EMPLOYMENT TRIBUNALS

Claimant: **Mr V Phatty**

Respondent: **Extraman Limited**

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **17, 18 and 19 January 2023**

Before: **Employment Judge M Brewer**

Members: **Ms A Berry**
Mr J Webb

Representation
Claimant: In person
Respondent: Mr S McCrossan (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is:

1. **The claim for unfair dismissal fails and is dismissed.**
2. **The claim for victimisation fails and is dismissed.**

REASONS

Introduction

1. The Claimant is a qualified forklift truck driver. The Respondent is an employment business and one of its main clients is Britvic Soft Drinks Limited ("Britvic"). The Respondent found work for the Claimant at Britvic starting in February 2018 and that work came to an end at some point in either late 2020 or early 2021, the precise date being a matter of dispute. The claims set out below and which we were required to consider arise out of the ending of the Claimant's work for Britvic. We note at this stage that the Claimant accepted that he was an agency worker, but he says that he was an agency worker employed by the Respondent.

2. This case has a reasonably long history which requires some explanation.

3. The Claimant originally brought a claim for unfair dismissal against the Respondent.

4. Subsequently he sought to add a second Respondent, Britvic, to the proceedings. The Claimant sought to bring claims of unfair dismissal, race discrimination and victimisation against Britvic and wished to amend his claim to bring the same discrimination and victimisation claims against the Respondent.

5. At a preliminary stage the Claimant was given leave to add Britvic as a second Respondent. However, he was not given leave to bring a claim of unfair dismissal against Britvic although he was allowed to pursue claims under the Equality Act 2010 so that, at that stage, he had a claim of unfair dismissal against the Respondent and claims of direct race discrimination against the Respondent and Britvic and a claim of victimisation also against the Respondent and Britvic.

6. Prior to the final hearing the claims against Britvic were withdrawn. Given that the claim of direct discrimination in fact related solely to Britvic, that claim fell away, so that at this final hearing we were left to consider claims of unfair dismissal and victimisation as detailed below.

7. At the hearing the Claimant represented himself and the Respondent was represented by Mr McCrossan of Counsel.

8. The issue of documentation became somewhat contentious. We had an agreed list of issues, albeit one that was prepared when there were two Respondents, what we assumed was an agreed bundle of documents running to over 200 pages, a chronology prepared by the Respondent and witness statements from the Claimant and, on behalf of the Respondent, Mr Gary Waller, Operations Director. However, at various stages during the hearing the Claimant suggested that he had further documents which were relevant to the matters in issue and on several occasions, we paused the proceedings in order to allow the Claimant time for him to provide those further documents. In the event some of the extra documents the Claimant provided were already in the bundle and others were either not relevant or of limited value. Nevertheless, we allowed them to be included and we have considered them in reaching our decision.

9. We also add for the sake of completeness that during the hearing the Claimant provided an e-mail with what amounts to a witness statement made by Mogib Elrahman Mahgoub-Tawer. Given that Mr Mahgoub-Tawer did not attend the hearing and could not be cross examined we have not given his statement any weight.

10. Both witnesses gave evidence under oath, were cross examined and asked questions by the Tribunal. At the end of the evidence Mr McCrossan and the Claimant made oral submissions which we have also considered in reaching our decision.

11. We delivered our judgment in the afternoon of the final day.

Claims and issues

12. The Claimant pursues claims for unfair dismissal and victimisation. The agreed issues are set out here (although note that we have amended as necessary to reflect that there is now only a single Respondent, and we have omitted some of the unnecessary drafting)

    12.1. Unfair dismissal:

        12.1.1. Was the Respondent the Claimant's employer? If not, does the Tribunal have jurisdiction to hear the Claimant's claim of unfair dismissal?

        12.1.2. If the Tribunal has jurisdiction to hear the Claimant's complaint of unfair dismissal, was the Claimant unfairly dismissed?

    12.2. Victimisation:

        12.2.1. Has the Claimant done a "protected act" for the purposes of section 27(2) of the Equality Act 2010? The Claimant relies on the following alleged protected act"

        12.2.2. that, on or around 6 December 2020, he raised a concern to his line manager, Mr Ross Greenwood, that only "white Europeans" were being appointed to become permanent staff members and no black members of staff. (*sic*)

        12.2.3. Has the Respondent subjected the Claimant to a detriment because of the Claimant's alleged protected act? The Claimant relies on the following alleged detrimental act:

        12.2.4. having his work at [Britvic's] site Terminated on 17 December 2020.

