EMPLOYMENT TRIBUNALS

Claimant: Mr D C Kim

Respondent: Vatech Dental Manufacturing Limited

Heard at: **London South (by Cloud Video Platform)**
On: 13 July 2023

Before: **Employment Judge Rice-Birchall**

Representation
Claimant: In Person
Respondent: Ms Berry, Counsel

JUDGMENT having been sent to the parties on 20 July 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

Background

1. By a claim form submitted on 21 December 2022, the claimant brought claims of unfair dismissal, and for notice pay and holiday pay, against the respondent.
2. In its response, the respondent contended that the Tribunal did not have jurisdiction to hear the claimant's unfair dismissal claim as he had less than two years' service. This was on the basis that the claimant was not an employee of the respondent in the period February to September 2020, when the claimant was engaged under a Marketing Agency contract (the agency agreement). As a result, he lacked the qualifying service to bring his complaint of unfair dismissal, having been employed by the respondent from 1 October 2020 until the termination of his employment on 19 August 2022.
3. The respondent also contended that all holiday pay and notice pay was paid to the claimant.
4. On 27 February 2023, the claimant was sent a strike out warning letter in relation to his claim of unfair dismissal by the Tribunal. He was also asked

to explain why he said he was entitled to notice pay and holiday pay.

5. The claimant responded making certain arguments, largely about how integrated he was in the respondent's business, as to why the claim should not be struck out by letters dated 18 and 20 March 2023.
6. The respondent, by letter of 21 March 2023, made an application to strike out the claimant's claims on the basis that they had no prospect of success on the basis set out above. That was the application being determined at this hearing.

Evidence

7. The Tribunal had the benefit of a Bundle of documents from the respondent and a number of additional documents which the claimant had sent to the Tribunal contained in a number of separate emails. There was a witness statement from Franc Jang, Managing Director of the respondent. The claimant had not prepared a witness statement but relied on his two letters to the Tribunal, referred to above, of 18 and 20 March 2023 as his evidence.

Facts

8. GVS Ltd (GVS) is a company operated and owned by the claimant, which was incorporated in 2016.
9. The claimant entered into an agency agreement with the respondent, which was commercial in nature, between February and September 2020, on behalf of his company, GVS. The claimant does not dispute the agency agreement, nor that it was entered into by GVS.
10. The agency agreement clearly states that: "nothing in this Contract or otherwise shall make any of {GVS'} employees, including but not limited to {the claimant}, and employee of {the respondent}.
11. The agency agreement was non-exclusive, which meant that the respondent could appoint alternative agents in Africa and/or market its products directly, and that GVS was not guaranteed any sales or commission.
12. Under the terms of the agreement, GVS would be paid commission only in return for introducing customers to the respondent.
13. The claimant did not earn any money during the life of the agency agreement because GVS did not meet its sales targets. He was however paid some expenses (£177.29 in total) in accordance with, and consistent with the terms of, the agency agreement (clause 5.2 and schedule 7).
14. The claimant was not obliged to attend work during the period of working for the respondent under the agency agreement, in contrast to the position once he was employed, from October 2020, under a contract of employment. Between February and September 2020, there was no obligation on the claimant to work or on the respondent to provide work.
15. The claimant was given some training into some of the products he was selling under the agency agreement.
16. Significantly, during this period, the claimant claimed furlough pay as an employee of GVS. The respondent furloughed its employees (with the exception of the senior service team). The claimant was not one of the employees furloughed by the respondent.
17. Following some correspondence between the claimant and Mr Harry Kim of the respondent, the claimant signed a deed of termination effective from 30 September 2020 by way of which the parties intended to mark the end

of the commercial arrangement in order to allow the claimant to enter into an employment relationship. This came about because, probably as a result of COVID, the claimant couldn't continue without earning any money, having earnt nothing between February and September 2020 under the terms of the agency agreement.

18. Specifically, the communication from Mr Kim to the claimant stated: "…to ensure that the time and effort invested ..do not go to waste, we discussed the extension of the commission attainment period or a change to a full time employment contract. As you know hiring someone as a full time employee, who is running a business or employed by another company is not legally valid…therefore we reached a verbal agreement to make a practical change to a part time contract….".
19. That contract was entered into on 1 October 2020. Clause 2 states that the claimant's employment with the respondent would begin on 1 October 2020 and that no employment with a previous employer would count towards his period of continuous employment with the respondent.
20. The claimant admitted that he had been paid his notice pay in full.
21. In relation to holiday pay, the claimant admitted he had been paid all outstanding annual leave on termination of his employment, but contended, at the hearing, that he was due a payment in lieu of four days when he had taken annual leave but had been needed to work whilst he was on holiday for some hours of the day.

