EMPLOYMENT TRIBUNALS

Claimant: Mr. R Vician

Respondent: BAE Systems (Operations) Limited

Heard at: London South, by video

On: 2 May 2024

Before: Employment Judge Cawthray

Representation
Claimant: In person, not legally qualified
Respondent: Ms. G Nicholls, Counsel and Mr. Pickard observing

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent at the relevant time. The breach of contract claim is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

2. Further and or in the alternative, the claim is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

REASONS

Introduction

1. A Case Management Preliminary Hearing took place on 4 March 2023. That hearing had been listed as a public preliminary hearing to consider the issues being addressed today. However, it was not possible for those issues to be considered in full at that hearing as time was spent clarifying the claim.

2. At the hearing today, both parties had a copy of a file of documents containing an index and 118 pages. I was referred to various documents in the file throughout the course of the hearing.

3. The Claimant had prepared a written statement, that also included a section on legal argument. The Claimant affirmed his written statement and was cross-examined.

4. Mr. McGarry, witness for the Respondent, had produced a witness statement, which he affirmed, and the Claimant cross examined him.

5. I asked several clarification questions.

6. Ms. Nicholls had submitted a written skeleton argument on behalf of the Respondent. Both the Claimant and Ms. Nicholls gave oral closing submissions.

7. No adjustments were required for any attendee and regular breaks were taken throughout the hearing. I explained the process of giving and challenging of evidence and making submissions at the start of the hearing.

Issues

8. The issues for determination are set out below.

    a. Who the Claimant's employer was;

    b. Whether to strike out the Claimant's claim on the basis that it has no reasonable prospect of success; and

    c. Whether to make a deposit order on the basis the Claimant's claim has little reasonable prospect of success.

9. At the start of the hearing I sought to clarify the basis of the Respondent's application for strike out and Ms. Nicholls confirmed that the application for strike out was on the basis that there was no reasonable prospect of success because the Respondent was not the Claimant's employer and a breach of contract claim can only succeed against a claimant's employer.

10. The only claim pursued is a breach of contract complaint. This was clarified at the Case Management Preliminary Hearing on 4 March 2024.

Facts

11. I have reached the findings of fact as set out below based on the evidence provided.

12. The Respondent operated a programme known as the Evergreen Programme and identified that it required project management resource. The Claimant was recommended to members of the Respondent's management by Rob Grace. Rob Grace was a contractor.

13. On 9 and 15 February 2023 the Claimant discussed the Evergreen Programme with Gosia Kozlowski and Anish Dhanecha, Evergreen Programme Manager and Head of IT respectively (referenced as Gosia and Anish).

14. Gosia and Anish decided that the Claimant would be a good fit to provide the services in relation to the Evergreen Programme.

15. The Respondent is not permitted to engage contractors unless they are on a preferred supplier list. The Respondent may use preferred suppliers to provide it with a list of people that may be suitable for any particular project and in other situations it may be recommended a particular person or seek out a specific person for a role/project. However, regardless of how a contractor is sourced, they must be registered with a recognised supplier.

16. Mr McGarry took over as the Head of IT on 1 March 2023. It was at this stage that he became involved in the engagement of the Claimant.

17. Due to the Respondents requirement that any contractor must be on a preferred supplier list the Claimant was introduced to Baytree Labs Ltd. (**Baytree Labs).** Mr. McGarry arranged contact in order to facilitate a smooth and swift on boarding process.

18. On 17 February 2023 Shakeel Dodhy emailed the Claimant. He introduced himself and explained:

    "… I work for a company called Baytree Labs. It is through our company that we will be managing your engagement with BAE Systems.

    We understand this agreement needs to be inside IR35. The way we do this at Baytree Labs is to bring you in as an employee of Baytree Labs. Naturally we will arrange your salary so that it equates to what has been agreed between you and BAE Systems, £625 (Gross)/day."

19. The email also provided information regarding security forms and a starter checklist.

20. The Claimant was provided with a contract of employment from Baytree Labs. The contract of the employment of employment clearly sets out that the employer is Baytree Labs. It also sets out of the key terms of the employment relationship between. There is also a provision in relation to third-party pressure. The contract was due to be for a fixed term period of six months and the contract contains a clause with provision for service of notice. The contract notes the Claimant will primarily be working remotely with time in BAE Systems office when required.

