



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Sohal v  
**First Respondent:** DHU Healthcare CIC  
**Second Respondent:** Logistical Support Limited

**Heard at:** Leicester  
**On:** 8 June 2022  
**Before:** Employment Judge Smith

## Appearances

**For the Claimant:** In person  
**For the First Respondent:** Mr P Clarke, Consultant  
**For the Second Respondent:** No attendance

## JUDGMENT

1. The Claimant was at no material time an employee of the First Respondent.
2. The Claimant's claim of unfair dismissal, presented against the First Respondent, is therefore dismissed.
3. The Claimant was at all material times an employee of the Second Respondent.
4. The Claimant's claim of unfair dismissal, presented against the Second Respondent, shall proceed to a full hearing.

# REASONS

1. An oral judgment on the issue of the identity of the Claimant's employer, together with reasons, was delivered at the preliminary hearing on 8 June 2022. Written reasons for the Tribunal's judgment were requested by the Claimant at the conclusion of the preliminary hearing. These fuller written reasons have been promulgated pursuant to that request and the parties' right to written reasons as stipulated by **rule 62(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1.**

## Introduction

2. Mr Ranbir Singh Sohal, the Claimant in this case, contends that he was an employee of the First Respondent, DHU Healthcare CIC, from 2017 until the alleged termination of that employment by the First Respondent on 4 November 2020.
3. It is common ground that throughout this period the Claimant was an agency worker employed by the Second Respondent, Logistical Support Limited, and that they terminated that employment albeit at a later date, 27 November 2020. The Second Respondent has not filed a response to the Claimant's claims and has not been present or represented today.
4. On the preliminary issue of the correct identity of the Claimant's employer, I heard evidence from the Claimant on his own behalf and from Mr Malcolm King, a manager within the First Respondent. I was also referred to two relatively short bundles of documents and to an email provided by the Claimant at the preliminary hearing. Mr Clarke had no objection to me reading that email and to its introduction in evidence.

## Analysis

5. In this section I have made findings of fact and, where necessary, made reference to the parties' respective submissions.
6. From the two bundles provided I was shown a number of documents dating from 2017 which showed, in summary, the Claimant corresponding with a Mr Marc Wilson of the Second Respondent about an opportunity for employment with the Second Respondent. I was also shown documents such as an application form, an initial medical questionnaire, and a form headed "employee bank details", in which the Claimant had provided the necessary information.
7. It was clear to me that these documents supported the Claimant's suggestion that he was an employee of the Second Respondent, and I agreed with that suggestion as it was consistent with that documentary evidence. For their part, the First Respondent took no issue with the Claimant's position that he had at all material times been employed by the Second Respondent; that fact had been their understanding as well. I found that the Claimant was indeed employed by the Second Respondent under a contract of employment which commenced at

some point in late 2017. It was not necessary for me, at this stage, to make an express finding as to the precise start date.

8. I was, however, not shown any equivalent documents in relation to the Claimant and the First Respondent. It was not suggested that the Claimant ever applied for employment with the First Respondent or had to complete the initial formalities typically seen at the start of employment relationships. Equally, it was not suggested that the relationship between the Claimant and the Second Respondent was a sham designed to mask the reality, i.e. the true, but concealed, existence of an employment relationship between the Claimant and the First Respondent.
9. It was agreed that the Claimant was not issued with a written contract of employment by the First Respondent, nor was he ever issued with payslips by the First Respondent in relation to work he carried out on their behalf.
10. The Claimant worked as a driver and, on the unchallenged evidence of Mr King, his role was to drive the First Respondent's clinicians to and from their patients. The Claimant accepted in evidence that he had never been paid by the First Respondent for work carried out by him on their behalf. For that work, he had always been paid by the Second Respondent, the agency who it is agreed (and I have found) employed him under a contract of employment.
11. I accepted the Claimant's evidence that as a driver, and given the nature of his role, he was in regular contact with the employees and clinicians of the First Respondent, but it was not suggested that these communications showed a relationship of management or supervision of the Claimant by the First Respondent. Nor did it show any particular degree of integration of the Claimant into the First Respondent's business, or indeed that the relationship between him and the First Respondent changed over the course of time. I was simply not told anything about the contents of these communications and the fact there had been regular communication did not particularly assist me in determining the relationship between the Claimant and the First Respondent.
12. During the course of Mr King's evidence the Claimant stated that he had been provided with a document by the First Respondent that, in essence, admitted that he was an employee of theirs and had been since 2017. This preliminary hearing had been listed since December 2021 and had been listed, in part, to determine this very issue. The fact that this document had not been produced was unfortunate, especially given that the legal burden of proof was on the Claimant to show he was an employee of the First Respondent. However, on the balance of probabilities I considered it unlikely that a document making such a brazen admission would have been sent to the Claimant by anyone at the First Respondent. It would have been entirely inconsistent with the other documentary evidence in the case, some of which I have referred to and some I will refer to subsequently. The Claimant himself did not refer to it in his own evidence despite being given every opportunity to explain why he believed he was an employee of the First Respondent. Those matters I found very surprising. It was for these reasons that I did not accept the Claimant's contention in relation to the existence of this document.

