EMPLOYMENT TRIBUNALS

Claimant: Mr S Gijare

Respondent: Ent Serv UK Limited

Heard at: Bury St Edmonds (by CVP) **On:** 1 May & 21 June 2024

Before: Employment Judge Emery

REPRESENTATION:

Claimant: In person
Respondent: Mr F Mortin (counsel)

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant was not an employee of the respondent at the relevant time. The claim of unfair dismissal is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

2. The claimant was a contract worker of the respondent within the meaning of section 41 of the Equality Act 2010 at the relevant time. The claim of race discrimination against the respondent can therefore proceed.

3. The respondent's applications - that the claims of race discrimination be struck-out or that a deposit be ordered to be paid - fail and are dismissed.

REASONS

The Issues

1. Reasons were provided at the hearing; written reasons were requested.

2. The claimant's case (in answer to a question at this hearing) is that "when he landed" in the UK he became an employee of the respondent, as defined by the Employment Rights Act. Alternatively, he says that he was an employee as defined by s.83(2)(a) Equality Act 2010, employed under a contract personally to do work.

3. The respondent does not accept that the claimant was employed by it; it accepts he was a contract worker, and it was the principal (s.41(5) Equality Act 2010).

4. The respondent says that the claimant was on secondment to it from his employer, EIT Services India Private Limited (EIT India) the India-based Group company of the respondent. The respondent argues that the claimant was employed and paid throughout his assignment by EIT India.

5. The issues to be determined at this hearing:

    a. Was the claimant an employee of the respondent? If he was not, the claim of unfair dismissal will be struck-out.
    b. Should some or all of the claims of race discrimination and/or disability discrimination be struck-out on the basis that they stand no reasonable prospects of success?
    c. Should a deposit be ordered to be paid by the claimant on the basis that some of all of the claims of race discrimination and/or disability discrimination stand little reasonable prospects of success?

Witnesses and evidence

6. The claimant provided a witness statement and gave evidence on his status with the respondent and the impact on his medical condition on his day-to-day activities.

7. For the respondent Mr Jaspal Singh Basra give evidence. Part-way through Mr Basra's evidence the claimant made the case that, for immigration purposes, he was classed as an employee by the respondent, that he had a skilled worker's visa and this visa required him to be in employment with the sponsoring company.

8. The respondent was unable to respond to this allegation, as it was unaware of the immigration rule or the respondent's actions in seeking that visa. I was of the view that there were significant issues for the respondent if the claimant's contention

was correct. Mr Mortin needed to take instructions, the only realistic source of information was Mr Basra who was under oath.

9. Given this situation I released Mr Basra from his oath to enable him to give instructions and to collate the respondent's evidence on this issue, I adjourned the hearing.

10. At the re-listed hearing Mr Basra served a revised witness statement addressing the skilled workers visa issue, Mr Mortin provided an amended Skeleton Argument. A supplemental bundle of documents was provided, the claimant having received this prior to the hearing. The claimant gave evidence again on this issue, Mr Basra recommenced his evidence from where it had left off.

The relevant facts

11. The claimant was engaged in July 2010 by EIT India. Both the respondent and EIT India are wholly owned by DXC Technology, a global IT infrastructure company.

12. It is accepted that from February 2018 the claimant was on what he describes in his ET1 an "international assignment" from EIT India to the respondent.

13. The claimant signed a secondment letter between him and EIT India on 15 February 2018. It was for an initial period of 12 months (99). The secondment was extended in April 2019 (105) and April 2020 (106). In his evidence the claimant accepted that the secondment letter was the only contractual documentation he received while he was engaged by the respondent.

14. The claimant's secondment was to work on an IT infrastructure project at Rolls Royce in Derby as Project Manager. This project was a contract between the respondent and Rolls Royce

15. The terms of the secondment were:

    a. The secondment was for 12 months but could be changed "at the discretion" of EIT India
    b. He was required to file tax returns in the UK and India
    c. Some of his salary was paid in India, some in the UK
    d. He and his family were not allowed to work in the UK beyond his work permit approval dates

16. The respondent sponsored the claimant's Tier 2 inter-company transfer (ICT) visa from February 2018 to February 2021. This visa was renewed to February 2023.

17. The claimant says that his status as an employee can be seen on the "Immigration Connect" system run by Fragomen, who are the respondent's immigration service provider. This says that the claimant's "present job details" state his employer is

"EntServe UK Limited" (108). The respondent says that the reference to 'employer' is from Fragomen's own systems, to reflect the sponsor of that worker, rather than their formal employment status with that sponsor.