21. The Claimant signed the contract of employment and I find that at the time the Claimant understood that Baytree Labs was his employer. He raised no concerns about the arrangement.

22. Emails between Mr McGarry and Mital indicate that the respondent required the arrangement to be inclusive of IR35.

23. The Claimant started doing work for the Respondent on 13 March 2023.

24. On 13 March 2023 Baytree Labs sent the Respondent an invoice. It is headed "Estimate BAEREAS_RV01" and states:

    Service Consulting Services of Roman Vician from 13 March 2023 to 30 Sep 2023

    Net total 135,976.87 20% 135,976.87

    VAT 27,195.37

    GBP Total £163,172.24

25. The Respondent produced a purchase order dated 30 March 2023 which includes terms.

26. Baytree Labs paid the Claimant his salary throughout the period of his engagement.

27. Whilst providing work on the Evergreen Project for the Respondent the Claimant undertook around 98% of his work from home. Mr McGarry did not have contact with the Claimant regarding work matters whilst he was working on the Evergreen Project and the Claimant's contact was mostly with Gosia.

28. The Respondent made a business decision to reduce resource on the Evergreen Programme. Mr. McGarry had not seen the Claimant's contract of employment.

29. On 5 June 2023 Mr. McGarry emailed Mitul at Baytree, the email stated:

    "Hope you are keeping well. I think I touched on this before but we are looking to end Roman's contract, he has yet to be notified.

    We thought the notice period was 4 weeks, but Rob Grace believes his notice period from yourselves is 2 weeks, can you please confirm Roman's notice period."

30. Mitul replied the same day and within the email stated:

    "I do recall you mentioning Roman. I have just re-checked his contract and his notice period is 1 month.

    Once you let me know, I'll ensure he is notified and we can start the exit process."

31. At the time, Mr. McGarry did not appreciate the difference between a one month notice period and four weeks.

32. On 6 June 2023 Mr. McGarry exchanged emails on the matter with Gosia. Within the emails he told Gosia that he had: *"told*

the DTX contractors that we were letting them go and then notified their organisation."

33. Gosia replied: *"Ah, I thought it would come from Baytree. I actually wasn't in that position before so if you could help me with that and have that conversation with Roman I would appreciate that."*

34. Mr. McGarry considered that the courteous thing to do would be to inform the Claimant that he was no longer needed directly, rather than via Baytree Labs given his work on the project. Mr. McGarry telephoned the Claimant on 6 June 2023 and told the Claimant he would no longer be required. The Claimant has not provided any evidence in his witness statement regarding the details of the conversation and I accept the account set out at paragraph 15 of Mr. McGarry's statement.

35. The following day, 7 June 2023, Mr. McGarry emailed Mitul and said:

"Unfortunately given the state of the Evergreen project we had to give Roman 4 weeks notice yesterday that we needed to end his contract.

Could you please arrange."

36. Mitul replied: *"Thank you for letting me know. It is unfortunate news, but I appreciate the situation at hand. We will take the necessary steps from our end."*

37. Later that same day, Shakeel Dodhy of Baytree Labs emailed the Claimant:

"I have just been informed by my colleague at Baytree Labs that he was informed by BAE Systems today that, due to the state of the Evergreen Programme you were given 4 weeks' notice on your role on this programme.

I am sorry that this is the case but unfortunately, this means that we officially must terminate your contract with Baytree Labs Ltd. Please consider this Baytree Labs' official 4 weeks' notice. This means your official last day will be Wednesday, 5th July 2023.

Regarding your BAE equipment I will liaise with you on how and when these items will be returned to BAE Systems."

38. There were numerous emails exchanged between 8 June and 26 June 2023 regarding notice period and termination arrangements. The Claimant did not challenge the identity of his employer in the email correspondence.

39. In one of the email's Mr. McGarry emailed the Claimant on 16 June 2023 stating:

"Please take this email as written confirmation of termination of your contact.

Mitul, can you please advise Roman any outstanding holiday balance, and confirm termination date."

40. This email was in response to an email from the Claimant in which he said *"I don't have a confirmed termination of contract".*

41. In an email dated 20 June 2023 Mital stated that he considered Mr. McGarry's email as simply re-confirming the contract was being terminated.

