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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Kamal Lathar**

Respondents: **(1) Commissioners for Her Majesty's Revenue and Customs (the 'First Respondent')**
(2) Sopra Steria Recruitment Limited (the 'Second Respondent')
(3) Capita Business Services Limited (the 'Third Respondent')

Heard at: **East London Hearing Centre**

On: **15 January 2019**

Before: **Employment Judge Burgher**

Representation

Claimant:	In person
First Respondent:	Ms K Apps (Counsel)
Second Respondent:	Mr M Humpreys (Counsel)
Third Respondent:	Mr J Heard (Counsel)

JUDGMENT

The Claimant was not an employee of any of the Respondents. Consequently, the Tribunal does not have jurisdiction to hear the Claimant's complaint. His claims are therefore dismissed.

REASONS

Issues

1. At the outset of the hearing the Tribunal identified the following issues for determination.

1.1 Whether the Claimant was an employee of the First, Second or Third Respondent, pursuant to section 230 of the Employment Rights Act 1996. This was necessary in order for the Claimant to be able to bring

a contract claim in the Tribunal pursuant to regulation 3 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994.

1.2 In respect of the First Respondent only, whether the Claimant is employed as a civil servant. The Respondent contends that section 10(2) of the Constitutional Reform and Governance Act 2010 prevents any employment of a civil servant unless the selection is on the basis of fair and open competition.

1.3 If the Claimant is an employee of any of the Respondents, whether there has been a breach of contract. If so, what remedy is due.

Evidence

2. The Claimant gave evidence on his own behalf. Mr Ray Meehan, Commercial Manager, gave evidence on behalf of the First Respondent. Ms Joyce Blundell, Client Implementation Manager, gave evidence on behalf of the Second Respondent. Mr Andrew Roadknight, Client Solutions Director, gave evidence on behalf of the Third Respondent. All witnesses had written statements and gave sworn evidence and were subject to cross-examination and questions from the Tribunal.

3. I was referred to relevant pages in an agreed hearing bundle of 231 pages and was referred to separate documents submitted by the Claimant.

Facts

4. I have found the following facts from the evidence.

5. The Claimant is an experienced IT Security Consultant and has offered his services on a consultancy basis for over 16 years to various organisations through his personal service company, Rapier Computers Ltd ('Rapier').

6. The First Respondent ('HMRC') is a government department responsible for tax collection, compliance and enforcement.

7. The Second Respondent ('Sopra') is a recruitment business that sources and supplies candidates for interim, contractor and permanent vacancies.

8. The Third Respondent ('Capita') is engaged in the provision of outsourcing services.

9. HMRC has a direct contractual relationship with Capita under the Contingent Labour 1 ('CL1') Framework Agreement for the supply of temporary workers. Pursuant to CL1, HMRC would have entered into a confidentiality agreement with the temporary worker. Save for these contracts, HMRC did not have any express contractual relationship with any other party in this matter.

10. Sopra's business is governed by the Conduct of Employment Agencies and Employment Business Regulations 2003. Sopra's terms were such that candidates for roles would contract with them in order to be placed at clients.

11. Sopra also entered into a Framework Agreement with Capita under CL1 for the supply of temporary workers to a contracting body. Contingent labour related to casual workers and independent contractors. HMRC was a contracting body to the CL1 but Sopra did not have any express contractual relationship with HMRC.

12. Capita's role under the CL1 Framework Agreement with HMRC was limited to:

12.1 Supporting HMRC with integrating contingent labour and exiting the placements of contingent labour with HMRC;

12.2 Acting as an intermediary between HMRC and Sopra; and

12.3 Maintaining an IT interface accessible by contingent workers during any assignments.

13. Capita therefore had direct contractual relationships with Sopra and HMRC, and acted as intermediary between these two organisations. It had no express contractual relationship with the Claimant or Rapier in this matter.

14. On 8 May 2017, Ms Babita Arora, Sopra recruitment consultant, contacted the Claimant to enquire about his availability for a temporary IT security role at HMRC. Subsequently, on 19 January 2018, Sopra put the Claimant forward via the CL1 Framework Agreement with Capita for a CLAS Security Advisor role at HMRC.

15. On 6 February 2018, the Claimant attended an interview for the CLAS Security Adviser role. Ms Beverley Martin and Mr Ian Jefferies from HMRC interviewed the Claimant. During the interview, it was stated that some workers work from home. On 14 February 2018, the Claimant was informed by Ms Arora that he was unsuccessful for the CLAS role. On 20 February 2018, however, the Claimant was subsequently contacted by Ms Arora again to enquire whether the Claimant would be interested in roles at HMRC. The Claimant confirmed that he was.

