EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104325/2022

Employment Judge S Cowen

In the Edinburgh Employment Tribunal on 8 December 2022

Stephen Alderson	**Claimant** **In Person**
Lothian Health Board	**Respondent** **represented by** **Ms Wood- solicitor**

JUDGMENT

1 The claimant's claim for unfair dismissal is dismissed.

REASONS

Introduction

1. The Claimant issued a claim on 2 August 2022 claiming unfair dismissal. He claims to have worked for the Respondent as a Logistics Consultant, from 28 May 2013 to the date of his dismissal (by way of resignation) on 6 May 2022.

2. The Respondent did not accept that the Claimant was an employee throughout that period. They assert that the Claimant was self employed until 1 November 2020, after which he became an employee. The Respondent therefore asserts that the Tribunal had no jurisdiction to hear the claim as the Claimant did not meet the two year continuous employment criteria.

3. This Preliminary Hearing was listed to consider the issue of employment status and to decide whether the Claimant qualified under s.108(1) Employment Rights Act 1996. If the Claimant is found to have the qualifying period his claim for unfair dismissal will proceed and date listing letters will be sent to the parties to list the final hearing and give directions.

4. The parties had provided a joint bundle of productions. The Respondent explained that their witness could not attend the hearing, but that they were happy to proceed based on the evidence of the Claimant alone, who gave evidence on oath.

The Facts

5. The Claimant initially worked with a company called Consort who contracted with the Respondent as part of a Private Finance Initiative in relation to the building work of the Royal Hospital for Sick Children in Edinburgh. The Claimant's role was to manage health and safety logistics on the site and to manage the traffic and health and safety of access to the Royal Infirmary Edinburgh during the building project. He started work in May 2013, with an

agreement to work full time, Monday- Friday for 18 months. This was described as a Provision of Services Agreement. The Claimant ran his own limited company called PMPRo31, which was in existence prior to his work for the Respondent. Payments were made via the company, in response to the Claimant submitting timesheets and invoices to Consort.

6. The Claimant subsequently undertook other projects for the Respondent when asked, such as one in relation to the car part management process, where a reconfiguration of the staff parking permit system occurred. He did not carry out any work for any other client during this period.

7. The Claimant worked in the Respondent's offices on site. He was provided with a computer and mobile phone by the Respondent and an email address which was also part of the Respondent's system. The Claimant reported to George Curley, who was employed by the Respondent. On occasion the Claimant would deputise for Mr Curley at meetings with external and internal parties. The Claimant liaised with the City Council, utility companies and taxi and bus companies with regards to the logistics of building the new hospital on an existing and busy hospital site. The Claimant saw himself as part of the Respondent's team and was included in team events and celebrations. He continued to work five days per week.

8. The Claimant was initially paid via the submission of invoices to Consort. He was paid a daily rate between 2013 and 2016. In April 2017, the Claimant continued to work for the Respondent's projects, but a change to the tax regime (IR 35) meant that NHSL would take on payment of the Claimant's invoices directly, rather than through Consort. After some discussion of the status of the Claimant, he was added to the Respondent's payroll as the new tax rules required that the Claimant's tax and national insurance contributions be taken at source. The Claimant was undertaking a further project for the Respondent at the time to test for fraud or impropriety within

Consort itself. This project produced an audit report in cooperation with Ernst & Young.

9. There was correspondence internally within the Respondent in November 2016 with regard to the Claimant's status and the move to pay him via the Respondent's payroll. Whilst the Financial Controller was of the view that the Claimant should be regarded as an employee, the paperwork which was sent out by the Head of Financial Control referred to a supplier's Provision of Service Agreement.

10. After the Claimant was placed on the payroll for the purposes of IR35 in April 2017 the Claimant continued to provide invoices to the Respondent for the days on which he worked and payments continued to be made to him via his company bank account, albeit with tax and National Insurance deducted at source until November 2020. He continued to charge the Respondent for his fuel costs and added VAT to his invoices. The Claimant drew his income from his company via dividends.

11. On 28 April 2020 Mr Curley wrote to the Claimant (not received until 19 May 2020) giving notice on the Claimant's contract as a consultant. The Claimant's contract was to end on 30 June 2020. On 24 May 2020 the Claimant replied outlining why he believed that he was an employee and that his services continue to be required. This was also supported by his trade union representative.