42. On 26 June 2023, Mr. Dodhy sent the Claimant a letter on Baytree headed paper stating:

"This letter officially confirms the termination date of your employment with Baytree Labs Ltd and thus your services to BAE Systems Ltd. As agreed, your final day will be 14 July 2023.

You are entitled to your salary up until 14 July 2023 and we will also compensate you for any outstanding annual leave. Based on your contract start date of 13th March 2023 to your termination date of 14th July 2023, your remaining annual leave equates to one day.

Your final salary will be paid on the 31 July 2023.

Regarding your IT equipment and your BAE Security pass, you must return these items to BAE Systems Security Office, Rochester on 14 July 2023."

43. The Claimant's last day in providing work to the Respondent was 14 July 2023. The Claimant emailed both Mr. McGarry and Mitul on 25 August 2023 querying holiday pay. Mr. McGarry replied on 31 August 2023 stating his view that the matter was for Baytree Labs as the Claimant's employer.

ACAS Early Conciliation & Claim forms

44. Early Conciliation with the Respondent started on 17 July 2023 and ended on 18 August 2023. The Claimant submitted his claim against the Respondent on 10 October 2023. Within box 8.1 of the claim form he states:

"BAE Systems created a 'Sham Contracting' engagement. BAE exerted undue pressure on my employer, resulting in breach of contract and

financial loss."

45. In box 8.2, the Claimant sets out some chronological detail. He uses the word engagement with reference to the Respondent. He sets out that he is seeking the sum of £34,334.67 in relation to what he considered to be the remainder of his fixed term.

46. The Claimant submitted a claim against Baytree Labs on 16 October 2023. The basis of the claim appears to be in relation to holiday pay and notice. In the claim form, at box 8.2, the Claimant includes *"Baytree labs breached the terms of our fixed term contract…"* The Claimant also references the Employee Handbook. In section 15 the Claimant states: *"The contract termination process was prolonged and Baytree Labs executed the termination very badly causing me considerable distress".*

Law

Employment Status

47. The Respondent cited the following cases in its written skeleton:

Hewlett Packard Limited v O'Murphy 2002 IRLR 4, EAT

James v Greenwich London Borough Council 2007 ICR 577

Cable and Wireless plc v Muscat 2006 ICR 975, CA

48. The Claimant referenced:

Autoclenz Ltd v Belcher [2011] UKSC 41
Pimlico Plumbers Ltd & Anor v Smith [2018] UKSC 29

49. I had regard to other key cases as noted below.

Section 230 of the Employment Rights Act 1996 states:

"(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."

50. 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.

Essential elements of a contract of employment

51. 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.

52. 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.

53. 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

54. 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.

55. 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

56. Where an individual provides services through an employment agency, there will typically be a tripartite arrangement. There will usually be a contract/documentation between the individual and the agency and another contract between the agency and the person to whom the services are provided (the end user).

57. When looking at arrangements between the person providing the services and end-users, the courts have been very reluctant to conclude that a person that is supplied by an employment business is an employee of the end-user. This position has derived from situations where both the worker

and end-user contract with the supplier and there is no express contract between them directly.

58. There may be circumstances where it is possible to imply a contractual relationship between the worked and the end user, but this is rare, and guidance was issued to Tribunals in deciding whether or not to imply a contract of employment.

59. 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.

60. 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".

61. 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."

62. The courts and tribunals 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.*

63. Elias P, at paragraph 37 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."

64. Guidance on the approach to be taken by Tribunals was given in *James v Greenwich London Borough Council [2007] ICR 577 EAT* and was expressly endorsed by the Court of Appeal. The Court of Appeal confirmed 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. In the Court's view, there will be no such necessity where agency arrangements are genuine and accurately represent the relationship between the parties.

65. The key elements of the guidance are summarised below:

    -whether the contract is performed in a way that 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

    -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

    -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 fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract, something else is required

    -it will be more readily open to a tribunal to imply a contract where the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user.

66. 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.

The legal principles – strike out orders and deposit orders Deposit Orders

Strike Out

67. Under Rule 37 a claim or part of a claim can be struck out on grounds that include it has no reasonable prospect of success. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

68. Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

Striking out

37.

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) or non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

69. Operation of rule 37(1)(a) requires a two stage test.

70. Firstly, has the strike out ground (here "no reasonable prospect of success") been established on the facts.

71. If so, secondly is it just to proceed to a strike out in all the circumstances (which will include considering whether other lesser, measures might suffice).

