# EMPLOYMENT TRIBUNALS

**Claimant:** **Dr Z Jones**

**Respondent :** **UK Health Security Agency**

**Heard at:** **London Central by video** **On:** **7th December 2022**

**Before:** **EJ B McKenna (sitting alone)**

**Representation**

**For the Claimant:** In person
**For the Respondent :** Ms S Garner, Counsel

# WRITTEN REASONS

## Background

1. The Claimant presented four complaints of automatically unfair dismissal under s.103A Employment Rights Act 1996 (ERA) to the Tribunal on 22nd and 23rd November 2021. Two claims were made at the Central London Employment Tribunal and one was made at the Watford Employment Tribunal and one at the Manchester Employment Tribunal. The latter was withdrawn by the Claimant. The three remaining claims were consolidated and proceeded at the Central London Employment Tribunal. She also made an application for interim relief under s.128 of the ERA.

2. Her claim was brought initially against five Respondents. The claims against the Second and Fifth Respondents were dismissed upon withdrawal at a case management hearing on 4th July 2022. The claims against the Third and Fourth Respondent were withdrawn following an explanation provided by Counsel at that hearing that those Respondents had the same legal personality as the current Respondent .

3. The interim relief application was considered at a one-day hearing before

Employment Judge Burns on 17th December 2021. The application was refused. An application for reconsideration was similarly refused on 18th May 2022.

4. A case management hearing took place before Employment Judge Klimov on 4th July 2022. At that hearing, Employment Judge Klimov directed that a preliminary hearing be held to determine if the Claimant was an "employee" of the Respondent pursuant to s.230 ERA. His Case Management Orders encouraged the Claimant to seek advice on her claim noting, at paragraph 5 of the Case Summary, that "the Claimant does not bring a detriment complaint under s.47B ERA, and there is no application to amend."

5. The preliminary hearing before me took place remotely by video. There were no significant technical difficulties.

6. I considered a bundle of 480 pages. The parties had helpfully prepared an agreed reading list. Ms Garner referred me to four authorities all of which are discussed below. The Claimant cited a further case: ***McTigue v University Hospital Bristol NHS Foundation Trust UKEAT/0354.***

7. Having taken evidence from the Claimant and two witnesses for the Respondent, Dr Jazz Grimsley and Ms Sarah Martindale, and having heard submissions from both parties, I found for the Respondent, deciding that there was no basis to imply a contract between the Claimant and the Respondent who was the end user for her services. I decided that she remained an employee of an umbrella company who assigned her to work for the Respondent on an agency basis. I gave an oral judgement with reasons.

8. The Claimant subsequently requested written reasons for my decision. I apologise for the length of time which it has taken me to prepare these written reasons which was due to my taking a period of sick leave during late January and February 2023.

**The Law**

*S.103A ERA Protected disclosure*

9. S.103A provides:

*"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

*S.230 ERA Employees, workers etc.*

10. S.230 ERA provides:

*"(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."*

11. Accordingly, the right to pursue a s.103A claim for automatically unfair dismissal is conditional on the Claimant being an employee as defined by s.230 ERA. The right to pursue a claim under s.47B for a detriment claim requires only worker status.

*Differences between contract for/or service(s) and agency arrangements*

12. In most cases, the determination of the question as to whether an individual works under a contract of employment involves a consideration of the relationship between only the putative employer and employee. In a typical agency scenario, the person providing services signs up to an agency which then assigns them to a client. Analysing the relationships between these three parties involves different considerations. The difference between these two scenarios was noted by LJ Mummery; ***James v Greenwich London Borough Council [2008] ICR 545, CA paragraph 49***.

*Essential elements of a contract of employment*

13. For a contract of employment to subsist, in addition to those general requirements arising from the law of contract such as offer and acceptance, the intention to create legal relations, consideration and certainty, three essential elements are required. These are:

    - an obligation to provide work personally,
    - mutuality of obligation between employer and employee; and
    - the person providing services must be subject to the control of the person for whom the work is provided to a sufficient degree.

14. The existence of the above three elements does not mean that a contract of employment actually exists only that it potentially does. Additionally, the individual must be sufficiently integrated into the employer's organisation and must not be carrying out the work on account of their own business.

