EMPLOYMENT TRIBUNALS

Claimant: Mrs M Hickox

1st Respondent: Max20 Ltd
2nd Respondent: MerseyCare NHS Foundation Trust
3rd Respondent: BSL Umbrella Limited

Heard at: Liverpool **On:** 21-22 June 2023

Before: Employment Judge Buzzard (sitting alone)

REPRESENTATION:

Claimant: In Person

1st Respondent: Mr M McNally (Solicitor)
2nd Respondent: Mrs Worthington (Solicitor)
3rd Respondent: No Appearance (no defence filed)

JUDGMENT having been sent to the parties on 29 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issue

1. The issue to be determined in this hearing was whether the claimant was an employee of any of the three respondents. At the outset of the hearing the claimant confirmed that she does not seek to suggest she was an employee of either the first or the third respondent. Accordingly, the sole issue is whether she was an employee of the second respondent.

Background Facts Summary

2. The relevant background facts were not in dispute between the parties. For context, an outline of these is summarised below.

3. The claimant worked at the premises of the second respondent. At that location she undertook work, as directed by the second respondent.

4. The claimant accepts that she did not have any form of written contract with the second respondent. She specifically confirmed that she did not suggest that an express oral contract existed between her and the second respondent.

5. The claimant was a party to a single page written tripartite contract ("Tripartite Contract"). This was between the claimant, the first and third respondent. The Tripartite Contract was initially for a period of three months, commencing from 15 March 2019. The Tripartite Contract was renewed in July 2019 for a period of a further seven weeks. That renewal was documented in a further signed document which was materially the same as the Tripartite Contract.

6. The Tripartite Contract states on it's face that it was subject to something called the '*Master Agreement for the supply of service terms and conditions*' ("Master Agreement").

7. A copy of a July 2019 version of the Master Agreement was in the bundle of evidence. When read, this is an agreement between the claimant, the first respondent and possibly the third respondent. It does not in any way appear to be an agreement with, or entered into by, the second respondent. The second respondent, in the Master Agreement, is defined and referred to as an "*end user*". The Master Agreement specifically states that the second respondent's rights are limited to any rights acquired under the Contracts (Rights of Third Parties) Act 1999. This limitation is not consistent with a suggestion that the second respondent was a party to that Agreement.

8. No further written extension or variation in any way of the Tripartite Contract beyond the July 2019 version was in evidence at this hearing. It is, however, clear from the fact that the claimant remained in post until the termination of that post in January 2022 that there must have been further renewals.

9. The claimant was, throughout the engagement, paid by the third respondent. The first respondent, throughout the claimant's engagement, made payments to the third respondent to cover the claimant's pay. The second respondent paid the first respondent for the services which were provided, which were, during the claimant's engagement, provided by the claimant.

The Law

10. For the claimant to be an employee of the second respondent there must have been a contract of employment between her and the second respondent. Noting that the claimant accepted that there was no express contract (written or otherwise), such a contract would have to have been implied for it to exist.

11. The leading case in this area is the case of **James v Greenwich London Borough Council**. In the EAT stage of that case the then President of the Employment Appeals Tribunal, Mr Justice Elias, set out relevant guidance about whether an implied contract of employment exists.

12. The effect of that guidance is to require the following two questions to be answered, namely was there a contract at all and then if there was a contract, was it a contract of employment?

13. The guidance provided by Mr Justice Elias which is relevant to this hearing relates to the first of these questions. That guidance is that a contract can only be implied where it is necessary to do so to give effect to the reality of the relationship between the parties. Mr Justice Elias made the following relevant observations:

a. For there to be a contract to exist there must be some form of mutual legal obligations, often in the workplace context that is "*not just the fact that the end user is not paying the wages, but that he cannot insist on the agency providing the particular worker at all".*

b. Even if there are such obligations, it will not be necessary, and would be rare, to imply a contract between the claimant and the second respondent if the agency arrangements in place are genuine and they can be said to accurately represent what was happening on the ground.

c. For a contract to be implied on those rare occasions referred to above, there would have to be some subsequent conduct or words that would lead to a conclusion that the agency arrangements no longer adequately reflected what was happening on the ground.

d. The mere fact that an agency worker has been with a particular client for a considerable period simply does not justify the implication of a contract.

