



THE EMPLOYMENT TRIBUNAL

Claimant: Mr D Carabott
Respondent: London Borough of Tower Hamlets
Heard at: East London Hearing Centre
Before: Employment Judge Elliott
Members: Ms T Jansen
Ms A Berry
On: 18, 19 and 20 September 2024

Appearances:

For the Claimant: Ms S Driver, US Attorney
For the Respondent: Mr N Bidnell-Edwards, counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The respondent's application to strike out the claim is refused.
2. The claim for notice pay was dismissed on withdrawal.
3. The claims for unfair dismissal, holiday pay, failure to provide written reasons for dismissal and unlawful deductions from wages fail and are dismissed.

REASONS

1. This unanimous decision was given orally on 20 September 2024. The claimant requested written reasons.
2. By a claim form presented on 21 March 2024, the claimant Mr Dennis

Carabott brings claims of unfair dismissal, breach of contract for notice pay, holiday pay, unlawful deductions from wages, a redundancy payment, trade union detriment or dismissal and a failure to provide written reasons for dismissal.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
4. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. Around 12 members of the public attended.
5. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties that were not easily resolved.
6. The participants were told that it was an offence to record the proceedings.
7. The witnesses were all in different locations and had access to the relevant written materials. We were satisfied that neither of the witnesses was being coached or assisted by any unseen third party while giving their evidence. The claimant had Alex Owolade with him for support and to help him as he has dyslexia. Mr Owolade was present during the claimant's evidence and was on screen with the claimant, so that everyone could see him.

Compliance with Tribunal Orders

8. The original notice of hearing was sent to the parties on 24 May 2024. This was for a 2-day hearing, 18 and 19 September 2024. It included Orders for the preparation of the hearing, including disclosure of documents by 24 July 2024, agreeing the bundle by 7 August 2024 and exchange of witness statements on 21 August 2024.
9. There was no witness statement from the claimant who has been represented by Ms Driver since at least 10 July 2024 and there had been no disclosure from the claimant.
10. Ms Driver suggested that the claimant use his Particulars of Claim as his witness statement and this was agreed by Mr Bidnell-Edwards for the respondent.
11. It was clear that there was some necessary disclosure missing from the claimant in relation to his employment with his Agency Adecco. We could see from the ET1 that the claimant had attempted to bring a claim against Adecco. That claim was rejected due to lack of an EC Certificate.

12. We were satisfied that the claimant's representative knew about the Tribunal's Orders because on 10 July 2024 she applied for an extension of time to provide the claimant's Schedule of Loss. Despite this, no Schedule of Loss was prepared.
13. We considered that both sides were at fault in terms of the lack of preparation for this hearing. The claimant had failed to comply with the case management orders. The respondent had also failed to disclose all their documents which led to late disclosure on their part.
14. We granted two lengthy breaks during the morning of day 1 for the parties to see whether they could put themselves in a position to start the hearing.
15. By 12:40pm we were provided with a copy of the claimant's contract of employment with Adecco. By about 1:35pm we had a witness statement from the claimant and further documents. At 1:55pm the claimant sent a document stating that he had checked and had no further documents to submit. At 2:50pm the claimant's representative submitted 2 further documents. One of these documents was already in the bundle in a different format (page 34).
16. One of the documents provided at about 1:35pm was a different version of the ET1 which was not the version stored on the tribunal file or in the respondent's possession. The top right-hand corner was not completed with the name of the Tribunal or the date of receipt. Ms Driver for the claimant was prepared to accept that this was not the version of the ET1 presented to the tribunal by the claimant and she said she was happy for the tribunal and the respondent to disregard this version. Ms Driver said it had been provided to her only the day before, on 17 September 2024, by Mr Owolade who was supporting the claimant.
17. The respondent wished to make a strike out application. They said that the manner in which proceedings have been conducted by or on behalf of the claimant was unreasonable or scandalous, there had been non-compliance with the Rules, it had not been actively pursued and there were a whole series of allegations from the claimant about his working conditions in his witness statement at paragraph 6 which had not been made before.
18. The respondent was entitled to make this application. Ms Driver, for the claimant, is not qualified in UK law. Due to the seriousness of this application we decided that Ms Driver should have an opportunity to consider the application and prepare to respond to it. We ordered that the respondent put their application in writing and serve this on Ms Driver who had the opportunity to respond in writing. We also directed Ms Driver to Rule 37 of the Employment Tribunal Rules of Procedure 2013 so that she could consider this.