16. By email dated 22 February 2018 and timed at 10.43, Ms Arora offered the Claimant a role as CLAS Security Adviser. The email stated that the pay rate would be £750 per day, the start date would be confirmed. The contract duration was stated to be as soon as possible until 16 June 2018, and the location would be South East - Alexander House. The email contained a 34-page attachment with Sopra's comprehensive contract between Sopra and a different applicant and personal service company, namely 360 Worldwide Limited. This was sent in error, as the Claimant's name and personal service company did not appear in this contract.

17. The email stated that the role had been confirmed as inside IR35 and that the Claimant had to provide specified information, including a limited company certificate of incorporation, VAT certificate and limited company bank details, and DBS certification and onboarding documentation for him to be screened and approved for the role. The

email stated that the Claimant would be able to view and accept the contract once an email was sent from Sopra with a link to the e-contract.

18. On 22 February 2018 at 11:07, Ms Arora then sent the Claimant an almost identical email. However, this time the email did not attach the 360 Worldwide Limited contract. It attached information regarding the Fieldglass portal that the Claimant would be required to use to submit timesheets during the assignment.

19. On 22 February 2018 at 17:18, the Claimant responded by accepting Ms Arora's email offer. He stated that he would like an answer as to whether he would be able to work from home as well as other people in the normal weeks.

20. The Claimant was concerned about IR35. He did not think it was appropriate that up to 45% of his income should be deducted in circumstances where he was an independent contractor providing services through his personal service company.

21. The Claimant was aware that the contractual arrangements with Sopra to place him at HMRC were to be through a personal service company and he completed Sopra's PSC and Umbrella Contract Checklist on this basis. The Claimant confirmed that the contracting party with Sopra would be Rapier and that he was working as an independent contractor on a business-to-business basis.

22. On 23 February 2018, the screening process began and the Claimant provided some of the required documentation and signed the confidentiality agreement required under CL1 for him to work at HMRC.

23. It seems that erroneous enquiries were made by Capita to HMRC as to whether the Claimant was able to work from home a couple of days each week. On 26 February 2018, Mr Meehan of HMRC stated that they could not engage with the Claimant on those terms and instructed Capita to withdraw the offer and close the role. The role was subsequently offered to 2 Capgemini contractors.

24. On 27 February 2018, Ms Arora telephoned the Claimant to inform him that the role had been withdrawn. The role was withdrawn before the Claimant had completed the onboarding process, and before all the necessary documentation outlined in Ms Arora's email of 22 February 2018, including DBS Scotland, was provided by the Claimant.

25. The Claimant brings a claim for breach of contract arising from the withdrawal of the offer made by Ms Arora on 22 February 2018, that he accepted.

Law

26. 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.

27. The starting point for my consideration therefore is whether there is a contract, express or implied, between the Claimant and HMRC, Sopra or Capita. If there is such a contract, my next consideration is whether such a contract of service is necessary.

28. In view of the evidence I have found that:

28.1 There is a confidentiality agreement between the Claimant and HMRC which would have applied if the Claimant commenced work;

28.2 There is an email exchange between the Claimant and Sopra on 22 February 2018; and

28.3 There is no express contract at all between the Claimant and Capita.

29. The confidentiality agreement between the Claimant and HMRC cannot be construed as a contract of employment. Therefore, there is no express contract of employment between the Claimant and HMRC.

30. In any event, the Claimant's central position was that there was a relevant concluded contract of employment evidenced by the email exchange between him and Ms Arora on 22 February 2018. He stated that it was usual in contractor agreements for work to commence without the contractual documentation being finalised. Whilst this may be the case, no work actually commenced and any offer to start the work was withdrawn before a start date was confirmed.

31. I conclude that the email exchange between the Claimant and Ms Arora on 22 February 2018 was not sufficient to amount to a concluded contract. At most, it was an agreement to seek agreement and various steps such as screening, start date and completion of contractual documentation would be necessary for the contract to be concluded. Therefore, there was no express contract of employment between the Claimant and Sopra in this matter. Further, if there was an express contractual agreement evidenced by the email exchange on 22 February 2018 it could not in the circumstances of the case have amounted to a contract of employment. The agreement was intended to be between Rapier and Sopra as seen by the 360 Worldwide Limited contract.