The law

Strike out

22. The Employment Tribunal Rules of Procedure (the 2013 Rules) provide that a claim or response (or part) may be struck out at any stage of the proceedings, on five grounds, one of which is that the claimant is scandalous or vexatious or has no reasonable prospect of success (rule 37(1)(a)).
23. A Tribunal's power to strike out is a draconian measure, and case law repeatedly emphasises that the power should only be exercised in rare circumstances, due to the severity of the sanction. For a claimant it means that the claim, or part of it, comes to an end.
24. However, there are clearly cases where strike out is appropriate. No-one gains by truly hopeless cases being pursued to a full hearing.
25. Determining that one of the specified grounds on which a claim (or part) can be struck out is not determinative. The Tribunal must also consider whether to exercise its discretion to strike out.
26. The Tribunal also considered the guidance in **Cox v Adecco Group UK & Ireland and others 2021 ICR 1307** on how Tribunals should approach strike out applications against litigants in person.

Employee, worker, or self-employed

27. Section 230 of the Employment Rights Act 1996 ("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.

Case law regarding the implication of a contract

28. A contract of employment will only be implied between the end user and the worker if it is necessary to give business reality to the relationship: **James v Greenwich LBC [2007] ICR 577.**

29. There will be no need to imply such a contract where the contractual arrangements genuinely and accurately reflect the parties' relationship as the CA held at [51] – [52]: "51. 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."
30. In **Heimerl v Citibank NA ET Case No.3200700/15** it states that "the relationship between H and C mimicked an employment relationship in almost every respect — H had his own workstation at C's London office, access to all C's systems, business cards in C's name and remote logins and mobile devices belonging to C." When H sought to pursue claims of breach of contract and unlawful deductions from wages, an employment tribunal found that he was neither an employee nor a worker of C. The tribunal applied **James** (above) and concluded that, although this was an unusual situation and H's superficial resemblance to an employee was total, the contractual reality was different.
31. The EAT in **Plastic Omnium v P Horton [2023] EAT 85** held that the ET had erred in holding that the claimant was a worker of the respondent when there was no contract between them. The contract was between a company established by the claimant and the respondent and the ET had held that this contract reflected the true agreement between the parties, the reality of the situation and was of benefit to the claimant. The claimant had been offered employment and declined in favour of providing his services through a limited company. The ET had however, gone on incorrectly to have regard to **Autoclenz** and determine that the claimant's subordination and dependency were relevant. The EAT held at [59] – [61] that: "I consider that the Judge erred in law by failing to engage with what was, in my judgment, a real issue in the case: that the contract was not between the parties. … The finding that the Claimant was subordinate to others within the Respondent, and dependent (presumably upon the Respondent) as its primary or sole client, did not mean that the Judge could simply step around, or ignore that significant issue. Those issues could have been relevant to whether the written agreement reflected the reality of the agreement between the parties, or, for example, whether the structure created by it was unilaterally imposed upon the Claimant. Yet, the Judge concluded that the written agreement was in accordance with the reality, and the parties' agreement, and of benefit to the Claimant. Had the Judge applied the statutory language, perhaps using the structure set

out above, he would have identified that the first issue was in fact significant: the Claimant had worked 'under' a contract, but, importantly, not one between him and the Respondent. It was between a company which he had set up and through which he, personally, was provided to work for the Respondent by the company and through which one other member of staff was provided to work for the Respondent. I accept the submissions of the Respondent: in error, the Judge simply did not engage with that important issue."

32. Whether a contract should be implied is ultimately a matter of law and involves an objective analysis of all the relevant circumstances. The parties' understanding that there was no such contract in place is an "extremely powerful factor" militating against any such implication: **Tilson v Alstom Transport [2011] IRLR 169, CA**.
33. The claimant sought to rely on **Autoclenz** and **Pimlico Plumbers Limited and another v Smith [2018] ICR 1511** but neither case involves a tripartite agreement as was in place in this case.