The respondent's strike out application

19. We dealt with the respondent's strike out application at the start of day 2 of this hearing. The application was on the following grounds:
- a. The failure to comply with tribunal orders. The respondent said that the claimant had not provided a Schedule of Loss, a witness statement or complied with the duty of disclosure.
 - b. That the claimant and his representative did not appear to have understood the importance of disclosure or the breadth of information which could be disclosable. The respondent relied upon the claimant stating that disclosure was complete and then sending 2 further documents about an hour later. The respondents submitted that this was unreasonable conduct which meant that it was not possible to have a fair trial. This was on the basis that the respondent submitted the claimant could not be trusted to have understood the duty of disclosure.
 - c. The late submission of the claimant's witness statement requiring further evidence to be called by the respondent. The respondent said that the claimant now relied upon new allegations of how he was treated at work and this did not give the respondent a fair opportunity to reply to it.
 - d. The claimant and his representative have previous experience of tribunal proceedings and complying with orders and the handling of documents.
 - e. The provision of a new version of the claimants ET1. The respondent said this was a topic that could be addressed in cross-examination.
 - f. The respondent said it attempted to exchange witness statements on Monday 16 September 2024 but the claimant and/or his representative did not cooperate. The respondent said there was no good excuse for these failings.
20. The claimant responded by relying on the following:
- a. The claimant says it was the respondent's burden to produce the lion's share of the documents and that they failed to produce a bundle until 17 September 2024, the day before this hearing. They say this severely prejudiced the claimant in preparing his case.
 - b. The claimant relied upon his application to postpone the hearing on grounds that the parties needed more time to prepare. This application was made by the claimant's representative on 21 August 2024 and was supported by the respondent. The application

was refused by Regional Judge Burgher for the reasons set out in the Tribunal's letter of 10 September 2024 and in a further letter of 13 September 2024 when new information was put before the Regional Judge.

- c. The claimant relied on requesting from the respondent a document that he says he signed on 13 November 2023. He says that the respondent produced the wrong document.
 - d. The claimant relied on the late submission of the bundle on the afternoon of the day prior to the hearing.
 - e. The claimant submitted that in reality it was the respondent's conduct which had been scandalous and vexatious.
21. In reply and orally, the respondent said that although the claimant had said that there was a document of 13 November 2023 which he signed by way of a contract of employment, this does not exist. The matter was in dispute. The respondent said it has fulfilled its obligations on disclosure but that this did not affect their application for strike out.
22. The respondent said paragraphs 6, 7 and 9 of the claimant's witness statement were new factual matters that went to the element of control in terms of employment status. It covered how he worked from day to day.
23. It was submitted that the tribunal could take the view that this was such an unreasonable use of tribunal time, with the statement being produced on day 1, with no explanation of why it could not have been done before. This was unreasonable conduct. The respondent said we could not have a fair trial and sought an adjournment as an alternative to strike out. Alternatively, the claimant should be told that he could not rely on his new witness statement. The respondent made the submission that this claimant is experienced in tribunal litigation.
24. In oral submission the claimant said that the respondent should not "*call the kettle black*" because they did not receive the respondent's statement until 17 September 2024, which was a disadvantage for the claimant. Nonetheless, the claimant was prepared to go ahead with the hearing. The claimant said that the information they relied upon was predictable. The claimant said in his ET1 that he was working at the respondent from July 2020. This issue of employment status was not new.
25. The claimant said that the issue of missing documents could not be resolved and it would be a matter of credibility. It was submitted that there had been a lack of compliance on both sides.