        12.2.5. Was the allegation made by the Claimant false and made in bad faith?

    12.3. There are a number of issues in relation to remedy which we have not felt the need to set out here.

Law

13. In terms of the law, we are required to consider whether the Claimant was an employee of the Respondent, if he was, whether he was dismissed and if he was dismissed, whether that dismissal was unfair. The claim for victimisation is as set out above. We set out here a summary of the relevant law.

Employment status

14. In most cases, as in this one, there will be no doubt that there is a contract between the employment business and the worker. However, establishing that the contract is one of employment is likely to be problematic, regardless of how long the agency worker has been on the books of a particular employment business, or how long he or she has been assigned to work for a particular hirer.

15. The starting point is to consider whether the agreement between the parties is a contract of service (that is an employment contract) or whether it is something else, most usually a contract for services. To undertake this task requires consideration of the so-called multiple test as set out below.

16. The most common judicial starting point for the multiple test is a passage from the judgment of Mr Justice MacKenna in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433, QBD. He stated:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."*

17. The continuing relevance of this passage was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors** 2011 ICR 1157, SC, where Lord Clarke called it the '*the classic description of a contract of employment'*. In essence, the **Ready Mixed** formulation of the multiple test can be boiled down to three questions:

    17.1. did the worker agree to provide his or her own work and skill in return for remuneration?

    17.2. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

    17.3. were the other provisions of the contract consistent with its being a contract of service?

18. Following the **Ready Mixed Concrete** decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements:

    18.1. personal performance,

    18.2. mutuality of obligation, and

    18.3. control.

Personal performance

19. Personal performance means what it says and freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, (although a limited or occasional power of delegation may not be). Personal performance is not in issue in the present case. It is agreed that the Claimant was required to provide his services personally.

Mutuality of obligation

20. For a contract to exist at all, the parties must be under some obligation towards each other. However, the courts have endorsed the idea that, for a contract of employment to exist, there must be an 'irreducible minimum' of obligation on each side — see **Nethermere (St Neots) Ltd v Gardiner and anor** 1984 ICR 612, CA, and **Carmichael and anor v National Power plc** 1999 ICR 1226, HL.

21. In essence, mutuality of obligation in an employment contract means that there exists what is often described as a 'wage/work bargain'. That is the employee is paid by the employer to be available to do, or to do work.

22. In **Bunce v Postworth Ltd t/a Skyblue** 2005 IRLR 557, CA, B signed a document confirming that he was entering into a contract for services with the employment business, which was not intended to give rise to a contract of employment. P Ltd was under no obligation to provide work and B under no obligation to accept any. B was allotted 142 assignments before the contract was terminated. The Court of Appeal agreed with the Tribunal's analysis that B was not an employee of the employment business because the contract lacked the necessary requirements of control and mutuality of obligation.

Control

23. It is the issue of control that is more likely to provide a significant stumbling block for the finding of a contract of employment.

24. It is not necessary for the work be carried out under the employer's actual supervision or control. In the context of employment status, control is a matter of degree: it is rarely a question of whether there is any control, but rather of whether there is *enough* control to make the relationship one of employer and employee.

25. In a more general sense, therefore, control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer. However, indirect control, which exists by virtue of an employer's right to terminate the contract if the worker fails to meet the required standards of skill, integrity and reliability, is not by itself sufficient. Some element of more direct control over what the worker does is needed.

Determining true terms of agreement

26. The starting point for considering the relationship between a worker and his or her purported employer is the express terms of the agreement between them.

27. Under ordinary contractual principles, the ability of courts to look behind the written terms of a signed contract is limited to situations where there is a mistake that requires rectification or where the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract, i.e. the contract is a sham. However, the Supreme Court in **Autoclenz Ltd** (above) definitively accepted the premise that employment contracts are an exception to ordinary contractual principles in this regard. It endorsed a line of cases which stressed that the circumstances under which employment contracts are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. The Court held that

> "*the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part."*

Unfair dismissal

28. In this case the Respondent denies dismissal. It goes on to say that if the Claimant was dismissed then that was either for conduct or some other substantial reason (SOSR).

Was there a dismissal?

