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EMPLOYMENT TRIBUNALS

Claimant:	**Mr Sokratis Lasdas**
Respondent:	**Investigo Ltd (R1)** **The Secretary of State for Education (R2)**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**6 December 2022**
Before:	**Employment Judge Townley**

Representation

For the Claimant:	In person
For the Respondent:	Mr D Patel (Counsel) First Respondent (R1)
	Mr S Tibbitts (Counsel) Second Respondent (R2)

Judgment having been sent to the parties on 5 January 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Procedural history

1. By claim presented on 23 May 2022, after an ACAS early conciliation period between 14 and 25 April 2022, Mr Lasdas (the Claimant) brought claims for unfair dismissal, a redundancy payment, notice pay, holiday pay, arrears of pay and 'other payments'. On the claim form, the Claimant also stated that he had 'tried to make a whistle-blower disclosure to the Department for Education but that the whole handling was ludicrous'.

2. By letter, dated 30 June 2022, the Tribunal ordered the Claimant to confirm, by 8 July 2022, the basis upon which he pursued his unfair dismissal claim given that he had less than two years' service and also advised that he did not have the two years' service required for a redundancy payment claim. The letter contained a 'strike out' warning. No response to that letter was ever received from the Claimant.

3. On 30 September 2022, EJ Reid struck out the Claimant's claims for unfair dismissal and a redundancy payment on the basis that he had failed to clarify the basis of his claims. EJ Reid ordered that the Claimant, by 17 October 2022, set out:

   (i) what he claimed his notice period was in weeks or months and the basis for such claim (eg by a document agreeing to pay notice);

   (ii) the particulars of his claims for wages, holiday pay and 'other payments'; and

   (iii) provide a witness statement setting out the basis for why he was either an employee or worker of either Respondent by 1 November 2022.

4. The Claimant's remaining claims were listed for a preliminary hearing in public (PHP) on 6 December 2022 to determine solely the issue of whether he was an employee or worker of either Respondent.

5. Sometime after R1 terminated the assignment of the Claimant on 18 January 2022, the Claimant had made a Subject Access Request (SAR) on a date which he did not specify to the Department for Education (R2). The Claimant took objection to R2's response to his SAR and he sought to have the PHP postponed and suggested that the Tribunal should order R2 to provide a further response to his SAR.

6. On 1 November 2022 the Claimant said that he had not received the order made by EJ Reid on 30 September 2022. In order to avoid a postponement of the PHP, R2 proposed varied dates to the order of 30 September to enable the Claimant to comply. R2 also further explained to the Claimant that SARs did not fall within the Tribunal's jurisdiction.

7. On 24 November 2022, Acting REJ Burgher, refused the Claimant's application to postpone the PHP and confirmed that it remained listed. The Judge ordered that the parties were to ensure that the case management orders sent to the parties on 30 September 2022 were complied with to ensure the issue can be determined. It was stated that the failure to comply with the case management orders 'may result in a claim or response being struck out due to non-compliance with Employment Tribunal orders'.

8. On 28 and 29 November 2022 the Claimant repeated his request for the tribunal to order disclosure of the SAR documentation and stated he was waiting for a response from the Tribunal and that, without such a response, it was his intention to not attend the PHP.

9. On 29 November 2022, R2 provided a hearing bundle for the PHP and informed the Claimant that the PHP had been listed only to determine whether he was an employee or worker and that R2 was therefore not clear in respect of how the Claimant's queries in respect of his SAR were relevant for the purposes of the PHP.

10. On 30 November 2022, EJ Massarella, ordered that the remit of the PHP was solely to determine whether the Claimant was an employee or worker of either R1 or R2 and stated 'the parties must comply with the orders of EJ Reid dated 30 September 2022.'

The hearing

The Claimant's application to postpone and rulings on the conduct of the hearing

11. I was provided with a bundle with a total of 181 pages by the Respondents. Witness statements were supplied by Mr Matthew Pope (R1) and Mr Adam Sowman (R2). Mr Pope and Mr Sowman attended the tribunal but for the reasons set out at paragraph 15, I did not need to hear from these witnesses.

12. The Claimant attended the hearing but declined to provide a witness statement or any other documentary or other evidence in support of his remaining claims in breach of the numerous case management orders from 30 September 2022 onwards, as detailed above. The Claimant again asked for the hearing to be adjourned until the Tribunal had ruled on his SAR application.