The relevant law on strike-out

26. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides as follows:

- (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) for 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.
27. A claim 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.
28. The Court of Appeal in ***Blockbuster Entertainment Ltd v James 2006 IRLR 630*** said of the power to strike out under Rule 37(1)(b):

This power... is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.
29. The tribunal has to consider the proportionality of a strike out. ***Arriva London North Ltd v Maseya EAT/0096/16*** dealt with a strike out for failing to disclose documents. The EAT held that the ET had crucially failed to consider the authorities on strike out and the principles to be applied. The EAT found that the problems regarding amendments to the response and the disclosure of documents, which were at the heart of the decision to strike out, were all capable of resolution without causing undue delay, so that there was nothing to prevent a fair trial from taking place. The sanction of strike out was considered disproportionate in the circumstances. The tribunal must consider whether the failings are capable of being remedied.
30. Other than in exceptional circumstances, the tribunal must consider whether a fair trial remains possible – ***Bolch v Chipman 2004 IRLR 140***. If a fair trial is possible, it will be a very unusual case that justifies strike

out on procedural grounds. It is an error of law to fail to consider whether a fair trial is possible and whether a less draconian sanction was more appropriate – *Ahmed v Bedford Borough Council 2013 All ER (D) 188*.

31. In terms of failing to comply with tribunal orders, the tribunal must consider the magnitude of the non-compliance.

Decision on the strike out application

32. We agreed with the claimant's submission that there had been a lack of compliance with tribunal orders on both sides. The respondent complained about the introduction of a statement from the claimant on day 1, when they produced their statement only the day before.
33. The respondent was aware from the outset that employment status was one of the key issues in this case and this was referred to in Mrs Simpson's statement at paragraph 2. It was open to the respondent to deal with the key issues on control, in terms of employment status. They did not do so.
34. We found that a fair trial was possible. There was a bundle. The claimant had introduced a small number of new documents on day 1, one such document was already in the bundle. The respondent was represented by experienced employment law counsel. It was not a document heavy case and the statements were short. Strike out would be draconian and disproportionate.
35. The application to strike out was refused.

The issues

36. The issues for determination by the tribunal were clarified with the parties at the outset of this hearing both on day 1 and day 2.
37. Was the claimant an employee of the respondent such that he is entitled to claim unfair dismissal, breach of contract for notice pay and a failure to provide written reasons for dismissal.
38. The parties agreed that the tribunal should deal in the first instance as a preliminary issue with the question of whether the claimant was an employee of the respondent such that he is entitled to claim unfair dismissal, notice pay and a failure to provide written reasons for dismissal?
39. It also became clear during initial discussions that the claimant's case was that he became employed by the respondent on 13 November 2023 which raised the issue of qualifying service for the ordinary unfair dismissal claim.
40. Was the claimant automatically unfairly dismissed for trade union reasons?

41. Was the claimant subjected to detriment with the purpose of preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so? The detriment relied upon is dismissal.
42. Has the respondent made an unlawful deduction from the claimant's wages?
43. Is the claimant entitled to notice pay in excess of the 3 weeks pay he has received? This claim was dismissed on withdrawal on day 2.
44. Is the claimant due 3 days of holiday pay for 24, 25 and 26 of December 2023?
45. Did the respondent fail to provide the claimant with written reasons for dismissal?

Witnesses and documents

46. There was an electronic bundle of 93 pages. The claimant introduced further documents on day 1. One of the documents was already in the main bundle in a different format. A final bundle was compiled of 132 pages.
47. For the claimant the tribunal heard from the claimant himself.
48. For the respondent the tribunal heard from Mrs Gail Simpson, Acting Head of HR.
49. Tribunal Member Ms Jansen disclosed to the parties that she was familiar with the name Gail Simpson. Ms Jansen does not know Mrs Simpson personally and has not worked with her, but had worked some time ago in the same department, but in a different area, as Mrs Simpson's partner. The parties confirmed that they had no objection to the tribunal remaining as constituted. Mrs Simpson also confirmed that she had never met Ms Jansen.
50. We had written submissions from the parties to which they spoke. All submissions and authorities were fully considered, whether or not expressly referred to below.