18. The claimant says that he received a letter from the respondent confirming it was his employer; he has not got a copy of this letter, which he has sent to the Home Office for immigration purposes. He says that whenever his visa was renewed, the work permit was issued under cover of a letter from the respondent.

19. The claimant also relies on a letter dated 22 December 2018 from Fragomen to the Home Office Visa Application Centre in Bangalore, India, as evidence of his status. This states that the claimant has "been issued with a Certificate of Sponsorship to facilitate his employment with EntServe UK Limited in the UK for 3 years." (283).

20. The claimant's place of work throughout was the Rolls Royce premises in Derby. He says that he reported to both Rolls Royce and the respondent's management. The claimant says his team who worked under him and to his direction were employed by the respondent "I give directions to Entserve employees." He says he reported to the Programme Protocol Lead (or Portfolio Lead), employed by the respondent, Mr Gary Miller.

21. The claimant had a DXC email address, so did Mr Miller and, he says, his team on this Project. None had a respondent email address. He points to Mr Basra, the respondent's witness, employed by the respondent but also with a DXC email.

22. The claimant's case is that internal systems showed him as an employee of the respondent – for example billing sheets and timesheets. He says that he and Mr Miller were integrated into the respondent. He says that he was "customer facing" i.e. dealing mainly with Rolls Royce personnel, while Mr Miller would be overseeing the project, undertaking progress tracking and weekly reporting. He accepted that he would receive instructions from Rolls Royce employees, it was Rolls Royce's contract. He accepted that he "worked heavily" with Rolls Royce employees, arguing also that it was part of his role to integrate with Rolls Royce and other organisations involved in the project, including for example BT.

23. The claimant accepts that his supervisor included a manager in India, he also says he was supervised by the Portfolio Lead. He accepts that his annual performance review was undertaken by a manager at EIT India, he argued that this was based on input from his Portfolio Lead. He accepts that EIT India "integrated the feedback" he received, that the EIT India manager gave him his performance review scores. The claimant did not accept that this meant he was an employee of EIT India.

24. The claimant's salary was paid to him as 'split-pay': his basic salary was paid by EIT India into an Indian bank account in India; the remainder, which included UK

living allowance was paid by a UK subsidiary of EIT India (not the respondent) into a UK account.

25. The parties agree that the claimant sought a permanent international transfer (PIT) to the respondent through its internal processes in 2021, in the main for personal reasons relating to his family.

26. The claimant's evidence was that the decision to apply for a PIT was made by him and agreed with his line manager at the time, who has since left the respondent.

27. The respondent argues that the fact that the claimant applied for PIT shows that he accepted he was not employed at this time by the respondent, hence his application to transfer. The claimant says this does not mean he was not the respondent's employee, he argues that he was required to go through these steps, he was required to input information onto the respondent's template in order to progress his status.

28. The parties agree that the claimant's PIT application was being considered over a lengthy period of time, that by January 2023 it had not been determined. As a consequence, because his latest Tier 2 ICT visa was coming to an end, the respondent agreed to apply for a further visa for a period of 3 years. This was granted in January 2023 as a Skilled Workers Visa. At around the same time, the respondent extended the claimant's secondment for a further 6 months, to 30 June 2023.

29. The claimant says, and I accept, that the "purpose" of extending his visa in 2023 for a further three years was to enable his application for permanent transfer to the respondent to continue to be processed.

30. The claimant argues that by applying for a Skilled Workers Visa, the respondent accepted he was its employee; he says a precondition for gaining a Skilled Workers Visa was that he was an employee of the sponsor. He argues that he therefore had permission to work for the respondent as his employer. He says that his employment status with the respondent must have been part of the respondent's application for his Skilled Workers Visa.

31. The claimant's argues there is clear guidance from UKVI on the responsibilities of the sponsor as the employer, that this means his status must be that of employee.

32. Mr Basra argued at the reconvened hearing that the sponsoring entity need not be the legal employer for a skilled workers visa; that it is common to have workers on secondment to the UK who require a visa but who remain employed in their country of origin.

33. The documents disclosed at the reconvened hearing show the following:

a. On 16 January 2024 the claimant was told a skilled worker's visa was being applied for
b. The decision to apply for a skilled workers visa instead of a Tier 2 ICT visa was made in discussions between the respondent and Fragomen, whose advice was that a new Tier 2 ICT visa was not possible because of the claimant's salary level (supplemental bundle 55)
c. On the documents sent to the claimant at this time by Fragomen, the claimant is told he must have been "offered a job" by the sponsoring company (SB70).

34. The respondent says that its reasons for informing the claimant on 24 May 2023 that it had decided not to grant a PIT, and to terminate his secondment on 30 June 2023, include the following: there was no commercial reason why the secondment should continue, there were financial reasons and performance reasons for this decision, the claimant's role could be done by others; EIT India required the claimant to return to his role in India.