29. An employee who wishes to claim unfair dismissal must first show that he or she has been dismissed within the meaning of S.95 of the Employment Rights Act 1996 (ERA). S.95 states that an employee will be treated as dismissed if:

    29.1. his or her contract of employment is terminated by the employer with or without notice,

    29.2. he or she is employed under a limited-term contract and the contract expires by virtue of the limiting event without being renewed under the same terms, or

    29.3. he or she has been constructively dismissed. A constructive dismissal occurs when an employee resigns, with or without notice, because of a repudiatory breach of contract by the employer.

30. The burden of proof falls on the employee to show a dismissal. The standard of proof is that of the 'balance of probabilities' as normally applied in civil courts: the Tribunal must consider whether it was more likely than not that the contract was terminated by dismissal rather than, for example, by resignation or by mutual agreement between employer and employee.

Unfair dismissal - conduct

31. If there has been a dismissal, the relevant statute law is set out in sections 94, 98, 119, 120, 122, 123, 124 and 124A Employment Rights Act 1996 (ERA). We need not set out the text of those sections here.

32. In terms of case law in conduct dismissals, the relevant test is as follows:

    32.1. Did the Respondent act reasonably in all the circumstances in treating the Claimant's actions as a sufficient reason to dismiss the Claimant and in particular:

    32.2. did the Respondent genuinely believe in the Claimant's guilt,

    32.3. were there reasonable grounds for the Respondent's belief in the Claimant's guilt,

    32.4. at the time the belief was formed the Respondent had carried out a reasonable investigation,

    32.5. did the Respondent otherwise act in a procedurally fair manner,

        32.5.1. was dismissal within the range of reasonable responses?

        (see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588)

    32.6. We remind ourselves that we should not step into the shoes of the employer and the test of unfairness is an objective one.

    Unfair dismissal - SOSR

    32.7. In terms of a dismissal for SOSR the requirements are to establish what the other substantial reason was and then to determine whether that reason was 'substantial' such as to justify the dismissal in the particular circumstances of the case.

Victimisation

    32.8. In determining allegations of victimisation three questions should be asked:

    32.9. did the alleged victimisation arise in any of the prohibited circumstances covered by the Equality Act 2010 (EqA)?

    32.10. if so, did the employer subject the Claimant to a detriment?

    32.11. if so, was the Claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

33. The acts that are protected by the victimisation provisions are set out in S.27(2). They are:

    33.1. bringing proceedings under the EqA — S.27(2)(a)

    33.2. giving evidence or information in connection with proceedings under the EqA — S.27(2)(b)

    33.3. doing any other thing for the purposes of or in connection with the EqA — S.27(2)(c)

    33.4. making an allegation (whether or not express) that A or another person has contravened the EqA — S.27(2)(d).

34. The essential question in determining the reason for the Claimant's treatment is always the same: what, consciously or subconsciously, motivated the 'employer' to subject the Claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

35. This is said not to be a strict causation question but rather, it requires the Tribunal to identify the *real reason*, the core reason, the *causa causans*, the motive for the treatment complained of (see **Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL).

36. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail — **Essex County Council v Jarrett** EAT 0045/15. This was confirmed by the Court of Appeal in **Scott v London Borough of Hillingdon** 2001 EWCA Civ 2005, CA, when it upheld the EAT's decision that an unsuccessful job applicant had not been victimised for bringing a race discrimination complaint against a former employer. The Court ruled that knowledge of a protected act is a precondition of a finding of victimisation and that, as there was no positive evidence that the Respondent knew of the Claimant's previous complaint, there had been no proper basis for the Tribunal to infer that the Claimant had been victimised.

37. An act which purports to be a protected act will not be a protected act if it was made in bad faith.

Findings of fact

38. We make the following findings of fact (numbers in square brackets are references to pages in the bundle).

39. On 23 February 2018 the Respondent arranged a Fork Lift Truck (FLT) Assessment for the Claimant with Britvic by email [120]. On 26 February 2018 the Claimant attended Britvic for the FLT Assessment [123].

40. The Claimant joined the Respondent on 26 February 2018 as an Agency Worker completing an application form [129]. He signed an agreement with the Respondent on 27 February 2018 [131 – 132].

41. In or around early November 2020 Britvic decided to directly employ more staff in the team in which the Claimant was engaged. This was not an unusual occurrence, but it did mean that potentially some of the Respondent's staff would become permanent employees of Britvic. A recruitment exercise was undertaken, some staff were offered interviews following which a number were appointed to Britvic. On 6 November 2020 Jamie Warwick (one of the Britvic shift managers) emailed Charlotte Barrow (Britvic HR) with a shortlist of unsuccessful candidates that he and Lee Smith (another Britvic shift manager) had compiled. The Claimant had been one of the applicants who had been unsuccessful, and his name appears on the list [152-153].