13. When I asked the Claimant why he had not supplied a witness statement or any other evidence to address the question of whether he was a worker of employee of either Respondent, he said that he could not present a witness statement or any documents in support of his case until R2 had responded to his SAR and, until he was given disclosure, he could not positively state what his case was. He explained that R2's response to his SAR had been inadequate because the documents had been so heavily redacted that they were of no use to him. I explained to the Claimant that the Tribunal did not have jurisdiction in relation to SARs and that he had already been informed by R2 of his right to complain to the Information Commissioner's Office if he remained unsatisfied with R2's response to his SAR.

14. Both Mr Patel and Mr Tibbetts did not object to a postponement of the hearing (both also pointed out that they had, at present, no idea what the Claimant's case was and consequently had no idea about what case they had to meet) but submitted that the Tribunal could and should strike out the Claimant's claims on the ground that he had failed to comply with the case management orders.

15. The Claimant's application to postpone was refused on the basis that he had been made aware, on a number of occasions, through multiple case management orders and also in a detailed letter from the tribunal, about the issues that were to be decided at the PHP and about what information he needed to provide to the tribunal. He had also been warned that failure to comply with the orders may lead to his claims being struck out and he had nevertheless declined to take the opportunities that he had been given provide any information about his cast to the Tribunal.

16. Following this ruling, the Claimant said that he also wanted to bring a whistle-blowing claim. I informed him that he had not provided any particulars in relation to such a claim. In response to questioning, the essential elements of the claim were disclosed and the Claimant confirmed that any alleged detriment (ie the termination of his relationship with either R1 and/or R2) pre-dated any such disclosures (which would preclude the making of such a claim). Furthermore,

when asked, the Claimant declined to provide any particulars about the disclosures to which he was referring. The Claimant then said that he did not wish to bring any whistle-blowing claim.

17. Having refused the postponement application, I informed the parties that I proposed to proceed with the PHP and would determine the issue of whether the Claimant was either a worker or employee of either Respondent on the basis of submissions alone because it was a narrow issue of law. As the Claimant had refused to give details of his claim or say what the issues were, I proposed to seek clarification of his claim by asking him a number of questions before allowing the Claimant some time to address the issues of law that needed to be determined.

18. Neither Counsel objected to this proposed approach where the Claimant was given the opportunity to put his case with the assistance of the Tribunal. However both Counsel sought to reserve their respective positions until after they had heard the Claimant's submissions as they were potentially prejudiced by not knowing what the Claimant's case was in advance of the hearing. They both also reserved their positions on the basis that they might need to take further instructions and therefore might not be in a position to respond today. I said that I would permit this course of action.

19. The Claimant gave evidence under oath and confirmed that he runs Consultco Limited (CCL), an IT consultancy business of which he is listed at Companies House as a director. He confirmed that he signed a contract with R1 on 10 January 2022 as the company director but that the contract was between CCL and R1 and that such tripartite arrangements were not unusual in his industry. A daily rate of £575 per day was agreed and payments made under the contract were paid into the CCL business account. The Claimant said that he spoke on a daily basis to a number of individuals whom he named at R2. His relationship with R2 was terminated on 18 December 2021 after a discussion with Mr Pope of R2 that the 'deliverables' under the contract were not being met. The Claimant said that 'he' was not paid after that. He said that R1 was not involved save to deal with the contract and 'his' pay. The Claimant then said that he wanted to make a whistle-blowing claim. I explained to him that this had been discussed previously and that there was no legal basis for any proposed amendment.

20. Mr Tibbitts on behalf of R2 then confirmed that he had been able to take instructions about the individuals named by the Claimant as those he had spoken to on a daily basis about the project. Mr Tibbitts said that none of the individuals named by the Claimant appeared in Ministry for Education employee directories.

21. The Claimant then said that he did not wish to bring the individuals at the Ministry for Education, whom he had named earlier (which I noted but have not named in this judgment), into the case.

22. The Claimant wished for the case to continue but I explained that I was adjourning for one hour and 15 minutes in order to permit him to consider the issues of his employee or worker status. I explained again that this was the sole issue on which he needed to address the tribunal. I referred the Claimant to the relevant law, namely ss 230(1) and 230(3)(a) and (b) of the Employment Rights

Act 1996. I read out the relevant sections out in full and also advised the Claimant that he could find the provisions online through a Google search, having checked that the provisions were readily available as a result of a key word search.