13. Whilst it is not necessary for me to delve too deeply into events that are said to have taken place towards the end of the Claimant's relationship with the First and Second Respondents, it is clear that on 4 November 2020 Heidi Stevens, Transport Manager at the First Respondent, wrote to Mr Wilson of the Second Respondent stating that it was agreed that an agency driver who would not wear a face mask was "too high risk" (in relation to the transmission of Covid-19) and that that person should not be used. It is common ground that this email was referring to the Claimant as the driver who should not be used in future. That email concluded with Heidi Stevens requesting that the Second Respondent no longer send any drivers that are exempt from wearing masks.
14. The Claimant contended that this email amounted to a dismissal, and he says it supported his claim that the First Respondent had been his employer up to that point. I disagree. In my judgment, the email of 4 November 2020 is entirely consistent with the existence of an agency and hirer relationship between the First and Second Respondents, and not supportive of there having been an employment relationship between the First Respondent and the Claimant. The email itself was not addressed to the Claimant but to Mr Wilson, a fact unaffected by the fact it was subsequently forwarded by Mr Wilson to the Claimant in order that they could discuss it. Furthermore, whilst the result of the email may well have been that the Claimant was no longer to carry out work for the First Respondent from that point onwards, the email itself and the language used within it does not expressly say, or indeed infer, that an employment relationship is coming to an end.

### The law

15. Under **section 230(1)** of the **Employment Rights Act 1996**, for unfair dismissal purposes an "employee" means "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*" A "contract of employment" means "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*" (**section 230(2)**).
16. However, this case concerns an individual (the Claimant) who contends that as well as being an employee of an agency (the Second Respondent), he was also and at the same time an employee of the entity that hired his labour through the agency (the First Respondent). In cases such as these there are certain principles that govern the approach the Employment Tribunal must take.
17. At the start of the preliminary hearing I drew the parties' attention to the Employment Appeal Tribunal case of **Patel v Specsavers Optical Group Limited UKEAT/0286/18/JOJ (13 September 2019, unreported)**, which touches on situations where it is contended that an employee of an agency is also an employee of the hiring entity. It is binding on me and useful in the additional sense that it refers to other relevant cases and the principles that derive from them. I have directed myself according to paragraphs 40 to 43 of the judgment in **Patel**, which read as follows:

“40. Unlike in the theatre, it is a well-established principle of employment law that in general terms one employee cannot simultaneously have two employers (**Laugher v Pointer (1826) 5 B & C 547**). The reason why the concept of dual employment has such theatrical comedic potential derives from the confusion and farcical consequences that can arise from competing and contradictory instructions being given by two employers to one employee. It was also a seam mined by Laurel and Hardy, so slapstick potential too.

41. In the context of establishing vicarious liability for the negligent act of a workman, depending on the precise facts of the case it is possible for dual vicarious responsibility to arise and be shared as between a general and temporary employer, where for, example, a workman has been loaned or hired from one employer to another and where control is shared between the general and temporary employers (see **Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2006] ICR 327** and **Hawley v Luminar Leisure Ltd [2006] IRLR 817**). The policy consideration for such a development is to ensure that individuals are properly compensated for tortious acts.