*Need to consider true agreement between the parties*

15. In considering whether or not a contract of employment is in existence, it is necessary to consider all circumstances of the relationship and to go beyond any labels which the parties apply; ***Young & Woods Ltd v West [1980] IRLR 201.*** Contractual terms which negate employment status may be disregarded where those terms do not represent the true agreement between the parties, ***Autoclenz Ltd v Belcher [2011] ICR 1157.*** In ***Autoclenz,*** the Supreme Court took note of the disparity in bargaining power between the parties, stating that Tribunals should take a purposive approach and be alert to the possibility that the agreement was a sham. It should be noted that ***Autoclenz*** did not involve an agency arrangement: the claimants in that case were designated as self-

employed but the Supreme Court determined that they were workers as defined by the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999.

*Contract of employment only implied in agency arrangements where necessary to give business reality to the situation*

16. Where an individual provides services through an employment agency, there will be typically be a tripartite arrangement. There will usually be a contract between the individual and the agency and another contract between the agency and the person to whom the services are provided (the end user). The person providing the services will rarely be an employee of the end user. A contract of employment may only be implied between the individual and the end user where it is necessary to do so to give business reality to the situation; ***James v Greenwich London Borough Council [2008] ICR 545 CA.*** There will be no such necessity where the agency arrangements are genuine and accurately represent the parties' relationship.

17. At paragraph 23 Mummery LJ stated that the test for an implied contract was that formulated by Bingham LJ in ***The Aramis [1989] 1 Lloyd's Rep 213 (***where he quoted with approval the judgment of May LJ in ***The Elli [1985] 1 Lloyd's Rep 107, 115 :***

> *"… I ….agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist".*

18. Mummery LJ went to say at paragraph 24:

> *"As Bingham LJ went on to point out in the same case that it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."*

19. At paragraph 30, he said:

> *"The real issue in "the agency worker" cases is whether a contract should be implied between the worker and the end user in a tripartite situation of worker/agency/and end user rather than whether as in "the casual worker" cases where neither the worker nor the end-user has an agency contract, the irreducible minimum of mutual obligations exists. In the agency worker cases, the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker's provision of work to the end-user or the fact of the end-user's payment of the worker via the agency. Those facts and the relationships*

*between the parties are explicable by genuine express contracts between the worker and the agency and the end-user and the agency, so that an implied contract cannot be justified as necessary."*

20. A distinction was drawn in the Court of Appeal's judgment between cases where there was an employment agency and those where no employment agency was involved as in ***Carmichael v National Power [1999] ICR 1226***:

> "*In the agency worker cases the issue is whether a third contract exists at all between the worker and the end user. The relevant question in such cases is whether it is necessary, in the tripartite setting, to imply mutual contractual obligations between the end user to provide the worker with work and the worker to perform the work for the end user."*

21. The judgment concluded:

> *"in conclusion, the question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user.*

22. The courts must examine the underlying reality of the position. There may be circumstances where the agency arrangements "were never intended to reflect reality but rather to obfuscate the true nature of the relationship"; ***James v Greenwich London Borough Council [2007] ICR 577 EAT paragraph 37.*** In this judgment Elias P noted that:

> ***" …****the circumstances in which a contract can be implied are not limited to situations where the arrangements were never intended to be genuine. It may be that the parties intend to regulate or alter their relationship … but do not in fact do so. In such circumstances a Tribunal will be entitled to find that there is a contract between worker and end user.";* **James EAT paragraph 37.**

23. In ***Tilson v Alstom Transport [2011] IRLR 169,*** the Court of Appeal held that it was not permissible for a Tribunal to find employment status in a situation where a senior manager worked for the end user via two intermediaries on the basis that it was against public policy for agency arrangements to be entered into to avoid contractual status and therefore limit the employer being subject to statutory employment rights.

*EAT guidance to Tribunals in tripartite agency cases*

24. Guidance to Tribunals to consider in such tripartite agency cases was given by Elias P in ***James*** in the EAT and was expressly endorsed by the Court of Appeal. That guidance is summarised below at paragraphs 24 to 28. .

25. First, is whether the way in which the contract is performed is consistent with the agency arrangements or whether it is only consistent with an implied contract of employment between the worker and the end user; paragraph 54.

26. Second, if there was no agency relationship then the implication of a contract between the worker and end user would be inevitable; paragraph 55.

27. Third, for a contract to be inferred in circumstances where the arrangements are genuine there "must, subsequent to the relationship commencing be some words or conduct which entitle the Tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract"; paragraph 58.