35. The claimant accepts that he was dismissed by EIT India in October 2023 because he had not relocated back to India and started work as instructed; he submitted some medical certificates to India during this period. The reason for dismissal was his unauthorised absence (357). He accepted that this suggests he was employed by EIT India.

36. On the claim of race discrimination and the respondent's application to strike-out or a deposit order. The claimant's case is that his performance was regarded as good, there were no issues with the way he did his role and this is why the respondent went through the process of the ICT. He says that his manager was fully supportive of the ICT, and he expected therefore to transfer.

37. Instead, he says that his role was "handed over" to another employee, based in Singapore, Ms L Roxas. The respondent told him that his role was being moved offshore, but in fact Ms Roxas was "flown in" to the UK to undertake it. This happened only to his role, no other employee was similarly affected. The respondent does not accept Ms Roxas worked in the UK, the claimant points to Ms Roxas's out of office, the time-zone suggests she was based in the UK.

38. He alleges that the reason for this treatment was that he is an Indian national, that someone of a different nationality who was on secondment with a similar performance who was going through a process to transfer their employment to the respondent would not have been dismissed. He points to the fact that Ms Roxas, although not an actual comparator because her circumstances were not the same as his, was treated more favourably than him.

39. The respondent argues that there is evidence race was not a factor in the termination of the claimant's secondment, that a factor to meet this requirement is good performance, and the evidence shows that in April 2023 "he was

underperforming and to be placed on a PIP (SB 127). The claimant does not accept this is a valid argument, saying that his performance was classed as meeting expectations in his prior year end appraisal – and his appraisal was based on input from several stakeholders.

40. Mr Basra could not say the extent to which each of the claimant's managers had contributed to this appraisal, he argued that the respondent is "risk averse" and so any adverse conduct may lead to a secondment being terminated. He argued also that it was likely that EIT India wanted the claimant back to work in India.

41. In his email dated 27 June 2023, the claimant says that his secondment is being ended "due to diminishing incoming business pipeline…" (SB179). The claimant says this is what he was told, that this email is an attempt to find another role with the respondent, and in such an email he would not put "they do not like me".

42. Evidence on disability: The claimant's disability statement and his disclosed medical records make it clear that the claimant started suffering from significant mental health symptoms from May 2023, after he was told his secondment was not continuing. He say his GP for the first time about this condition in June 2023. The claimant says that he suffered from anxiety prior to May 2023, however there is no evidence that this had a substantial impact on him prior to May 2023.

43. I accept that from May 2023 the symptoms were serious, and the claimant has been significantly affected by the end of his engagement with the respondent, with the consequent effects on his private life. However, there is no evidence that the claimant had a disability – a condition which had a substantial effect on his day-to-day activities – until after he had been told his secondment was ending.

Closing arguments

44. Both parties made closing arguments, where relevant these are incorporated into the conclusions section below.

The law

45. <u>Status</u>

(i) Employment Rights Act 1996

s.230(1): "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

s.230(2): A contract if employment means: "a contract of service … whether express or implied, and (if it is express) whether oral or in writing"

(ii) *United Taxis Ltd v Comolly and another [2023] EAT 93:* Whether an individual is an employee (or worker) is fact-sensitive and depends on the precise nature of the relationship between the parties.

46. Strike-out – does the claim have “no reasonable prospects of success” - rule 37(1)(a) Employment Tribunals Rules of Procedure 2013?

(i) *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*: where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested. It upheld the EAT's decision that tribunals should not be overzealous in striking out a case as having no reasonable prospect of success, unless the facts as alleged by the claimant disclosed no arguable case in law.

(ii) *Anyanwu and another v South Bank Students' Union and South Bank University [2001] IRLR 305:* discrimination claims should not be struck out as having no reasonable prospects of success, except in the plainest and most obvious cases. It was a matter of public interest that tribunals should examine the merits and particular facts of discrimination claims.

(iii) *Balls v Downham Market High School & College UKEAT/0343/10*: strike out is a power that should be exercised only after a careful consideration of all the available material, including the evidence put forward by the parties. No reasonable prospects of success does not mean the claimant's claim is likely to fail, or it is possible the claim will fail, and it is not a test that can be determined by considering whether the other party's version of disputed events is more likely to be believed. It is a high test: there must be *no* reasonable prospects of success.

47. Deposit order – does the claim have "little reasonable prospect of success" -- rule 39(1), Employment Tribunals Rules of Procedure 2013?