42. On 6 November 2020 the Claimant was informed that he was unsuccessful in his application for employment by Britvic [149].

43. On 10 November 2020, Jamie Warwick emailed Charlotte Barrow and Lee Smith with a shortlist of 10 candidates for interview [150].

44. On 24 November 2020, Jamie Warwick emailed Gary Waller, Lee Smith, Neil Pickering of Britvic and the Respondent with the list of successful candidates confirming that at that stage the candidates had not yet been informed. The successful list contains two non-white candidates – Darren Etienne (Black) and Wiquas Hussain (Asian) [153:1- 153:3].

45. On 6 December 2020 the Claimant raised what he said was an 'informal complaint' with Ross Greenwood, who was then the acting team leader at Britvic concerning alleged racism in recruitment and disciplinary matters. There were no witnesses to the conversation [34].

46. On 15 December 2020, Britvic ascertained that someone had taken a steel drum from Britvic [155 /157] and on 19 December 2020 Matt Philips confirmed to Lee Smith, Neil Pickering and other Britvic staff that one of the Respondent's workers had been caught on camera taking drums from Britvic on 15 December 2020 [155].

47. On 19 December 2020, Lee Smith informed Matt Phillips, Neil Pickering and other Britvic staff that "*no-one has been given permission from Jamie or myself to take these drums from the waste yard – waste guys mentioned the drums were being taken but slipped my mind*" [154].

48. On 21 December 2020, Jamie Warwick downloaded CCTV footage of the removal of the barrel for Neil Pickering to review [154]. By this stage Britvic had

determined that the culprit was the Claimant based upon the fact that he was the only staff member driv9ng the type of vehicle visible in the CCTV footage.

49. On 21 December 2020 Gary Waller received a call from Britvic informing him of Britvic's requirement that the Claimant's assignment with them had to be terminated because he had been seen taking barrels without permission.

50. As a result of this, on 21 December 2020, Clare, one of the recruitment team at the Respondent, emailed the claimant, after trying several times to telephone him, to advise him not to go into work that night and to call and discuss the matter further [157-158].

51. On 21 December 2020 the Claimant emailed the Respondent's Earls Court Office, in response to the above email from Clare, stating that he was offended by the insinuation that he had been stealing and although he accepted that he had taken barrels he said that he had done so for a co-worker called 'George' who himself had permission from Britvic [157].

52. On 22 December 2020 the Claimant emailed the Respondent alleging that his rights under the Agency Workers Regulations 2010 had been breached and asserted that termination without notice by the Respondent was contrary to 2010 Regulations. The Claimant says, "*As my employer I'll be holding you responsible*". The Claimant further asserted that *"this is their [Britvic's] plot to get rid of me'…I think Britvic is under a mission to ger rid of the black guys on nights hence the reason why we can't get jobs*" [159].

53. On 24 December 2020 the Claimant emailed the Respondent seeking further information about why he was no longer to attend work. His e-mail is in the following terms:

> *"… I was told by Claire over the phone not to go to work as Extraman didn't want me back in… I still haven't received any reply to my e-mail… can you please send me an e-mail for the reason why I am not allowed back at Extraman"* [169]

54. By way of completeness, and presumably as part of Britvic's evidence, on 13 January 2021 George Tettey (Agency Worker at Britvic) made a statement denying that the Claimant had permission to take barrels, and in effect refusing to give evidence in support of the Claimant [182].

55. On 6 and 7 January 2021 the Claimant emailed the Respondent regarding accrued untaken holiday pay from his assignment at Britvic [171].

56. On 7 January 2021, Gary Waller emailed the Claimant in response to the Claimant's request for further information about the termination of the Britvic assignment advising him that no further investigation would be undertaken because Britvic were clear that they did not want him back working for them and he was reminded that that as a worker under the Contract for Services, any assignment could be '*ended without notice'* either by the Respondent, the hirer or indeed the worker [173].

57. On 7 January 2021 the Claimant emailed Gary Waller essentially alleging that his assignment at Britvic ended a week after he had raised concerns about serious racial discrimination at Britvic implying that this was the reason for the termination [173].