Findings of fact

51. The claimant Mr Dennis Carabott worked in the respondent's Waste Services department from 20 July 2020 to 12 December 2023 as a Driver. He worked at the respondent's Council Refuse Department.
52. In his ET1 the claimant sought to bring a claim against his agency Adecco, as a second respondent. This claim was rejected on 22 May 2024 due to the lack of an Early Conciliation Certificate.

Industrial dispute

53. In the autumn of 2023 the respondent was involved in a trade dispute with Unite the Union in relation to Waste Services. The dispute concerned pay and conditions for staff, both agency staff and employees.
54. An agreement was reached within this dispute that long term agency workers, including the claimant, who had worked for the respondent in excess of 6 months, would be considered for permanent employment subject to a modified recruitment process.
55. We saw the offer made by the respondent to the union, dated 25 September 2023, (page 32) which said the following in relation to Agency Workers:

“Agency Workers: The Council will look to recruit as many agency workers to establishment posts, subject to the agency workers undertaking a simplified recruitment process. Agency workers will be ringfenced for the posts. To be considered for these posts the agency workers staff will be required to attend a short meeting to ensure they meet all of the essential criteria for the posts, require any adjustments, and to establish basic employee information to enable the Council to place them on employment contracts. Further information on this will follow. This offer does not extend to those recently engaged agency workers of six months or less who have been brought in to cover staff in substantive posts, for example those on sick leave or maternity leave. Employment will be on the grade for the post and placement on the salary scale will be to the nearest match to the workers current salary. The Council will seek to conclude the process as quickly as possible, and no later than by 31 December 2023.”

56. We saw a letter dated 6 November 2023 addressed “Dear Colleague” and headed “Information required on the offer of a Tower Hamlets contract of employment” (page 42). The letter commenced by saying:

“As you will be aware, as part of the agreement to end the strike in Waste Services it was agreed that agency workers with over 6 months of continuous engagement with Tower Hamlets in Sweeper/Cleansing Operative, Loader, HGV Driver and Non-HGV Driver jobs will be offered a Tower Hamlets contract of employment. This will be subject to compulsory employment checks and data gathering which we need to undertake before any final offer of employment can be made.”

57. The claimant accepts that he was told this and said that he had no problem with it. The letter went on to set out a list of information to be provided including:

“details of a referee for a reference (the Tower Hamlets Policy

requires 2 satisfactory references before we can confirm an offer of employment. One can be provided by the agency employing you currently to undertake work at Tower Hamlets, which we will gather on your behalf from the agency. The second reference must be from your most recent employer prior to working at Tower Hamlets. The form requires you to provide contact information for this second referee). All job offers are subject to the council receiving references it deems to be 'satisfactory';"

The simplified recruitment process

58. The union did not want all the agency workers to go through a lengthy online recruitment process. Mrs Simpson said in evidence that some of those workers were not particularly "*internet savvy*" and preferred not to fill in an online form themselves. The respondent simplified recruitment process by setting up two dates when they would meet the workers and go through all the information the respondent needed. This meant the workers were not required to fill out the forms online, unless they chose to do so. The meeting dates were on 13 and 20 November 2023. It was a process they had not used before. It arose out of the agreement reached with Unite. There was no requirement for an interview.
59. The respondent was expecting to issue over 100 contracts of employment. They asked for references from each workers' Agency because they did not know whether any issues had arisen during the period of their work with the Agency and they wanted a verified record that showed that they satisfied the respondent's standards. It was put to Mrs Simpson that there was nothing to suggest that the claimant had not met the Council's standards during his work for Tower Hamlets. She agreed that this was the case.
60. The requirement in the letter of 6 November 2023 was for 2 references. Mrs Simpson said that this was agreed between the respondent and the union. Workers were told that they should provide a reference from their Agency and one from their past employer. Mrs Simpson described the claimant's reference from Adecco as "*anodyne*" as it was a basic reference only giving dates of employment and job role (page 45). She said it was the practice of agencies just to give the basic employment information.
61. The respondent's Reference Policy was at page 62. At paragraph 3.1 (page 65) it says: "*External candidates must supply the names of two referees, one of which must be their manager at their current or most recent employer*".
62. We find that all the agency workers within the simplified recruitment process were asked for two references, in accordance with the Reference Policy. Mrs Simpson told the tribunal that about 50% of those agency staff were not able to produce two references, for example because the company in question had closed down. Mrs Simpson was asked what happened to workers who did not produce a second reference. She said