72. When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely *(Balls v Downham Market High School and College [2011] IRLR 217).* The Tribunal must take the allegations in the claimant's case at their highest. If there remain

disputed facts there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible (*Ukegheson v Haringey London Borough Council [2015] ICR 1285; Merchkarov v Citibank NA [2016] ICR 1121).* In other words a strike out application has to be approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact.

73. In *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330* the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in *Ezsias,* where the facts sought to be established by the claimant were *'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'* (para 29, per Maurice Kay LJ).

74. A strike out application succeeds where it is found that, even if all the facts were as pleaded by the claimant, the complaint would have no reasonable prospect of success. It was said by Underhill LJ in *Ahir v British Airways [2017] EWCA Civ 1392* that *"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment… Nevertheless it remains the case that the hurdle is high, and specifically that it is higher than the test for making a deposit order, which is that there should be "little reasonable prospect of success."*

75. Where a litigant in person is involved the tribunal should not simply ask the question orally to be taken to the relevant material in support of the claim but should also carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it*; Cox v Adecco Group UK [2021] 1CR 1307.*

76. If a strike out application fails the argument about the overall merit of the claim is not decided in the claimant's favour. Both the claimant and the

respondent argue their positions on the merits in full and afresh at the full hearing.

77. *Yorke v Glaxosmithkline Serviced Limited*, at paragraph 51, HHJ Tayler states: *"Where the parties are represented it is the representatives that bear the principle responsibility for ensuring that the list of issues is up to the job".*

78. Although a poorly pleaded case presents difficulties for the tribunal, striking out the claim is rarely the answer. In case where there is a litigant in person, as established in *Mbuisa v Cygnet Healthcare Ltd EAT 0119/18* the proper course of action would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and make a deposit order if appropriate.

Deposit Order

79. The power to make a deposit order is provided by rule 39 of the ET Rules, as follows:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

80. The test for the ordering of a deposit is therefore that the party has little reasonable prospect success. It was said by the Employment Appeal Tribunal in *Hemdan v Ishmail [2017] IRLR 228* that the purpose of a deposit order is *"To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails"* and it is "*emphatically not…to make it difficult to access justice or effect a strike out through the back door."* A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.

81. As for the approach the Tribunal should take, in *Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 and Van Rensburg v Royal Borough of Kingston-UponThames and others [2007] UKEAT/0095/07* it was said, a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a balance to be struck as to how far such an analysis can go. It was also made clear in *Hemdan* that a mini-trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested.

82. The Respondent pursues the application as an alternative to their strike out application. The test is therefore one of "little reasonable prospect of success" as opposed to "no reasonable prospect of success" for a strike out application.

83. Rule 39 allows a tribunal to use a deposit order as a less draconian alternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success.

84. In *Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames UKEAT/0096/07,* the EAT observed: "27. … the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of

the party being able to establish the facts essential to the claim or response."

85. A deposit order application has a broader scope compared to a strike out application and gives the Tribunal a wide discretion not restricted to considering purely legal questions. The Tribunal can have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it.

86. In a case where a Tribunal concludes that a claim or allegation has little reasonable prospect of success, it does not mean that a deposit order must be made. The Tribunal retains a discretion in the matter and the power to make such a deposit order has to be exercised in accordance with the overriding objective and with having regard to all of the circumstances of the particular case.

Conclusions

87. I have set out below my conclusions on each issue as far as required. I have considered the authorities referenced and the submissions made by both parties and applied the law to my findings of fact in order to reach my conclusions.

88. In order to bring a breach of contact claim against the Respondent the Claimant must first establish that he was an employee of the Respondent.

Employment Status

89. The Respondent submitted that the Claimant was employed by Baytree Labs and this was known and accepted by the Claimant throughout his employment. It submits that that there was a genuine agency arrangement and there was no contractual relationship between it and the Claimant. It is further submitted that the threshold for establishing employment status is high, and an employment relationship should only be implied between an agency worker and an end user where it is necessary to give effect to the reality of the relationship.

90. It was submitted by the Respondent that this was not a case where there was anything odd or unusual and that it was not necessary to look behind the contractual terms as there was no sham arrangement, and therefore this was not a case where *Autoclenz* applied.