28. Fourth, the continuation of a relationship for an extensive period of time does not of itself establish a contract between the end user and the individual performing the work. Something else is required to establish that the tripartite arrangement has been supplanted by a new contract between them; paragraph 59.

29. Finally, where agency arrangements are imposed on an existing contractual relationship, the Tribunal may conclude that the agency arrangements have not terminated the original contract of employment; paragraph 60.

*Resemblance of agency staff to employee not sufficient to imply contract*

30. The Court of Appeal again considered the necessity test in ***Tilston v Alstom Transport [2011] IRLR 169*** holding that it was not open to a Tribunal to find employment status against the end user on the basis that the individual resembled an ordinary employee.

**Facts found**

31. The Claimant who is a scientist with many years' experience in the Pharmaceutical industry worked at the Respondent, an Executive Agency of the Department of Health and Social Care (DHSC). The Respondent played a key role during the Coronavirus pandemic, taking on the functions of NHS Test and Trace, the Joint Biosecurity Centre (JBC) and particular aspects of NHS England's work.

32. The Claimant worked for the Respondent on assignment from 1st November 2021 until 17th November 2021 when that arrangement was terminated.

33. The Claimant entered into a contract of employment with MyPay Limited on 30th September 2021. That contract provided that the Claimant would work 37.5 hours per week at a daily rate of £600 as a mixed science leader. The contract covered terms customarily found in contracts of employment such as annual leave, sickness, pay and working hours. The contract provided for MyPay Limited to act as an umbrella company with Alexander Mann Solutions Limited.

34. Her assignment to the Respondent was arranged through the Public Sector Resourcing (PSR) framework agreement. PSR is a single framework through which public sector bodies can engage contract workers. It is operated by Alexander Mann Solutions Limited.

35. At the relevant time, DHSC had a "call off" agreement with Alexander Mann Solutions Limited through the PSR framework agreement. Simply put, a "call off" agreement is a contract between a supplier and purchaser for the provision of services, goods or people. Here, the agreement was to provide temporary or contingent workers and to ensure a flexible workforce.

36. The process by which individuals were supplied through PSR to the Respondent began when a team leader or manager identified a vacancy which needed to be filled by a temporary worker and had developed a business case for the resource. That request then had to be approved by the Respondent's Human Resources department and the business case considered. Once the business case was approved, a job description was produced by the relevant team leader or manager and sent to PSR who scanned for suitably qualified Individuals. When individuals were identified, PSR carried out the necessary screening including seeking references and conducting security checks. Interviews were conducted by the relevant UKHSA team leader or manager. When a decision has been made to hire a particular individual, PSR arranged for the individual to be assigned to the Respondent .

37. The Respondent played a vital role in managing the Government's response to the COVID-19 pandemic. This meant that the Respondent needed quickly to take on large numbers of what Miss Martindale, referred to as contingent workers. She said that the urgent and important nature of the Respondent's work meant that it needed to dispense with protracted civil service recruitment processes in order to fill skills gaps quickly.

38. Miss Martindale also said that given the nature of the pandemic and the Respondent's urgent and changing priorities, it was not possible to predict the precise numbers and types of individuals required and nor was it possible to identify the length of time for which they would all be needed. The Claimant contended that the Respondent had adopted the PSR mechanism to hire specialists so that it could avoid the application of protected disclosure legislation.

39. The Claimant was interviewed by Dr Josh Bunce, one of the Respondent's scientists, and a request was made to PSR for her to be assigned to the Respondent.

40. On 25th October 2021, an assignment agreement was entered into between Alexander Mann Solutions and MyPay Limited. The agreement provided that the Claimant would be assigned to DHSC, the sponsoring government department for the Respondent. It further specified that she would be assigned to UK Test and Trace/ JBC from 1st November 2021 to 31st March 2022 as a genomics research lead which was a Grade 7 role. In the interim JBC was absorbed by the Respondent and the Claimant was assigned to work at the Respondent on the environmental monitoring for its Environmental Monitoring and Health Protection deputy directorate.

41. The Respondent paid Alexander Mann Solutions Limited for the Claimant's services. Alexander Mann Solutions Limited subsequently paid MyPay Limited who then paid the Claimant by PAYE.

42. The Claimant underwent an onboarding process where she was briefed on the Respondent's policies including its whistle blowing, bullying and harassment policies.