14. In **Mitsui and Co.Ltd v Novorossiysk Shipping Co. (The Gudermis)** [10993] 1 Lloyd's Rep.311, 320 Staughton LJ stated:

> *"It is not enough to show that the parties have done something more than, or different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract."*

Submissions

15. The first respondent made no submissions.

16. The second respondent provided written submissions to which orally nothing of substance was added.

17. The third respondent was not present or represented and had made no written submissions in advance of this hearing.

18. The claimant made a number of oral submissions, and she covered a number of points in her evidence. The key points of the claimant's submissions were as follows:

a. The claimant was of the view that she was a valued and integral part of the department and team she worked in.

b. The claimant was clear that on occasions she had acted as a mentor or guide to other members of that team.

c. The claimant believes that she had been treated in the same way as staff employed by the second respondent directly, at least in terms of provision of name badges, inclusion on internal phone lists, provision of other equipment like phones and computers, and general integration into the team she worked within.

d. The claimant would often '*go the extra mile'* which, she submitted, demonstrated that she believed that she was an employee of the second respondent.

e. The claimant had never taken any sick leave or had any sick pay.

f. The claimant believed that she had to have the agreement of the second respondent if she wanted to take annual leave.

g. The claimant had never been subjected to any form of disciplinary action.

Conclusion

19. A contract between the claimant and the second respondent can only be implied if the way in which the claimant was working for the second respondent's benefit was not consistent with the agency contracts in place. In this claim, that would have to mean that the relationship between the claimant and second respondent was not consistent with the Tripartite Contract and the Master Agreement.

20. There was no evidence to suggest that the express written contracts setting out the agency arrangements were not genuine. On a careful reading of these documents there is nothing in them that suggests that they do not fully describe and explain the arrangements as they were implemented. This again does not suggest a basis to imply a contract between the claimant and the second respondent, in the words of Mr Justice Elias "*Provided the arrangements are genuine and the actual relationship is consistent with them, it is not then necessary to explain the provision of the worker's services or the fact of payment to the worker by some contract between the end user and the worker, even if such a contract would also not be inconsistent with the relationship. The express contracts themselves both explain and are consistent with the nature of the relationship and no further implied contract is justified*".

21. There was no evidence presented which could suggest in any credible way that this case would be one of the "*rare occasions*" where there have been "*some subsequent conduct or words that would lead to a conclusion that the agency arrangements no longer adequately reflected what was happening on the ground*. Taking all the above into account I am satisfied that there cannot be a conclusion that it was necessary to imply the existence of a contract between the claimant and the second respondent. The agency arrangements in place were fully consistent with the reality on the ground, and were genuine. The mere fact that those realities could also have been consistent with a contract of employment is not something that justifies or allows the implication of a contract.

22. The fact that the claimant was a valued, hardworking and effective team member of the second respondent's team, and moreover that she considered herself to be integrated into the second respondent's working arrangements does not suggest such an inconsistency. In the words of Staughton LJ *"It is not enough to show that the*

parties have done something more than, or different from, what they were already bound to do under obligations owed to others". Accordingly, the claimant's submissions relating to her efforts in the placement with the second respondent do not themselves create a need to imply a contract.

23. The fact that the claimant has been in post from early 2019 until 2022 does not itself require the implication of a contract between the claimant and the second respondent. In the words of Mr Justice Elias "*Effluxion of time does not of itself establish any mutual undertaking of legal obligations between the worker and end user*".

24. The evidence presented was that after the claimant had been terminated in her placement with the second respondent, the second respondent had then requested from the first respondent a replacement. A replacement had then been sourced and supplied to the second respondent. There was no evidence to suggest that the second respondent could, or did seek to, "*insist on the agency providing the particular worker at all",* which in this case would be insisting on the supply of the claimant specifically rather than another contractor to perform the services required.

25. Accordingly, given that there is no contract between the claimant and the second respondent, there cannot have been a contract of employment. Without a contract of employment the claimant cannot make a claim of unfair dismissal. For this reason her claim of unfair dismissal must fail and is dismissed.

Employment Judge Buzzard

Date: 31 July 2023

REASONS SENT TO THE PARTIES ON

8 August 2023

FOR THE TRIBUNAL OFFICE