Dual employment

34. In **United Taxis v Tidman and Comolly [2023] EAT 93** the EAT held that the ET had erred in holding that Mr Comolly was both an employee of Mr Tidman and a worker of United Taxis. It found that he was both things in respect of the same work at the same time. The EAT summarised the effect of the case law as follows: "the Court of Appeal and the EAT have both considered that to hold that a person was, simultaneously, the employee of two different employers in respect of the same work would be, for reasons explained, "problematic" … where the individual has been found to be the employee of one party, it cannot be necessary to imply that they are also the employee of another party in order to secure that they are not deprived of employment protection rights to which they should be entitled. … In my judgment many, if not all, of the same difficulties or conundrums, discussed in the authorities, to which dual employment under two contracts of employments with two different employers would arise, would equally arise from dual worker contracts with two different employers, having regard to the fact in particular that both entail a wage-work bargain. The same would be true, therefore, of dual employment with one employer as a worker and the other as an employee. While the EAT in Cairns observed that the problems may not be insuperable, I have not been referred to any authority which discusses how they could be overcome or holds that dual employment is legally possible. I cannot for my part see how they could be overcome." (at [44] onwards).

Case law regarding the nature of the implied contract

35. The test for employment was set out in MacKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (RMC)** at p 515: "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 others 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."

36. In terms of the first limb of the Ready Mixed Concrete test, it is helpful to have regard to explanation as to what is required to establish mutuality of obligation set out in **Revenue and Customs Commissioners v Atholl House Productions Ltd** [2022] EWCA Civ 501 at [74]: "In order to satisfy the requirement for mutuality of obligation, do there need to be obligations not only on the part of the employee to undertake some work but also on the part of the employer to offer some work or pay remuneration in place of offering work? It was long ago established that under a piecework contract the employer must offer work to the employee: **Devonald v Rosser & Sons [1906] 2 KB 728**. It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work: see **Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612**, **Carmichael v National Power plc [1999] ICR 1226**, 1230G—1231A, per Lord Irvine of Lairg LC, **Usetech Ltd v Young [2004] STC 1671** at paras 55—65, **Professional Game Match Offcials Ltd v Revenue and Customs Comrs** [2022] 1 All ER 971 at paras 120—124." 20. It has been established that mutuality of obligation and personal service must be established before the ET goes on to consider the third limb of the Ready Mixed Concrete test (as per Atholl House at [98] – [100]).

Conclusions

Notice pay

37. The Tribunal had no hesitation in striking out the claim for notice pay (breach of contract) on the basis that the claimant admitted that he had been paid his contractual and/or statutory notice pay in full. That claim therefore has no prospect of success. The Tribunal considered wther I should exercise its discretion to strike out the claim. As it would be a waste of Tribunal resource for this part of the claim to proceed, and therefore not in accordance with the overriding objective, the Tribunal has decided to exercise its discretion to strike out the claim.

Employment status/length of service

38. The Tribunal has concluded that there is no reasonable prospect of the claimant succeeding in showing that he was an employee during the period of February - September 2020, or prior to 1 October 2020, when the claimant and the respondent entered into a contract of employment.
39. Accordingly, the claimant has no reasonable prospect of being able to show that he has sufficient service, namely that he was employed for the minimum two year period, before his termination date of 19 August 2022, to bring a claim of unfair dismissal.
40. The claimant has not asserted that there was a written or oral agreement between him personally and the respondent prior to 1 October 2020 and has not disputed the existence of the agency agreement between GVS and the respondent, through which he provided his services, between February and October 2020.
41. Throughout the period of February to September 2020, there was clear contractual documentation in place between GVS and the respondent which did not reflect an employment relationship but which accurately

reflected the relationship between GVS, the claimant and the respondent.