Findings of fact

23. The Claimant is a self-employed IT contractor who is the director of a company, CCL. Investigo Limited (R1) is a specialist recruitment agency specialising in the supply of permanent and fixed term recruitment services. R2 is the Department for Education (a ministerial government department) (the legal entity of which is The Minister of Education in whose name the Department responds to these proceedings). R1, by agreement with R2, engaged with CCL for the supply of services to R2. There was a written contract between CCL and R1 which was signed by the Claimant as the director of CCL on 10 January 2022. There is no express contract, either written or oral, between CCL and R2.

24. CCL was initially assigned to R2 by R1 between 22 November 2021 and 31 March 2022 to assist with 'Technical Architecture' services on a project known as 'Get Help with Tech'. During January 2022, R2 raised some concerns about the 'deliverables' on the services not being met by CCL. R1 thereafter made the decision to terminate their relationship with CCL on 18 January 2022.

25. The Claimant's checked and certified HMRC tax status during the above period of time was that of an independent contractor working outside IR35 (meaning that the Claimant was being paid as a contractor by his limited company CCL and that he paid tax as a self-employed person).

<u>The express written terms of the contract (as relevant) between R1 and CCL</u>

26. Under the terms of the contract between CCL and R1, R1 was responsible for paying CCL. All payments for CCL's services were paid by R1 into the company account of CCL. CCL was paid for the services that it provided to R1 up to the termination of their contractual agreement.

27. Clause 2.2 of the contract stated that the agreement was not be construed as a contract of employment between any consultancy resource supplied to provide the consultancy services and either the employment business (R1) or the Client (R2).

28. CCL was free to use any consultancy resource of their own choosing provided that resource was suitably qualified to complete the project (Clause 3.4) and to determine how the day to day work was to be undertaken (Clause 3.7).

29. CCL bore the prescribed insurance requirements (clause 14.1.2), provided all equipment (Clause 15.1.17), and bore the financial risk of non-performance (14.1.1 and 14.1.3) under the contract.

The law to be applied

Employment status

The Employment Rights Act 1996 ss 230(1) and 230(3)(a) and (b):

Section 230(1) provides that: 'an employee is an individual who has entered into a contract of employment (whether express or implied).'

Section 230(3) provides that: 'a "worker" is an individual who has entered into or works under (a) a contract of employment or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'

30. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433* it was held that a contract for service exists if three conditions were 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.'***

31. The Supreme Court in *Autoclenz Ltd v Belcher [2011] 41 SC***,** affirmed the principles set out in *Ready Mix Concrete* stating that it was now well-accepted in law that there are three irreducible minima without which a contract of employment cannot be said to exist, namely, (1) mutuality of obligation (without which there cannot be said to be any contract at all), (2) a requirement of 'personal performance' and (3) control.

32. The Court of Appeal in *Revenue v Customs Commissioners v Atholl House Productions Ltd [2022] EWCA Civ 501* confirmed the above and stated irreducible minima are preconditions, which only once satisfied, would require a tribunal to then make an overall assessment of all relevant factors in a multi-factorial approach to determine whether the relationship was one of employment. In short, to be an employee or worker, there must first be a contract between the individual and the other party alleged to be 'the employer', and second, a requirement on the individual personally to undertake the work.

Tri - Partite Situations

33. In *James v Greenwich London Borough Council [2008] ICR 545*, the Court of Appeal approved the approach of the EAT in this case, confirming that a tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation. There will be no such necessity where agency arrangements are genuine and accurately represent the relationship between the parties.

34. In *James,* the EAT laid down the following guidance to be applied when deciding whether to imply an employment contract between an agency worker and an end-user:

The key issue 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;

The key feature in agency arrangements is not just the fact that the end-user is not paying the wages but that it cannot insist on the agency providing the particular worker at all;

It will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be inconsistent with the relationship;

It will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied, there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed;

The mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two;

It will be more readily open to a tribunal to imply a contract where, like in Cable and Wireless plc v Muscat 2006 ICR 975, CA, the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user.

<u>The requirement for personal performance and substitution clauses</u>

35. Substitution clauses within a contract can often mean that a contract will be considered not to include an obligation of personal performance. There are many examples of this, but one such example with an indication as to the extent to which the right of substitution should be regarded as 'unfettered' is provided by *MPG Contracts Ltd v England (UKEAT 0488/08)* considered whether substitution clauses within a contract will be considered not to include an obligation of personal performance.