and we find, that they were engaged save for one worker who did not produce evidence of a right to work in the UK. This applied to 50% of the agency workers in the group.

The 13 November 2023 meeting

63. On 13 and 20 November 2023 HR staff attended the depot with their laptops to meet with the agency workers and obtain all the necessary information. They used Microsoft electronic forms and sat with each worker to ask the questions and fill out the forms with their input. Mrs Simpson was part of the HR team carrying out that work and it was she who met with the claimant on 13 November 2023.
64. The first step was for workers to show HR their documentation showing their right to work in the UK and those documents were scanned. Once that was done, the workers were given a piece of paper showing their right to work documents had been checked. They then moved on to the information gathering stage of the process.
65. Each worker gave information to HR who filled in the form. At each section of the document the HR officer explained what was going into the form and checked with the individual that the information was correct.
66. The workers were asked to complete a Declaration of Interest which we saw at page 119. They were asked if the information they had given was true and whether they would like a copy of the form. If they wanted a copy, it was sent to them by email. We find that the claimant did not ask for a copy of his form because it was not disclosed by either party. The information then went into a spreadsheet.
67. During this hearing the claimant took issue with the wording of the declaration of interest which said: "*It is important that you are protected from criticisms or complaint which might arise if any additional interests or employment you may have external to the Council could be seen to jeopardise your work*". It was suggested by the claimant that this was a prohibition on working elsewhere which he considered material to his case that he was an employee of the respondent.
68. We find that it was not a prohibition on holding other employment. It refers to "*any....employment you may have external to the Council*" and does not prohibit this. Mrs Simpson explained that this was to ensure that a person they employed did not hold employment or interests that may conflict with the interests of the Council. We accept this and find that Mrs Simpson's explanation was correct.
69. During the meeting on 13 November 2023, the claimant asked Mrs Simpson whether a previous employer could give him a bad reference because he was taking his former employer to the Employment Tribunal "*for sacking him*". The claimant had brought proceedings against London Borough of Newham in respect of his dismissal from that Council and a

hearing had taken place in September 2023. The claimant told this tribunal that these proceedings were ongoing because he has appealed to the EAT.

Did the claimant sign a contract of employment on 13 November 2023?

70. It was the claimant's case that he signed a contract of employment with the respondent at the meeting on 13 November 2023, but he was not given a copy.
71. Mrs Simpson's evidence was that he did not sign a contract of employment and that the document he "signed" was the giving of his approval to his electronic signature being placed on the declaration of interest form.
72. Mrs Simpson's evidence was that the respondent was not in a position to issue contracts of employment on 13 November 2023 as they were still in negotiation with the union about Job Descriptions and grades. Ms Simpson's evidence was and we find that contracts were not issued until after the termination of the claimant's assignment.
73. The claimant's case was that he had signed a 1-page document agreeing to work exclusively with Tower Hamlets and "*never received a copy*". We find he authorised the Declaration of Interest form and it did not contain a prohibition on working elsewhere. He did not sign a contract of employment on 13 November 2023.