32. There is no express contract at all between the Claimant and Capita in this matter and as such there is no express contract of employment between the Claimant and Capita.

33. Having concluded that there is no express contract of employment between the Claimant and any of the parties, I then proceeded to consider whether there was any implied contract of employment between the Claimant and any of the parties.

34. I was referred to several cases relating to the implication of a contract of

employment. In particular, in the Court of Appeal case of Smith v Carillion [2015] IRLR 470, Elias LJ stated:

21. The question arises whether and in what circumstances a contract between the worker and the contractor to whom he is providing his services can be implied. This question has been considered by the Court of Appeal on a number of occasions. In submissions before us counsel focused on two authorities in particular, namely James v Greenwich London Borough Council [2008] EWCA Civ 35; [2008] ICR 545 and Tilson v Alstom Transport [2010] EWCA Civ 169; [2010] IRLR 169. It is not necessary to analyse these cases in any detail since the principles they espouse were not disputed. For the purposes of this case they may be summarised as follows:

(1) The onus is on a Claimant to establish that a contract should be implied: see the observations of Mance LJ, as he then was, in Modahl v British Athletic Federation [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.

(2) ***A contract can be implied only if it is necessary to do so****. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in James which considered two earlier decisions on agency workers in this court, Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437and Cable and Wireless plc v Muscat [2006] ICR 975. It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed (para. 23). Mummery LJ stated that the EAT in that case had:*

"… correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213, 224:

"necessary . . . 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."

(3) The application of that test means, as Mummery LJ pointed out in James (para.24), that no implication is warranted simply because the conduct of the parties "was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."

(4) ***It is, however, important to focus on the facts of each case****. As Mummery LJ observed in James (para.51): "there is a wide spectrum of factual possibilities. Labels are not a substitute for a legal analysis of the evidence."* ***The question a Tribunal needs to ask is whether it is necessary, having regard to the way in which the parties have conducted themselves, to imply a contract between worker and end user.***

(5) Accordingly, ***if the arrangements which actually operate between the worker and the end user no longer reflect how the agency arrangements were intended to operate, it may be appropriate to infer that they are only consistent with a separate contract between worker and contractor.*** *This may be because the agency arrangement was always intended to be a sham and to conceal the true relationship between the worker and the contractor. But it may also be simply because the relationship alters over time and can no longer be explained by the dual agency contracts alone. However, the mere passage of time*

cannot be enough to justify the implication of a contract on necessity grounds: James para.31 per Mummery LJ.

(6) If an Employment Tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the Tribunal's decision: see Tilson per Elias LJ, para.9.

22. It is also important to bear in mind that it is not against public policy for a contractor to obtain services in this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed: James para. 56-61; Tilson paras.10-11. That will frequently but by no means always be the reason why the employer enters into a relationship with an agency. A contract cannot be implied merely because the court disapproves of the employer's objective.

35. I conclude that there were clear and rational reasons for the intended contractual arrangements in this matter. Further, it is not necessary to imply a contract of employment between the Claimant and HMRC, as potential end user, or any of the other parties can be implied in this case.

36. In this matter the Claimant would not have contracted with Sopra. He would have contracted through Rapier, his personal service company, as he had done consistently for the previous 16 years with numerous organisations. The Claimant's was exercised with the fact that the current arrangement involved the imposition of IR35. He stated that if tax was going to be withheld, he should be treated as an employee. However, the CL1 Framework Agreement is clearly drafted. I conclude that under CL1 and the Claimant has not established that it is necessary to imply a contract of employment between the Claimant and Capita or HMRC, despite the fact that the Claimant would have been integrated within HMRC for the duration of the work if it had commenced.

37. The significant difficulty that the Claimant faced in this regard is that work did not actually commence to found a factual basis needed to imply a contract in order to give business reality as to what was happening.

38. In any event I conclude that the specifics of the contractual arrangements between the respective parties were not a sham designed to circumvent the true position of an employment contract. They were appropriate business-to-business arrangements designed to address relevant commercial needs.

39. Given that there was no implied contract of employment for any party, the Claimant is not an employee of any of the Respondents.

40. Regulation 3 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994 states:

Extension of jurisdiction

> *3. Proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

41. The Claimant is not an employee and therefore the Tribunal does not have jurisdiction to consider his claim. The Claimant's claim is therefore dismissed.

42. The remedy hearing of 22 March 2019 is therefore vacated.

Employment Judge Burgher

Dated: 25 January 2019