessary for the Tribunal to have jurisdiction and accordingly his claim of unfair dismissal is dismissed.

Employment Judge O'Rourke
Dated: 26 January 2023