The contract with Adecco

74. The claimant entered into a contract of employment with Adecco on 16 July 2020. He introduced this contract on day 1 of the hearing at the tribunal's request. In this tribunal's experience, it was a standard contract of employment that we would often see as between an individual and an employment agency and was expressly stated to be a "*Contract of Employment*". It said that Adecco would offer the claimant assignments, it placed the obligation on Adecco to pay him both as to wages and holiday pay and gave him access to their disciplinary and grievance procedures. It gave Adecco the right to terminate his employment.
75. The claimant submitted that the respondent did not enquire about the claimant's contract of employment with Adecco because he was treated as their employee. We reject this submission. The respondent had no need to know the terms of employment between the claimant and Adecco. They had a contractual relationship with the Agency for the provision of agency staff. They did not need to know the terms of the contract between the agency staff and the agency.
76. When clarifying the issues on day 1, the claimant's representative appeared to confirm that the claimant was employed by Adecco until 13 November 2023, but later seemed to walk back from that position. It was later submitted that the claimant was employed by the respondent since

20 July 2020. The claimant's case appeared to change.

77. We consider it material that the claimant sought to bring this claim against Adecco as a second respondent. He suggested that he did not, but we find from the documents that he did. In relation to Early Conciliation the claimant, with the assistance of Mr Owolade, ticked the box that said that ACAS did not have power to conciliate on some or all of that claim, so as to explain the lack of an EC number in box 2.6. Clearly ACAS did have the power to conciliate, it was the same claim as against the first named respondent.
78. The claimant's evidence was that both before and after 13 November 2023 he received his pay from Adecco. This was supported by timesheet information in the bundle at page 87. The claimant made the point that Adecco paid him upon being paid by the respondent. This is the nature of an agency arrangement. There was no contractual obligation on the respondent to pay the claimant direct. The respondent's contractual relationship was with Adecco for the provision of agency workers. Adecco submitted invoices for the claimant's services, which the respondent paid.
79. The claimant made submissions in relation to the principles which are routinely considered when deciding whether an individual is an employee or self-employed. This overlooked the existence of the express contract of employment between the claimant and Adecco. It was not suggested to the respondent's witness Mrs Simpson that the Adecco contract was a "sham" and we find that it was not.
80. We find that on 13 November 2023 the claimant authorised the Declaration of Interest form. He did not sign a contract of employment with the respondent. We also find that the claimant did not sign, as he suggested, a piece of paper stating that he had to work exclusively for the respondent.

Employment status

81. We find that at no point was the claimant an employee of the respondent. At all material times there was a contract in place between the claimant and Adecco. Under the terms of the Adecco contract, the claimant was assigned to work in Tower Hamlets Waste Services department. This was not a sham contract. It was an unremarkable and in no way unusual Agency arrangement, albeit that the claimant worked on that assignment for 3 years and 4 months.
82. The contract with Adecco governed the working relationship with the claimant. It was submitted for the claimant that the tribunal should consider the issues normally considered when ascertaining whether a person is employed or self-employed, such as the control test. We find that it is a normal part of an agency assignment that the end user will issue instructions to the worker and this did not detract from the contractual position between the claimant and Adecco. He was paid by Adecco and

subject to their disciplinary and grievance rules. Adecco was responsible for the payment of his annual leave (contract paragraph 6). We find it unsurprising that he wore a Council uniform as he was providing services on their behalf.

83. The claimant was not an employee of the respondent from 20 July 2020 to 13 November 2023. He did not enter into a contract of employment with the respondent on 13 November 2023. We find that at all material times, he was employed by Adecco who offered him alternative work once the respondent terminated his assignment.
84. We also find that because the claimant was an employee of Adecco, he was not a worker in relation to the respondent.