42. It was the clear intention of the parties at the time that the agency agreement was entered into that this was different to that of an employment relationship because it was acknowledged that the claimant was a director and employee of GVS. This clarity was re-inforced during discussions about the termination of the agency agreement in favour of the employment contract.
43. The agreement in place was such that the claimant was engaged, through GVS, of whom he was an employee, throughout that period. In all respects he was treated by the respondent consistently with being an agent whilst that agreement was in place.
44. The claimant has not alleged that any term or terms of the agency agreement did not genuinely and accurately reflect the parties' relationship.
45. In fact, the agency arrangement as presented on paper reflected the relationship. For example, GVS was reimbursed for expenses incurred in accordance with the agency agreement and was held to agreed sales targets. Neither GVS nor the claimant were paid any remuneration or commission prior to October 2020, consistent with the terms of the agency agreement (on the basis that the agreed targets in the agency agreement had not been met).
46. The email communication around the termination of the agency agreement and entering into the employment contract is clear and consistent. There is no evidence of any misunderstanding or lack of clarity on the part of the claimant or the respondent. Indeed, the claimant referred to what was written as being clear. Also Harry Kim makes it clear for the claimant that he can't be an employee of the respondent whilst working for the respondent through the agency agreement whilst he was working for GVS. This is entirely consistent with an understanding that the relationship between the claimant and the respondent changed in October 2020 and reflected the intentions of the parties at that time.
47. It was the claimant who asked for a new arrangement, and who agreed to terminate the agency agreement by a formal deed of termination and enter into a new part time employment contract.
48. Some significant changes marked the start of the employment relationship including that the claimant was paid monthly, had access to the respondent's intranet OASIS and was required to attend the office.
49. Accordingly, the Tribunal is satisfied that the contractual documentation in place, namely the agency agreement for the period under dispute, was a true reflection of the business relationship between GVS, the claimant and the respondent, and that there is no need to imply a contract or terms to reflect the true nature of the relationship between the claimant and the respondent.
50. The claimant relies heavily on the nature of his relationship with the respondent and in particular with Harry Kim and the amount of effort and work he put in but that is neither quantifiable nor relevant as to whether or not he was an employee.
51. The claimant also asserts that he was "fully integrated" into the respondent's business prior to 1 October 2020 and that he worked hard to market their products. However, the test for implying a contract of employment is not met by the claimant demonstrating that he was integrated into the respondent's organisation. It is common for an agency worker on a long-term placement to be fully integrated into the end user's organisation and to be held out as its representative to third parties.

However, that does not mean that the claimant is in law an employee of the end user respondent.

52. The fact that the claimant was given some training into some of the products be was selling under the agency agreement is consistent with him not being an employee, and is consistent with the commercial nature of the agency agreement, given the claimant was contracted to introduce customers. He would need to know about the products.
53. The factual matrix is not consistent with a contract for service. There was no mutuality of obligation. The agency agreement contained no guarantee of paid work, sales or commission for GVS or the claimant and nothing in the parties' conduct prior to October 2020 contradicts these express terms. The claimant confirmed in evidence that he wasn't required to attend the office under the agency agreement and he was not entitled to wages.
54. In any event, even if that were not the case, **Comolly** says that, in respect of the same work, there cannot be two employers. The claimant was an employee of GVS and claimed furlough pay as such during the February to September 2020 period. It is simply not arguable that the claimant could have been an employee of the respondent at the same time.
55. Finally, the claimant sought to argue that he would, in any event, get to two years continuity of service if one added on any untaken holiday and notice but there is no legal basis for this, other than in respect of statutory notice in circumstances in which no notice has been given, which would, in any event, be insufficient.
56. The Tribunal has considered whether or not to exercise its discretion in these circumstances to strike out the claimant's claim of unfair dismissal as having no prospect of success. The Tribunal considers that it should exercise its discretion to do so, on the basis of saving expense in accordance with the overriding objective.

Holiday pay

57. For the first time in submissions the claimant advanced the argument that he was relying on four days when he was on holiday when he had done some work. That this was his claim had not been made clear before the hearing. The respondent had hitherto believed his claim was based on annual leave outstanding on the termination of the claimant's employment.
58. The claimant sought to argue that there was an unwritten agreement that any days on which the claimant had worked whilst on holiday would be reimbursed.
59. This was not a claim properly advanced by the claimant, who admitted that holiday pay outstanding on the termination of his employment in all other respects had been paid.
60. The claim therefore has no reasonable prospect of success and is struck out. Again, and for the reasons set out above, the Tribunal has no hesitation in exercising its discretion in so doing.
61. All of the claimant's claims (of unfair dismissal and for notice pay and for unpaid holiday pay) are struck out because they have no reasonable prospect of success.
62. The Tribunal has considered whether or not to exercise its discretion in these circumstances to strike out the claimant's claim of unfair dismissal as having no prospect of success. The Tribunal considers that it should exercise its discretion to do so, on the basis of saving expense in accordance with the overriding objective.

Employment Judge **Rice-Birchall**
Date: 23 August 2023