58. On 12 January 2021, the Claimant emailed the Respondent asking for accrued holiday pay. His e-mail states as follows:

> *"hello can you pay me all the money in my holiday fund this Friday please as I do not work for Extraman anymore…"* [175]

59. Following the above email, the Respondent responded as follows

> *"On Tue, 12 Jan 2021, 11:18*
>
> *Hi Valentine,*
>
> *No problem at all. I will process all your holiday pay to be paid this Friday.*
>
> *Would you like us to process your P45 once your holiday pay is paid out?*
>
> *Kind regards,*
> *Paulina"*

60. The Claimant responded to this on the same date as follows:

> *"Thank you can you leave my p45 for now ill request for it later thank you.*
>
> *Kind regard*
>
> *Valentine phatty"*

61. The date of termination of what we will at present call the Claimant's engagement by the Respondent set out in the Claimant's P45 is 14 March 2021 [178].

62. On 15 March 2021 the Claimant emailed the Respondent requesting he be sent his P45 [176].

Discussion and conclusion

63. We set out below our conclusions on the issues we have been asked to determine.

Employment status

64. The first issue for us to determine is whether the Claimant was employed by the Respondent.

65. The starting point is the contract which the Claimant entered into with the Respondent and that appears at [131 – 132].

66. It is not necessary for us to recite each of the clauses in the contract, but material to our determination is first that the contract is headed "Contract for Service". Of course that is not definitive.

67. In the definitions section the Respondent is referred to as the employment business and the Claimant is referred to as the agency worker which means "*the temporary worker supplied by the employment business to provide services to the hirer…"* and the hirer is of course the organisation to which the agency worker is supplied by the Respondent. In the present case therefore, the Respondent is the employment business, the hirer was Britvic and the agency worker was the Claimant.

68. Clause 2.1 of the agreement confirms that the agreement constitutes the entire agreement between the parties and also states that no contract exists between the employment business and the agency worker in between assignments (an assignment being the period of supply of the agency worker to the hirer). That in itself gives rise to an interesting question concerning the date of termination which we shall deal with below.

69. Clause 3.1 of the agreement states that the Respondent will endeavour to obtain suitable assignments for the agency worker to perform but it makes it clear that the agency worker is not obliged to accept any assignment offered by the Respondent. This is repeated in clause 4.1.

70. Clause 3.2 makes it clear that there may be periods when no work is available and it is also clear from the agreement that the Respondent makes no promise as to any work or any period of work, any particular hours of work or any rates of pay. Those are determined in respect of each assignment.

71. By virtue of clause 4.1 the worker is obliged to cooperate with the hirer's reasonable instructions and accept the hirer's direction, supervision and control. The worker must also observe the hirer's rules and regulations and keep the hirer's information confidential.

72. By clause 9.1 of the agreement any assignment may be terminated without notice or liability either by the worker, the hirer or the Respondent.

73. In summary, and we note that the Claimant agreed under cross examination, the following key aspects of the agreement between the Claimant and the Respondent were as follows:

    73.1. there was no obligation on the Respondent to offer any or any particular work to the Claimant,

    73.2. the Claimant was entirely free to refuse any offered work,

73.3. the Claimant was not prevented from doing other work for anybody else during any assignment,

73.4. there was no guarantee of any work,

73.5. there was no guarantee of any particular hours of work,

73.6. there was no guarantee of any particular level or rate of pay,

73.7. when on an assignment the Claimant was under the direction, supervision and control of the hirer, and

73.8. any assignment could be terminated at will, that is without reason or prior notice.

74. There was no evidence before us that the above clauses and the agreement in general did not reflect the reality of the relationship between the Respondent, the Claimant and indeed the hirer.

75. The Claimant raised an issue about holiday booking and suggested that he was required to book holidays through the Respondent which might, if true, be evidence tending towards an employment relationship. It is also the case of course that the Respondent paid the Claimant and in doing so deducted PAYE tax and National Insurance contributions.

76. In relation to the booking of holidays, the Claimant relied on an e-mail from 'Dominic' confirming that holidays had to be booked through the Respondent. Mr Waller's evidence, which we accept, was that this was an erroneous e-mail which was quickly followed up by a correction e-mail (which we had sight of) confirming that holidays had to be agreed by the hirer. That of course makes perfect sense because the hirer would need to know who was taking holiday and when and therefore holidays had to be agreed by the hirer before being booked. It seems to us to be irrelevant to ask whether the booking was done through the hirer or the Respondent because the key point is who had the right to approve or not approve holidays and we accept entirely that it was the hirer.