The decision to terminate

85. The respondent accepted that they did not receive any information that questioned the claimant's work performance during the time he worked with them.
86. There were two documents which the claimant said were material in the decision to terminate his engagement with the respondent. The first was an open letter to Newham Council dated 12 October 2023 (bundle page 34). The subject matter was "*Newham Refuse Workers: Strike to win now before it is too late*". It made express reference to the claimant who had been dismissed from Newham and had "*signed up 50 Tower Hamlets agency workers to join Unite*". On her own evidence we find that Mrs Simpson saw this letter at the time it was circulated, about a month before the 13 November meeting with the claimant.
87. It was not until shortly after 13 November that Mrs Simpson saw a flyer titled "*Strike to Win*" with a headline seeking the reinstatement of the claimant at Newham. She received it from Corporate Director Mr Simon Baxter who told her that he had been at the depot and had seen a copy. Mrs Simpson does not know that date upon which Mr Baxter received it but she got the impression from speaking to him that he saw it after 13 November 2023.
88. On 24 November 2023 the London Borough of Newham gave a reference for the claimant stating the reason for leaving as "*Dismissal*" (page 50) which the claimant accepted was correct. This reference was passed to Mrs Simpson who brought it to the attention of Mr Baxter. Mrs Simpson did not know the reason for dismissal by Newham and was concerned in the light of this information that the claimant had been engaged. She asked HR colleagues to find out what had happened.
89. The respondent uses a company called Matrix, a Neutral Vendor Managed Service, to procure and manage agency staff. Matrix does not employ Agency staff, it provides a management service for the respondent. On 5 December 2023 Josephine Macaulay in HR for the respondent, sent an

- email to Matrix and others saying that they were extremely concerned to have received the reference from Newham Council informing them that the claimant, had been dismissed from his permanent role with Newham (page 53). She asked how the claimant got through the pre-employment checks that they carry out for agency workers.
90. On 5 December 2023 Matrix told Ms Macaulay that they believed the claimant, was an agency worker before they, Matrix, took over the contract in 2021. They did not have his information on their system (page 52. Ms Macaulay replied (page 51) saying that she was “*appalled*” that the claimant had been engaged despite having been dismissed from his previous employment.
 91. On Tuesday 12 December 2023, part way through his shift, the claimant was called into the office to meet with two of the respondent’s managers. He was told that he was “terminated” and he was escorted from the premises.
 92. At 12:25 on 12 December 2023, Fahima Begum in HR emailed Matrix saying “*The above named agency worker has been dismissed with immediate effect (today). We have made the decision to pay him 3 weeks pay in lieu of notice. Can you please arrange for this payment and for his assignment to be ended on Matrix. Also, if you could inform the agency. Thank you*”. The claimant agreed that he was terminated on 12 December 2023 and that he was told that he would be paid 3 weeks’ pay in lieu of notice.
 93. Mrs Simpson said that HR informed Matrix of the decision to terminate and that it was the responsibility of Adecco to deal with this. Mrs Simpson said it is for the respondent to decide whether they want to terminate an agency worker’s engagement and it then becomes a matter for the agency. The claimant’s evidence was that Adecco offered him alternative work but he did not take this up because he was not well enough. The offer of alternative work was consistent with the claimant remaining an employee of Adecco.
 94. Matrix replied on 12 December 2023 at 2:15pm saying: “*If you have agreed to end his placement and pay him for 3 week then he will have to or his agency submit timesheets for the 3 weeks. then we can end the placement for you.*” (page 54)
 95. The decision to terminate the claimant’s assignment and not to bring him into the respondent’s employment was made by senior managers in the service, including Mr Baxter. Mrs Simpson was not a decision maker. Her evidence was that the reference itself that the claimant had been dismissed from Newham, was a sufficient to justify the decision not to employ him. Our finding of fact is that there was no dismissal.
 96. On 18 December 2023 Ms Macaulay learned by email from a colleague in HR that the claimant’s dismissal from Newham was conduct related (page

- 57). This information post-dated the decision to terminate the claimant's engagement.
97. On 19 December 2023 the claimant emailed HR saying that on Tuesday 12 December he was called in by two managers and told verbally that his placement had been terminated. He asked as a matter of urgency for the reason for his termination.
98. On 21 December 2023 Fahima Begum in HR replied (page 60) saying:
- “As part of the onboarding of agency workers following the recent strike agreement, the Council requested for a reference from your recent employer (London Borough Newham) based on the details you provided.
The reference received is not deemed satisfactory which is the reason why your assignment with the Council has been terminated. In recognition of your 3 years service as agency, it was agreed you will receive 3 weeks pay in lieu of notice.
There is no right of appeal against this decision.”*
99. We find that the claimant was given the reason for the termination of his assignment.
100. The claimant is an active member of Unite the Union. His case was that he was “terminated” because he had been arguing for agency workers to secure their jobs and to prevent detrimental changes to terms and conditions.