12. On 6 July 2020 the Claimant was offered a contract of employment which he accepted and worked until February 2022 when he chose to terminate the contract. As this contract did not start until 1 November 2020, the Claimant continued to invoice and to be paid in the same way by the Respondent. Upon starting work as an employee, the Claimant gained authority to sign financial commitments on behalf of the Respondent. This was a distinction from his previous position. From the point where the Claimant became an employee he no longer had to invoice the Respondent. He was also subject

to a number of the Respondent's policies, including the fact that he had to apply for annual leave from an allowance of 29 days, whereas before this, there had been no formal limit and he had not had to formally request it. He was allowed to join the Respondent's pension scheme and the Respondent's disciplinary and grievance procedure and sickness absence policy also applied to him.

THE LAW

13. "S.108.Employment Rights Act 1996 (ERA)— Qualifying period of employment.

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years][1] ending with the effective date of termination."

14. "S.230(1) ERA - Employees, workers etc.

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

15. The authority on whether there is a contract of employment was set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. Where it was 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. (Hi) The other provisions of the contract are consistent with its being a contract of service.'*

16. There is now considered to be an irreducible minimum required for a contract of employment to exist; these are

    a. Control by the employer

    b. Personal service by the employee

    c. Mutuality of obligation by both sides.

Decision

17. The Claimant entered into an agreement with Consort in May 2013 to provide his expertise and skills for the benefit of Consort in a project they were running for the Respondent. The Claimant set up this relationship via his own company, which had been in existence for some time prior to this. The Claimant therefore understood the difference between working as an employee and working as a contractor and agreed to contract via his company. The Claimant's evidence made it clear that he did not at that time believe that he was being hired as an employee of the Respondent. He was aware that he was brought in as a contractor to provide his expertise, which was not available from anyone within the Respondent. He referred to having to speak to Mr Curley who instructed him on behalf of the Respondent.

18. When considering the employment status of an individual, the Tribunal must take account of the intention and understanding of both parties at the time the contract is made. The Claimant's evidence and his apparent agreement to submit weekly invoices and to receive payment which did not deduct tax and national insurance indicates that at the start of the contract and at the time when the Respondent took over direct payment to the Claimant, he was aware that he was not being treated financially as an employee. The Claimant was also aware that he was not subject to the restrictions and obligations of an employee, nor receiving the benefits of one.

19. The emails of the Respondent in 2016 refer to the Claimant entering into a contract for the provision of services. This is not a contract of employment and the Claimant was aware of this distinction.

20. Looking at the control element of the test for employment status - the Claimant's work was outlined by the Respondent. He was provided with all the necessary equipment, an email address and an office by the Respondent. From an external perspective, he become an integral part of the Respondent's team. However, he did not have authority to commit the Respondent in respect of any financial decisions and did not have the same benefits and obligations as an employee.

21. The Claimant's own evidence that he could decide whether to work and when to take holiday are not consistent with having the status of an employee whose ability to take time off are controlled by an employer. By the Claimant's own admission, he was not subject to the Respondent's grievance or disciplinary policy until such time as he became an employee in November 2020. Nor did he benefit from the pension scheme, or any paid sick leave.

22. 1note that the relationship had been in place for approximately 4 years, when in 2017 it was required to be altered due to the application of IR35. At that time, all parties reconsidered the Claimant's status and the correspondence shows that the issue of whether the Claimant was in fact an employee was discussed. Had it been the intention or understanding of either the Claimant or Respondent that the Claimant was an employee, reasonably it would have been raised at that time. However, the actions of the Claimant were to accept the offer of a Provision of Service Agreement from the Respondent and to continue to invoice them on a weekly basis. As both parties were of a clear understanding of the distinction to be made between employed or contractor status, the fact that this agreement was entered into and followed until November 2020 leads me to the conclusion that the Ciaimant was aware that

he was not an employee up to that point, nor did he become an employee in 2017 and that this was a position which he was willing to agree to and abide by.

23. Based on the evidence of the agreement between the parties, the mutuality of their agreement and the circumstances around the work that was being carried out - it was a limited, project nature - the relationship between Claimant and Respondent was not one of employment until November 2020.

24. The Claimant therefore does not have the required 2 years continuous service referred to in s.108 ERA, to allow the Tribunal jurisdiction to hear a claim of unfair dismissal and the claim is dismissed.

Employment Judge: **S Cowen**
Date of Judgment: **28 February 2023**
Entered in register: **28 February 2023**
and copied to parties