77. In terms of deductions from pay, these are required by law even in circumstances where there is no employment relationship and therefore nothing turns on that.

78. The Tribunal expressly told the Claimant during the hearing that he would need to address the evidential basis for his assertion that notwithstanding all of the above he was an employee, but he provided no further evidence supporting his contention.

79. In the circumstances it is plain to the Tribunal that there was no mutuality of obligation in the contractual relationship entered into between the Claimant and the Respondent. There was no obligation on the Respondent to offer work, and if they did offer work to the Claimant, there was no obligation upon him to accept it.

80. We should add that in his submissions the Claimant suggested that because he had worked consistently for Britvic this in some way created mutuality of obligation between himself and the Respondent. That is not the case but, in any event, the express terms of the contract were that there is no obligation on the Respondent to offer work and, if they did offer work, no obligation on the Claimant to accept it. That is fundamentally different from an employment relationship. In an employment relationship the worker is paid for either doing or being available to do work at the election of the employer and there is no right to refuse work. It is also noteworthy that the case of **Carmichael and anor (**above) makes it clear that if the contract gives the purported employee the right to refuse work, then there is no mutuality of obligation. It is irrelevant whether work has ever been refused, it is the right to refuse which causes the lack of mutuality.

81. Furthermore, the Respondent in no way directed, supervised or controlled the Claimant during any assignment. The Claimant confirmed in his evidence that no member of staff from the Respondent attended the site where he worked at any point and there is no evidence that they were in anyway involved in the assignment other than paying the Claimant.

82. In his oral submissions the Claimant suggested that the Respondent did in fact retain control to a sufficient degree to constitute him an employee of the Respondent. He said that the Respondent controlled his hours, allocated overtime and that he was required to tell them if he was late or absent as well as referring us again to the booking of holidays. We have dealt with holidays above. In relation to hours, there is no evidence before us that the Respondent controlled the hours the Claimant worked and indeed quite the opposite was the case. It was the assignment schedule which set out what the hours were and the information on the assignment schedule came from the hirer not the Respondent. The Claimant's own evidence was that he would be told by Britvic each week what he would be doing by way of work in the following week, and he agreed with the point put to him that if there was any change during the week to what Britvic required, it would be Britvic that would advise him of that. In fact, the Claimant's hours were regular as he always worked the night shift by choice.

83. The Claimant also asserted in his oral submissions that the Respondent allocated overtime. That was not part the evidence we heard and in the Tribunal's experience that would be absurd. How can it be said that an employment business or an employment agency can allocate overtime to be worked at their client and, at their client's cost. That is not a submission we can accept. We also point out that there was no evidence we heard to suggest that the Claimant was required to inform the Respondent if he was late for work. As far as absence is concerned given that workers may be entitled to statutory sick pay it is understandable that the Respondent would need to know whether the Claimant was off sick in the same way that they would need to know whether he was on holiday so that this could be reflected in the pay slips they are legally required to provide.

84. The Claimant also relied upon the fact that the Respondent provided their staff with certain elements of a uniform. We do not understand how the Claimant says that impacts upon whether he was an employee of the Respondent or not. It is

not uncommon for staff working at a business where they are not employees to be identified as such in order that the business, in this case Britvic, can identify those who are not its employees. In our view this does not indicate the Claimant was employed by the Respondent and even if it was indicative of an employment relationship, it is quite clear from the foregoing that the balance of the matters we have to consider weigh heavily against an employment relationship.

85. Finally, we should also mention that the Claimant relied upon the fact that the Respondent deducted PAYE tax and National Insurance contributions, but we have dealt with that matter above. To reiterate it is a matter of law that an employment business is required to make tax and national insurance deductions and the fact that they do so does not weigh in the balance against determining whether a particular individual is employed or not.

86. Clearly the requirement of personal service is made out but that in itself is insufficient to constitute the relationship between the parties as one of employment.

87. In the circumstances we are satisfied that the Claimant was not employed by the Respondent, he was at all times a worker when on assignment and in those circumstances, he does not qualify to claim unfair dismissal and that claim is dismissed.

88. We should add that even if we are wrong about the relationship between the parties, and the Claimant was as an employee, we can find no evidence to suggest that at any point the Respondent terminated the Claimant's employment contract.

89. A dismissal requires, in the absence of either the termination of a fixed term contract or a resignation constituting a constructive dismissal (neither of which apply in this case) either unambiguous words of dismissal or if there are ambiguous words, that it is reasonable to conclude from those that it was intended that there be a dismissal.