The money claims

101. The claimant did not include in his Particulars of Claim or his witness statement introduced on day one, any information about his claim for unlawful deductions from wages or holiday pay. He did not provide a Schedule of Loss. Mrs Simpson was not cross-examined on these matters.
102. When clarifying the issues the claimant said that he was not paid for three days over Christmas 2023. His holiday pay was a matter for his employer Adecco. The claimant gave no evidence as to any other monetary sums he said were due.

The relevant law

103. Section 230 Employment Rights Act 1996 covers the definition of employees and workers:
- (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.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

104. In ***McMeechan v Secretary of State for Employment 1995 IRLR 461*** the Court of Appeal found as follows (at paragraph 1):

The industrial tribunal adopted the wrong approach to the determination of the question for decision. Mr McMeechan's relationship with Noel Employment Ltd was governed by printed conditions of service. Where the relevant contract is, as here, wholly contained in a document(s), the question whether the contract is one of employment is a question of law to be determined upon the true construction of the document in its factual matrix.

105. Under section 146 Trade Union and Labour Relations (Consolidation) Act 1996 (TULRCA) a worker has the right not to be subjected to any detriment as an individual by any act, or deliberate failure to act, by his employer, if the sole or main purpose of:

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,
 - (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
- (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

106. Section 146(5A) provides that the section does not apply “*where (a) the worker is an employee, and (b) the detriment in question amounts to dismissal*”.
107. Section 152 of TULCRA provides that a dismissal is automatically unfair if the reason or principal reason is because the employee was or proposed to become a member of an independent trade union or had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.
108. Under section 94 Employment Rights Act 1996 (ERA) an employee has the right not to be unfairly dismissed by his employer. Section 108 provides a qualifying condition of two years’ service.
109. Section 92 ERA gives a right to an employee to be provided with a written statement of reasons for dismissal. This right is not extended to workers.
110. Under section 23 ERA a worker may bring a complaint to an employment tribunal that the employer has made an unlawful deduction from his wages in contravention of section 13 ERA.
111. Section 13 provides that:
 - (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
112. Under Article 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994 a claim for breach of contract must be made by an employee for the recovery of damages for certain matters including notice pay. This right is not conferred on workers.
113. Under section 135 ERA an employer shall pay a redundancy payment to an employee who is dismissed by reason of redundancy. This is not a right that extends to workers.
114. Under Regulation 16 of the Working Time Regulations 1998 (WTR) a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulations 13, 13A and 15B. Regulation 36 WTR specifically extends the definition of worker to cover agency workers.

Conclusions

115. The claimant based his case on being an employee of the respondent.

The detriment relied upon was dismissal. On our finding he was not an employee of the respondent. As there was no dismissal there is no basis for us to make a finding as to the reason for dismissal. He remained employed by Adecco who offered him further work. At no point did the claimant argue that he was a worker of the respondent and we have found in any event that he was an employee of Adecco assigned to provide services to the respondent. Under section 146(5A) he cannot pursue the detriment claim.

116. As the claimant was not an employee, he did not have the right to claim unfair dismissal whether ordinary or automatically unfair dismissal.
117. The claimant did not have the right to written reasons for dismissal although he was told in the email of 21 December 2023 the reason they terminated his assignment.
118. The respondent had no contractual responsibility for the claimant's holiday pay. This was the contractual responsibility of Adecco.
119. Any other claim for unlawful deductions from wages fails because it was unparticularised and not dealt with in the claimant's evidence. The payment of wages was in any event the responsibility of Adecco.
120. For these reasons the claims fail and are dismissed.

**Employment Judge Elliott
Dated: 20 September 2024**