(i) *Van Rensburg v Royal Borough of Kingston-Upon-Thames and others UKEAT/0096/07:* "a tribunal has a greater leeway when considering whether or not to order a deposit" than when deciding whether or not to strike out,

(ii) *H v Ishmail UKEAT/0021/16*: "The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for

reaching such a conclusion serves to emphasise the fact that there must be such a proper basis."

(iii) *Amber v West Yorkshire Fire and Rescue Service [2024] EAT 146:* If the prospects of success turns on disputed factual issues, it is highly unlikely that a deposit order will be appropriate. The claimant's case must be taken at its highest, requiring the tribunal to test the factual account and examine it "through the prism of reality". This would include examining the case against basic logic, internal inconsistency or any contradiction by contemporaneous documentary evidence.

48. Disability

(i) S.6(1) Equality Act 2010: a person is disabled if they (a) have a physical or mental impairment and (b) if the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

(ii) *Tesco Stores Ltd v Tennant UKEAT/0167/19/00*: a claimant must show that they met the definition of disability at the time of the alleged discriminatory acts.

(iii) *Cruickshank v VAW Motorcast Ltd [2002] ICR 7291:* The date of determination of disability status is at the date of the alleged act, not after. The tribunal must consider whether the impairment had a substantial adverse effect on day-to-day activities at that point, and whether that effect was likely to be long term at that point.

Conclusions on the facts and law

49. I accept that the overwhelming evidence points to the claimant being on secondment from EIT India to the respondent throughout the duration of his work with the respondent. There was no intention on the part of the respondent for the claimant to become an employee. The claimant accepted throughout his secondment that he was on secondment, working on a discrete project in the UK. The only written documentation says that the claimant was on secondment. He was paid by EIT India. The claimant was managed by his managers at EIT India, with whom he continued to be in contact; his appraisal was conducted by EIT India.

50. The claimant relies on Fragomen documents which use the word 'employee'. I accept the respondent's argument that letters and internal documents by a third-party immigration provider are not intended to suggest that the claimant has or will become an employee of the respondent – as defined by the Employment Rights Act 1996 - on his entry to the UK or at any time after. The 'tick-box' exercise undertaken by Fragomen called the claimant an employee, without more this does not mean that he was an employee.

51. I do not accept that the claimant became sufficiently integrated into the respondent's business such that he became their employee. There was a a hierarchy of command in the UK as the claimant reported to and received instructions from the Project lead; however, this was an operational necessity for such a project. It is not indicative of the claimant being line managed by the respondent. As is clear that the claimant's line management remained with EIT India.

52. There is no other evidence that the claimant was otherwise integrated into the respondent's operations such that he became its employee.

53. I do not accept that the DXC email address is indicate of integration to the respondent – many of the respondent's employees had this email address, which was specific to the respondent, it was the parent company's identity.

54. Disability: the evidence shows that any substantial impact from the claimant's condition occurred just after he was told that his secondment was ending. He saw his GP in June 2023. It is therefore clear that the claimant was not disabled during the material events – the decision to terminate his secondment. There is no evidence that there was any substantial impact on him prior to this decision.

55. While he may have suffered significant ill health as a consequence of this decision, to amount to an act of disability discrimination it *must* be a condition which had a substantial impact on him and which in some way resulted in the decision to end the secondment. This is not the case, and the claims of disability discrimination are dismissed on the basis that the claimant was not a disabled person, as his condition did not have a substantial impact on him at any time prior to the decision was taken to end his secondment.

56. Claims of race discrimination – strike/out and deposit order: There is a substantial dispute of facts. The claimant says his performance was good, the respondent not. The respondent says that there were financial reasons for off-shoring his role, the claimant says after he was dismissed a Singapore based employee was seconded and spent much of their time in the UK. I do not accept that there is a sufficient basis to say that there is no arguable case in law, that there are *no* reasonable prospects of success.

57. Similarly, on the application for a deposit, the claimant argues the sudden change in the respondent's view of his performance coincides with the progression for his application for an intercompany transfer. He does not accept his performance was poor, having been classed as good previously. This is a substantial dispute on the evidence , and it is not m role at this hearing to undertake an assessment of this evidence. I cannot say that there is little reasonable prospect of this claim succeeding.

58. The respondent accepts that the claimant was a contract worker pursuant to s.41(5) and s.41(7) EQA. The Tribunal therefore has jurisdiction to hear the claims of race discrimination, which can proceed pursuant to s.41(1)(b), s.41(1)(c) and/or s.41(1)(d).

59. Finally, I wish to express my apologies for the late delivery of these reasons: I either did not see, or I did not take notice of, the email asking for written reasons until this was forwarded to me in early December 2024.

Employment Judge Emery
12 August 2024
9 December 2024
Judgment sent to the parties on:

13/12/2024
For the Tribunal:

Note
Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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