36. In this case the contract provided that E could subcontract the work to *'suitably trained representatives, subject to MPG Ltd.'s right to satisfy itself that the replacements had suitable skills and experience'*. The EAT held that MPG Ltd could not be expected to accept an individual wholly inexperienced in drylining or ceiling fixing and so on the fact of the contract there was an unfettered right of substitution. The EAT went on to hold that while a right to provide a substitute would not necessarily negate an obligation of personal service, the fact that E

was free to engage labour other than himself to fulfil the contract was 'wholly inconsistent' with a contract for personal services. While Tribunals should of course be alive to the fact and ensure that the written terms of a contract reflect the reality of the working relationship, it is ultimately the reality of the working relationship, the practical application of any substitution clause and the extent to which such a right is fettered or not that should be considered to determine whether the predominant purpose of the contract required personal service or not (*Sejpal v Rodericks Dental Ltd [2022] EAT 91)*

37. The 'dominant purpose' test, namely whether the dominant purpose or feature of the contract is the obligation to personally perform work as opposed to a particular outcome or objective has been considered appropriate in the context of s.230(3)(b) Employment Rights Act 1996 (per Elias J in *James v Redcats (Brands) Ltd [2007] ICR 1006)*.

The submissions

38. The Claimant's argued that the contract that existed between CCL and R1 was a 'fake contract'. It was extremely difficult to ascertain what the Claimant's position was on whether he was either an employee or worker of either R1 or R2 other than that the contract itself was 'fraudulent'. Despite being given numerous opportunities to address the tribunal further on these issues, the Claimant refused to do so and instead made continuous references to his SAR to R2 being unsatisfactory. The claimant was persistent throughout the hearing, to the point of interrupting the submissions of both Counsel, that he could not make any submissions in the absence of the tribunal making an order for disclosure in respect of his SAR. Following the submissions of both Counsel the Claimant was given a further the opportunity to address the tribunal again in the light of those submissions but he did not address the issue of whether he was a worker or employee.

39. Counsel for R1 and R2 both made oral submissions to the tribunal. R2 supported R1's contention that the Claimant was an independent self-employed contractor and that, at no time, was the Claimant either a worker or employee of either R1 or R2. Both Counsel argued that the tribunal, therefore, had no jurisdiction to hear any of the claimant's claims and that all of his remaining claims should be struck out.

40. Mr Tibbitts for R2 further argued that there was no express or implied contractual agreement between the Claimant and R2. The contractual agreement that existed was between R1 and CCL (and a separate agreement between R1 and R2). Furthermore, there was no basis on which to suggest that the tripartite arrangement entered into was either false or a sham and that it was incapable of explaining how the Claimant himself had come to undertake work for the benefit of the end client, R2. The law as elucidated in *James v Greenwich* was a high hurdle whereby the claimant had to demonstrate a necessity to imply a contract between himself and R2 to give business effect to the reality of the situation. In the absence of any evidence from the Claimant, there was no basis on which the tribunal could make such a finding.

41. Both Counsel submitted that there was no requirement for personal performance under the contract and that CCL had an unfettered right of substitution of consultancy resource under the contract.

Conclusions on the law

Was the Claimant an employee or worker of either R1 or R2?

42. For the purposes of ss 230(1) and 230(3)(a) and (b) of the Employment Rights Act 1996, in order for an individual to be an employee or worker, there must first be a contract between the individual and the other party alleged to be 'the employer' and second, a requirement on the individual personally to undertake the work.

43. There was no express written or oral contract between the Claimant and either R1 or R2. A written contract existed between R1 and CCL (not the Claimant).

44. While the Claimant signed the contract with R1 as the director of CCL the contract did not require any form of personal service on the part of the Claimant. The terms of the contract stated that it was not be construed as a contract of employment between R1 and any consultancy resource supplied; CCL was free to substitute any suitably qualified consultancy resource of its own choosing, and CCL provided its own insurance, equipment, and undertook the financial risk of non-performance under the contract. Furthermore, the focus of the engagement under the contract was upon achieving the 'deliverables' or milestones as part of each phase of the 'Get Help with Tech Project' and it was thus a particular outcome or objective rather than the Claimant undertaking work himself as an individual that was the dominant purpose of the contract.

45. In order to imply any contractual relationship between himself and R1 and/or R2, the Claimant would have had to have demonstrated a necessity to imply such a contract in order to give business effect to the reality of the existing situation. By the Claimant's own admission such contracts were not unusual in the industry and in, any event, in the absence of any further evidence from the Claimant on this issue, there was no basis on which the tribunal could make such a finding. Likewise, there was no evidence before the Tribunal to suggest that the tripartite arrangement entered into between the Claimant and R1 and R2 was either false or a sham.

Employment Judge Townley
Date: 4 July 2023