42. As noted in **Cairns v Visteon UK Ltd [2007] ICR 616** by HHJ Peter Clark, interestingly the line of cases of dual vicarious liability for breach of tortious duties in the employment context such as **Viasystems** are not referred to in the employment contract line of authorities such as **Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217**. Judge Clark noted that both Mummery and Sedley LLJ were wary of the concept of a contract of service between a worker and both the employment agency and end user considering it “more problematical” than a contract between the worker and either the end-user, or to imply a contract with the agency. The mischief Sedley and Mummery LLJ were seeking to address in **Dacas** was the possibility of Mrs Dacas having no employer against whom she could enforce her statutory and contractual employment rights, which defied common sense and risked a lacuna in legal protection for employment law rights. Judge Clark continued:

“17. However, where it is common ground that she is employed by the agency, and thus is protected under **Pt 10, [Employment Rights Act]**, we can see no good policy reason for extending that protection to a second and parallel employer. If the only reason is, as appears to be the argument for the claimant in the present case, that she would have a better prospect of establishing unfair dismissal against the end-user rather than the agency, then we can see no basis for departing from what has been the common understanding from at least the judgement of Littledale J in **Laugher v Pointer 5 B & C 547** in 1826. A servant cannot have two masters. That of course does not prevent him from having different employers on different jobs, or as in the case for example of **Land v West Yorkshire Metropolitan County Council [1981] ICR 334**, severable parts of the same contract of employment with one employer.”

43. In **Cairns** Judge Peter Clark went on to explore some of the practical complications that would flow from a finding of dual employment given the structure of **ERA 1996**. Which employer would be responsible for conducting the disciplinary hearing? In a redundancy situation upon whom would the consultation obligations fall? How would any unfair dismissal compensation be apportioned as between dual employers? Not insurmountable he concluded, but all requiring further consideration.”

18. It follows from the above passages that there are strong public policy reasons why a person cannot have two employers in relation to the same work at the same time.

19. I have also directed myself according to the cases of **Smith v Carillion (JM) Limited [2015] IRLR 467** and **Tilson v Alstom Transport [2011] IRLR 169** (both Court of Appeal). Those cases stand for the principle that it is rare that dual employment relationships would ever exist and that the Employment Tribunal may only infer one between an agency worker and the ultimate hirer if it is necessary to do so. I refer in particular to paragraph 21 of **Smith**, cited thus:

*“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] IRLR 302** and **Tilson v Alstom Transport [2011] 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**, paragraph 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] IRLR 35** and **Cable & Wireless plc v Muscat [2006] IRLR 354**. It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJ agreed (paragraph 23). Mummery LJ stated that the EAT in that case had:*

*'... correctly pointed out, at paragraph 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** (paragraph 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** (paragraph 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** paragraph 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, paragraph 9.”

## Conclusions

20. In this case, the Claimant has not shown (the burden of proof being on him) that this is one of those rare cases where the public policy considerations as set out in **Patel** should be set aside.

21. The determination of this preliminary issue depends greatly on the facts, as recognised in **Patel**, **Smith** and **Tilson**. On the facts that I have found, the Claimant's relationship with the First Respondent was a classic one of agency worker supplied by and agency to the hirer. All of the documents shown were, insofar as they were relevant, entirely consistent with that kind of relationship and not one where the First Respondent was the Claimant's employer.
22. The fact that the Claimant performed work on the First Respondent's behalf for some three years did not mean that he became their employee through the mere passage of time. The reference made by him to two years' service (as is often seen in Employment Tribunals) is to whether an unfair dismissal claim can be pursued at all. It is, in the case of an employee, a qualifying period for the right not to be unfairly dismissed. It is not a threshold beyond which an agency worker becomes an employee of the hirer, as was submitted by the Claimant.
23. Following **Smith** and **Tilson**, I also need to consider whether it is necessary for me to infer a relationship of employment between the Claimant and the First Respondent. In my judgment, it is not necessary. The Claimant has an unfair dismissal claim against the Second Respondent and also other claims, against the First and/or the Second Respondents. Whilst the Second Respondent has not participated in these proceedings, the Claimant is not without a remedy.
24. Further, in this case all parties agree that the agency/hirer arrangements as between the Respondents are genuine and that an agency worker characterisation accurately represents the relationship between the Claimant and the Second Respondent. It is not necessary for me to imply a contract of employment between the Claimant and the First Respondent to give effect to the business reality of the situation that existed between late 2017 and late 2020.
25. In my judgment, and for these reasons, the Claimant was at no time an employee of the First Respondent. Accordingly, the Claimant's unfair dismissal claim against the First Respondent is dismissed. The claim of unfair dismissal claim as against the Second Respondent is unaffected by this judgment and continues

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Employment Judge Smith

Date: 20 June 2022

**Reasons having been given orally at the hearing, written reasons will not be provided unless they were asked for at the hearing or are requested in writing within 14 days of the date of this judgment being set to the parties.**