90. In this context the Claimant relies upon the exchange of emails on 12 January 2021 in which the Claimant is asked whether he would like his P45. We are satisfied that the reason he was asked that question is his own earlier e-mail in which he states that he no longer worked for the Respondent. It is an obvious response to what may have appeared to be a resignation to ask whether the individual would like to receive their P45. In the event the Claimant did not want to have his P45. We are satisfied that this did not constitute either unambiguous or indeed even ambiguous words constituting a dismissal.

91. In his oral submissions the Claimant also said that the e-mail which is at [173] indicated termination although this predated 12 January 2021 which the Claimant asserted was in fact the date of termination. The e-mail he referred to is from Mr Waller to the Claimant and deals with payment of accrued holiday pay. The e-mail also says that Britvic were clear that they did not wish him to return to work for them and that therefore there would be no further investigation of the incident over the taking of barrels. There is nothing in that e-mail which comes close to

amounting to words of dismissal whether unambiguous or ambiguous. This was not an e-mail terminating the contract between the Respondent and the Claimant.

92. The Claimant also referred us to the fact that after his assignment with Britvic ended, he was not offered further work by the Respondent. In our judgment this cannot be indicative of a termination of his relationship with the Respondent because the terms of the agreement between him and the Respondent expressly states that the Respondent was under no obligation to offer work and therefore it cannot be that the not offering of work is anything other than the performance of the contract by the Respondent and not the termination of it.

93. It follows from this that we are not required to determine what was the effective date of termination, but we have nevertheless turned our minds to that for the sake of completeness.

94. As we mentioned above, the written contract between the parties, states that there is no contractual relationship between them in between assignments. However, that presents a logical difficulty because the only document governing the relationship between the parties is the written agreement and it is that agreement which sets out that the Respondent may offer work and the Claimant may accept work. If those terms are not extant between assignments, then what is the nature of the relationship between the parties in those periods?

95. If we were required to address the point our best view is that given the terms of the written agreement between the parties, during periods where the worker is not on an assignment there is nevertheless a minimal agreement between them implied from the circumstances which is that the role of the Respondent is to look for and, if available, offer work to the agency worker should it wish to do so, and that the worker, in the present case the Claimant of course, would be free to accept or not that work. If work is accepted, then the full force of the written agreement comes into effect. The alternative is to take the written contract at face value but that would mean that the date of termination of the relationship between the Respondent and the agency worker would be the date each assignment ended, but there is nothing in the agreement itself to state that other than the clause which says no contract exists during periods where there is no assignment.

96. From all of that we conclude that the best view is that the Claimant's relationship with the Respondent, that is to say the Claimant's engagement by the Respondent, ended on 14 March 2021, the date on the P45.

Victimisation

97. We accept the Claimant's evidence that the Claimant did a protected act when he raised the issue of discrimination with Britvic. What is in issue is whether the Respondent was aware of that. The Claimant says that he had a conversation with a consultant of the Respondent called Dominic and advised him of the discrimination and from that, the Respondent was fixed with knowledge. There is no suggestion that the Respondent had constructive knowledge. The Claimant is very clear that they had actual knowledge of the protected act.

98. We have some difficulty with the Claimant's evidence on this point.

99. The first point to note is that there is no reference to the Claimant raising issues of discrimination by Britvic with the Respondent in his claim form [8].

100. Second. in the Claimant's revised ET1 in which he particularised the victimisation claim, there was again no reference to the Respondent being told or otherwise having knowledge of the protected act [44].

101. Finally, on 27 May 2021, the Claimant provided an e-mail in response to the Tribunal's request for further information about his claims and he confirmed the matters which he raised with Britvic but makes no reference to the alleged conversation with Dominic at the Respondent or any other contact with the Respondent prior to the termination of the assignment, relating to allegations of discrimination or any other breach of the Equality Act 2010.

102. Indeed, the first mention of the Respondent being fixed with actual knowledge appears in the Claimant's witness statement drafted for this hearing.

103. We do not accept the Claimant's evidence on this point. We prefer the oral evidence of Mr Waller who told the Tribunal that Dominic denied to him that the conversation ever happened. We do not accept that the Claimant had a conversation with Dominic in which he mentioned being discriminated against and in the absence of any other evidence we find that the Respondent did not know, at the material times, that the Claimant had done a protected act within the meaning of s.27, Equality Act 2010.