43. Her line manager at the Respondent was Dr Jazz Grimsley, Head of Research and Development in its Environmental Monitoring and Health Protection deputy directorate. Dr Grimsley was a Grade 6 officer. She managed a team of 10 people including the claimant.

44. It was not necessary for purposes of this preliminary hearing to consider in detail the dispute which arose between the Claimant and the Respondent save to say that their working relationship quickly became strained. A decision was taken by Dr Bunce and Dr Grimsley to end the Claimant's assignment having taken advice from Miss Sarah Martindale from HR. The assignment was terminated on 17th November 2021. The Claimant says that her assignment was terminated because she made protected disclosures. The Respondent denies this.

## Discussion and conclusion

45. I will refer to the parties' submissions where relevant in the course of my discussion and conclusion. Ms Garner referred me to the following authorities:
    - ***James v Greenwich London Borough Council [2008] ICR 545, CA***
    - ***James v Greenwich Borough Council [2007] ICR 577, EAT***
    - ***Tilson v Alston Transport [2011] IRLR 169***
    - ***Autoclenz Ltd v Belcher and ors [2-11] ICR 1157, SC***

46. In order to bring a s.103A claim for automatically unfair dismissal on grounds that she made a protected disclosure, the Claimant must establish that she was an employee of the Respondent.

47. Accordingly, she needed to establish that there was a contract between herself and the end user, the Respondent, as a matter of business necessity. The onus was on her to do so; ***Tilson v Alstom Transport [2010] EWCA Civ 1308.*** She

has failed to show that her arrangements between with the Respondent could only be explained by the necessary existence of a contract of employment between them.

48. I considered the authorities to which I was referred by both parties. The case of ***McTigue*** to which I was referred by the Claimant concerns a protected disclosure claim for which "worker" status as defined by s.43K(1)(a) was required. The Claimant has brought by a claim for which employee status is required. This case is not therefore relevant.

*Common features between agency arrangement and contract of employment not sufficient to imply contract of employment*

49. The Claimant sought to highlight those aspects of her relationship with the Respondent which mirrored a contract of employment. That is not sufficient to imply a contract between the Claimant and Respondent. What must be shown is the necessity to imply a contract to give effect to the business reality of the situation.

50. I found that the fact that the Claimant reported to Dr Grimsley did not by itself, evidence a relationship of employment as the Claimant submitted. It was obvious that any anyone providing scientific services to the Respondent but more particularly someone with the Claimant's experience and specialist knowledge and also given her significant daily charging rate would require a contact within the Respondent's organisation to manage her workflow and with whom she could raise concerns. Dr Grimsley spoke persuasively of the need, regardless of whether those working in her team were civil servants or contract staff, to ensure that they were "aligned on the science".

51. The fact that the Claimant underwent an onboarding process similarly did not evidence an employment relationship. The Respondent wanted all those working within it including contingent staff to understand the nature of its organisation as a public sector body with developed anti-discrimination and similar policies and to discharge the obligations they were therefore subject to whilst on assignment.

52. The Claimant also sought to place weight on the fact that the Respondent's organogram featured her role. I was not persuaded by her argument as a degree of integration in the end user organisation is not inconsistent with the status of agency worker. In any event, the organogram differentiated between its civil service staff and contract staff.

53. She also relied on the fact that common annual leave procedures applied to the Respondent's civil service and contract staff. I find that it was equally reasonable for the Respondent to choose not to operate different leave procedures for its contingent staff.

54. In summary the common features between the Respondent's civil service staff and contingent workers do not provide a sufficient basis to imply a contract of employment between the Claimant and Respondent. Those features are

equally consistent with there not being a contract of employment between the parties.

55. The Claimant sought to characterise her relationship with MyPay Limited as being only for tax and payment purposes. The contract was however comprehensive with and net statutory requirements with terms dealing with annual leave, sickness, pay and hours of work. I found that this was a genuine contract of employment.

56. In order to succeed in establishing that she is an employee of the Respondent, the Claimant must show that there is a legal basis for implying a contract of employment between herself and the Respondent. The law requires that it be necessary to imply a contract of employment between the Claimant and the Respondent to give business reality to the arrangement between them. This is a high hurdle and the number of cases where such employment contracts can be implied will be rare as noted by Elias P in the EAT judgment in ***James***; paragraph 58.