91. In regard to *Pimlico,* the Respondent submitted that case related to worker status, and that the present claim requires the Claimant to be an employee to pursue a breach of contract claim and therefore is not relevant.

92. The Claimant submitted that the identity of the employer comes down to who has control of the employee and who carries the risk. The Claimant said there was no contact with Baytree Labs other than when the Respondent instructed them to employ him. He further submitted that

there was collusion between the Respondent and Baytree Labs and an overlap on which organisation thought they had the right to terminate the Claimant's contract. He submitted that he was in effect an employee of the Respondent and suggested there was non-compliance with IR35.

93. As set out in the findings of fact above, the Claimant appears to have understood that Baytree Labs was his employer throughout his time working at the Respondent. Indeed, this view is reflected in the contents of his two claim forms submitted to the Tribunal in October 2023. I concluded that the employment arrangements were clearly explained and known to the Claimant at the start and throughout his time working at the Respondent.

94. The documentation in the Bundle clearly records the employment relationship between Baytree Labs and the Claimant. The reason for the Claimant being employed by Baytree Labs is clear, the Respondent cannot engage contractors directly and must use preferred suppliers. There is also documentation between the Respondent and Baytree Labs, and the Respondent paid sums in addition to the day rate due to the Claimant to Baytree Labs as part of the agreement between them.

95. There was no evidence before me that there was anything else that took place during the time that the Claimant was working on the Evergreen Project that changed the nature of the working relationships between the Respondent and the Claimant or I the Respondent and Baytree Labs.

96. Contact and instructions from staff at the Respondent is to be expected given the Claimant was working on a particular project, as is a degree of integration and there will inevitably be control over what is done and how.

97. I do not see that Mr. McGarry being courteous and telling the Claimant that he would no longer be required to work on the Evergreen project in advance of notification from Baytree Labs was an event that changed the nature of the relationship or could be used to imply an employment relationship between the parties.

98. I conclude that both separately and together, daily contact with management at the Respondent and Mr. McGarry informing the Claimant that he was no longer required as a matter of courtesy, is/are not sufficient to imply a contract between the Claimant and Respondent.

99. I conclude 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.

100. In order to succeed in establishing that he is an employee of the Respondent, the Claimant must show that there is a legal basis for implying a contract of employment between himself 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.

101. I do not consider this to be a case where implying a contract is necessary to give reality to the arrangements. The arrangements were clear, and indeed understood. There was no subsequent change.

102. I have considered the guidance in *James* and applying to the facts in this case I have concluded there are no grounds to set aside the contractual agreements in place to infer a direct employment relationship between the Claimant and the Respondent. The relationship only lasted three months, there was no evidence it had evolved and no evidence the agreements no longer reflected the relationship between the parties. The manner in which the Claimant worked was consistent with the agency arrangements in place.

103. I have concluded that the Claimant has failed to show that his arrangements with the Respondent could only be explained by the necessary existence of a contract of employment between them in the circumstances of this case.

104. I have concluded that the Claimant was employed by Baytree Labs Ltd and not by the Respondent. The breach of contract claim against the Respondent is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

Strike Out

105. As set out in the summary of the law above, the first matter to consider is whether the ground on which the application has been made has been established on the fact. In this case, the ground is that there are no reasonable prospects of success.

106. I have concluded that the ground is established based on the facts set out above and the reasons set out regarding who employed the Claimant.

107. I must then consider whether it is just to proceed to a strike out in all the circumstances, and consider whether another other measure would suffice.

108. The Claimant has brought a breach of contract complaint against the Respondent. Such a claim can only be pursued against the employer. The Respondent was not the Claimant's employer, and therefore the Tribunal does not have jurisdiction to consider the claim which means therefore means the claim therefore has no reasonable prospect of success. The claim is struck out.

109. It is noted that the Claimant feels the situation has led to a position where he feels that he lacked protection. However, it is a matter for the

Respondent for how it structures arrangements for short term staff and the Claimant is able, and indeed has, to pursue a claim in the Employment Tribunal against his employer, Baytree Labs Ltd. The Tribunal must apply the law that is in force.

Deposit Order

110. As the claim has been struck out on the basis that there is no reasonable prospect of success it was not necessary for me to consider whether a deposit order should be made.

_____
Employment Judge Cawthray

_____

Date: **5 June 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
20 June 2024
.....

.....
FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/