104. As we indicated above in the section on the law, detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment, in this case the Respondent, knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail (**Essex County Council v Jarrett**, **Scott v London Borough of Hillingdon** above).

105. For that reason alone, the victimisation claim fails.

106. The other point to note in relation to this claim is that even if the Respondent did have the required knowledge, it is difficult to see how they could have victimised the Claimant as he alleges. As is made clear in the list of issues the detriment is said to be "*having his work at the second Respondent's site terminated on 17 December 2020*" [115]. The reference here to the second Respondent is to Britvic who at the time the list of issues was drafted was still a Respondent to this case.

107. As we have indicated in the section relating to the law, although there is not in the very strict sense a causation requirement in a victimisation claim, that is to say there is no so-called 'but for' test, it is clearly the case that the protected act must be the operative cause of the detriment. Given that the detriment in this case was the termination of the assignment and given that it was Britvic and not the Respondent who terminated the assignment, it must be the case that the claim fails simply on, if we may put it this way, causation.

108. We should finally deal with one further issue which was raised by the Respondent in submissions which is that in doing the protected act the Claimant acted in bad faith.

109. The background to this is important. We referred above to the recruitment exercise in which Britvic wished to engage a number of staff permanently, the candidates being drawn from the Respondent's agency workers working at Britvic at the relevant time. A number of the Respondent's workers applied for the jobs, some were offered interviews and of those interviewed some were offered jobs by Britvic.

110. The Claimant's protected act is set out at paragraph 8 of the list of issues which is at [115]. The Claimant says that on or around 6 December 2020, he raised the concern to his line manager at Britvic that "*only white Europeans were being appointed to become permanent staff members and no black members of staff".*

111. During the Claimant's cross examination, he asserted that in the recruitment exercise, no black workers were appointed. This confirmed what the Claimant said in his witness statement which is that "*none of the black applicants… got the job… all the successful applicants were white European…".*

112. There was some exploration with the Claimant during cross examination as to the extent of his knowledge of the recruitment process at the time. The Claimant asserted that he spoke to almost everyone on his shift and so he knew who had applied, he knew who had been rejected and he knew who had been appointed. He then shifted his ground somewhat to say that he knew some of the people who had applied, some who had been rejected and some who had been appointed. When it was pointed out to the Claimant that two of the successful candidates were in fact black or Asian, and therefore not white European, the Claimant countered by saying that the one who worked on the same shift as him did not tell him that he had been successful and the other successful candidate who was not white European did not work on the same shift as the Claimant. The Claimant accepted that did not have full knowledge of what had taken place when he did his protected act. The Claimant agreed that his comments to Britvic about discrimination were based on limited information, although he stressed that it was more than a mere suspicion. He did concede that when he met Mr. Greenwood, the person to whom he made the disclosure, "*I did not know who had been successful*", despite which he asserted that only white Europeans had been appointed.

113. In submissions Mr McCrossan invited us to find that given those facts, the Claimant had acted in bad faith in suggesting that there had been discrimination in the recruitment process.

114. The Tribunal has given this very serious consideration. We have noted that the Claimant's responses to cross examination questions were often based on what he thought documents said but when the documents were considered during the hearing, they often did not say what the Claimant thought.

115. We also considered that despite the Claimant confirming that he had read his witness statement and that it represented a true and accurate account, he appeared to be somewhat unfamiliar with his own evidence in chief. So, for example when it was pointed out to him that his allegation was that no black staff were appointed following the recruitment exercise referred to above, and that in fact black staff were appointed, he said he meant black Africans were not appointed, and not simply black members of staff. We have taken into account that English is not the Claimant's first language, although his English is very good, and that he was under considerable pressure both being a witness and at the same time an advocate in his own case.

116. A further example of the Claimant's carelessness over details, if we may put it that way, can be seen in the e-mail from him to the Respondent of 12 January 2021 in which he says, as we have set out above, that he is no longer employed by "Extraman". When he was questioned about this the Claimant said that he meant Britvic, but if he meant Britvic then why did the e-mail not say so?

117. Whilst all of this this impacted on our assessment of the Claimant's credibility, we would characterise his approach to the evidence as careless and we have formed the view that when he told Britvic of his concerns about discrimination, despite this being based on less than complete information, he nevertheless genuinely believed what he said, even though it was not true, and we therefore find that he did not act in bad faith in doing the protected act upon which the victimisation claim relies.

Employment Judge Brewer
Date: 19 January 2023