57. The evidence of both Dr Grimsley and Miss Martindale on the challenging and fast-moving environment within which the Respondent was operating and the need to take on skilled personnel without delay was compelling. Their evidence satisfied me that the complex contractual arrangements by which the Claimant came to work for the Respondent genuinely described their relationship.

58. I found therefore that the agreements between the Claimant and MyPay Limited and various contracts which assigned the Claimant to the Respondent accurately described the parties' relationships. There was no basis to conclude that the written agreements were a sham. The mere fact that the contractual arrangements were complex does not by itself support a finding that the arrangements were a sham. The arrangements between the parties in ***Tilson v Alstom*** were similarly complex involving four parties and did not prevent a finding that no contract of employment could be implied.

*EAT guidance*

59. I further note and apply here the guidance set out in paragraphs 53 to 61 the EAT judgment in **James** by Elias P as he then was and subsequently endorsed by the Court of Appeal. Applying Elias P's guidance in ***James***, to these facts there were no other grounds to set aside those agreements to infer a direct employment relationship between the Claimant and the Respondent for the following reasons.

60. The Claimant's relationship with the Respondent was short-lived. The short duration of her work for the Respondent therefore afforded no basis to find that the relationship between the parties had evolved so as to enable me to find that the agreements no longer reflected how the work was being performed.

61. Similarly, as the working relationship had quickly foundered after just two and a half weeks, it was not possible for the Claimant to argue that a contract of employment had been established over an extensive period of time.

62. I find that given the challenging and fast-moving environment in which the Respondent was operating, there was no necessity to imply a contract of employment between the Claimant and the Respondent to give business reality to what was happening.

*Integration*

63. I find that the manner in which the contract had been performed by the Claimant was entirely consistent with the agency arrangements and was not only consistent with an implied contact between the Claimant and the Respondent. A degree of integration in the end user organisation is not inconsistent with the status of agency worker.

64. The degree of integration of the Claimant in the Respondent for example her role being shown on an organisational chart was perfectly understandable given the context. It is of little significance however in deciding whether she had a contract of employment with the Respondent. In ***Tilson***, Elias P noted:

> "*… in most cases it is quire unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree, and this will inevitably involve control over what is done and to some extent, the manner in which it is done. The degree of integration may arguably be material to the issue whether, if there was a contract, it is a contract of service. But it is a factor of little, if any weight when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows that in law he must be an employee."*

65. It is not enough therefore to say that because the Claimant worked side by side by directly employed civil servants and was engaged on similar work that she must be an employee, ***Heatherwood and Wrexham Park NHS Trusts v Kulubowila UK/EAT/0633/06*** **cited with approval in Tilson*.***

*Distinction from* ***Autoclenz***

66. The clear contractual arrangements in place here can be distinguished from the facts of ***Autoclenz and Belcher***. ***Autoclenz*** also relied upon Carmichael v National Power. I find that there is no need to establish mutuality of obligation.

*Wide spectrum of agency arrangements*

67. The Claimant, in her oral evidence and submissions. referred on a number of occasions to her many years' experience working within the scientific and pharmaceutical fields and to the wide variety of contractual arrangements under which she had worked there. She correctly noted that there was a wide spectrum of contracts and observed that she had worked both as a sole trader

where she had considerable autonomy and under a statement of work where her duties were very clearly prescribed. She likened the arrangement under which she had been assigned to the Respondent as being similar to the treatment of casual agency staff doing manual work.

68. The Claimant's own words chimed with the comments of LJ Mummery in paragraph 51 of ***James*** where he observed that "there is a wide spectrum of factual arrangements".

69. The Claimant may feel that the way in which she was assigned to the Respondent was ill suited to the important and skilled duties she was to carry out for the Respondent; she likened it to having done catering work on agency basis when she was a student.

70. It is a matter for the Respondent however to structure its arrangements to hire short term staff as it wishes. The fact that the Claimant feels this led to a situation where she lacked protection against automatically unfair dismissal on grounds of public interest disclosure as she was not an employee is a matter for Parliament and not for the Tribunal. She was protected in relation to detriment claims under s.47B ERA but has not made such a complaint to the Tribunal nor sought to amend these proceedings to make such a complaint.

71. The claim is therefore struck out for lack of jurisdiction as the Claimant was not employed by the Respondent.

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Employment Judge **B. McKenna**

Date 17th February 2023

JUDGMENT SENT TO THE PARTIES ON

20/03/2023

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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