EMPLOYMENT TRIBUNALS

Claimant: **Mr B Agyekum**

Respondent: **Securitas Security Services**

Heard at: **Watford Employment Tribunal (By CVP)**
On: **19 April 2021**

Before: Employment Judge Cowen

Representation
Claimant: Mr Lo, Counsel
Respondent: Miss Young, Solicitor

RESERVED JUDGMENT

1 The Claimant's claim for unfair dismissal is dismissed.

REASONS

Introduction

1. The claim was issued by the Claimant on 22 November 2019 for unfair dismissal. The response denied that the claimant had been dismissed, or that any dismissal was unfair. It asserted that 'some other substantial reason' was the potentially fair reason for any dismissal.

2. The hearing was heard by CVP online video hearing over one day. I received a joint bundle of documents, witness statements from the Claimant and Mr Tala Fawzi on behalf of the Respondent. I also received a written skeleton argument from both parties to support their closing submissions. I heard oral evidence from both witnesses.

The Facts

3. The Claimant was employed by Vision Security Group from 1 April 2014 and was subject to a TUPE transfer to the Respondent around 3 May 2019. He worked as a security officer at their client's premises, latterly for Arla foods.

4. Prior to the TUPE transfer the claimant had been allowed to take four weeks of holiday together, in order to have an extended holiday in Ghana to visit relatives and friends. However, in July 2019, when he requested the same holiday period via his supervisor, he was contacted by Mr Fawzi who declined his request.

5. In the same call, Mr Fawzi told the claimant that the only way he could be allowed four consecutive weeks of holiday would be if the claimant were to move to a 'casual contract'. The claimant was unsure about it, but Mr Fawzi reassured him that there was plenty of work and therefore his rate of pay and his hours would remain the same. He also told the claimant that if a permanent full time job arose, he would let him know. The claimant was therefore reassured that by changing to a casual contract he would not be placing his regular income and work at risk and that there may be an opportunity to return to a permanent contract after his holiday period.

6. An email was sent to the claimant by Mr Fawzi on 9 May 2019 asking him to agree to the change of contract to a casual contract. The claimant replied on 14 May 2019 accepting the change and saying that "I can trust you on this matter". The claimant also indicated that he was not in fact going to go on the holiday he had initially requested. On 22 May 2019 there was confirmation that the claimant's contract had been altered.

7. After this the claimant continued to work consistently at Arla foods on a casual basis, being offered shifts which he accepted.

8. Later in May 2019, Arla foods indicated that they wished to reduce their security requirement. Mr Fawzi had not known about this impending process when he had spoken to the claimant about changing his contract. The respondent commenced a consultation process for redundancies with the permanent staff. This did not include the claimant, whose offer of work could be reduced unilaterally due to the nature of the casual contract under which he now worked.

9. The claimant was therefore not offered shifts at Arla food after the end of May 2019. Mr Fawzi did offer the claimant shifts at a Marks & Spencer, London Colney in June and July 2019. This work was not as regular in terms of the timing of the shifts and was at a different location.

10. On 23 June 2019 the claimant wrote to Mr Fawzi, alleging that he had been persuaded to take the casual contract in a plot to get rid of him and requested that he be placed back onto a permanent contract. Mr Fawzi replied to deny that there was any such plot and said that he could not now return him to a permanent contract as there was insufficient work available.

11. The claimant was offered work by Mr Fawzi on 27 June. This was to work at Marks and Spencer for £9.50 per hour. The claimant accepted the offer of work and was then sent the contract which indicated it was for 40 hours per week (8 hours per week less than the permanent contract which the claimant had previously worked). This contract was to start on 15 July 2019. The claimant did not want to accept this contract and wanted to return to his previous contract. He indicated this to Mr Fawzi, by text message, who

explained that this was not possible and therefore the work was not carried out by the claimant.

12. No email or contract were sent to the claimant offering work in the first week of July 2019, but the claimant's file was marked as the claimant having refused to work at Marks and Spencer.

13. No other work was offered by the respondent in August, September or October. The respondent therefore paid the claimant his outstanding holiday pay in October 2019.

14. On 28 November Mr Fawzi called the claimant to ask if he would be interested in returning to work at the Arla Foods site. The respondent was offering a full time post to the claimant, but the claimant did not understand that to be the case. He believed that the job was purely as cover for another member of staff. He did not want to work for the respondent again, or to be subject to any further confusion. He declined the offer.

15. The claimant obtained alternative employment in January 2020 which is higher paid than his employment with the respondent.

The Law

16. The claimant asserts that he was dismissed by the respondent. The Tribunal must consider whether the claimant was an 'employee', or whether his status had changed to that of a 'worker' at the time which the claimant asserts that he was dismissed and therefore whether or not he had the protection of s. 98 Employment Rights Act 1996 (ERA).

17. S.230 ERA defines an employee and also a worker. Both of which attract different employment rights;

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

    S.230(3) defines a 'worker' as

    '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'

18. The authority on whether there is a contract of employment was set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. Where it was stated: '*A contract of service exists if these three conditions are fulfilled. (i) The servant agrees*

that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

19. There is now considered to be an irreducible minimum required for a contract of employment to exist; these are
    a. Control by the employer
    b. Personal service by the employee
    c. Mutuality of obligation by both sides.

20. When considering whether the contract provides 'worker' status, the tribunal will consider the decision in Uber BV and ors v Aslam and ors 2021 ICR 657, SC; looking at the practical reality of the working relationship between the employer and the worker and whether it amounts to subordination and dependence.

21. There are a number of benefits to the individual of employee status over worker status; one of which is the ability to bring a claim for unfair dismissal under s.98 ERA. If the only status is that of a worker, then a claim for unfair dismissal cannot be made.

22. *Hodge v Pryors Hayes Golf Club ET Case No.2403182/18* the employment tribunal found that PHGC had wrongfully dismissed H, a zero-hours employee, when he refused to work on a particular day. H had previously been a full-time employee, working a 48-hour week, but his contract was varied to become a zero-hours contract so that he could work flexibly in order to cope with a family illness. PHGC summarily dismissed H when he refused to work on a day on which it needed him. The Tribunal found H's conduct could not have been considered gross misconduct in the absence of any obligation on him to work. He had therefore been wrongfully dismissed in breach of contract. No claim for unfair dismissal was made in that case.

23. If the claimant was an employee throughout, then the Tribunal must consider whether the dismissal was unfair.

24. The respondent asserts that if there was a dismissal then it was for the fair reason of 'some other substantial reason' connected to a business reorganisation. The Tribunal will consider Hollister v National Farmers' Union 1979 ICR 542, CA, where the Court of Appeal said that a 'sound, good business reason' for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions.

25. In accordance with Iceland Frozen Food v Jones [1982] IRLR 439 the Tribunal will consider whether the decision to dismiss was a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.

26. The Tribunal should also consider if the dismissal was procedurally unfair, whether an adjustment should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? Polkey v AE Dayton Services [1987] UKHL 8.

The Decision

27. The claimant was employed on a full time contract with the respondent initially, but agreed on 14 May 2019 to transfer to a casual contract. Whilst this allowed for the basic relationship to continue, in that the claimant provided personal service at the respondent's control, it meant that neither party were obliged to offer or accept any work and that the arrangement between them became less regular. The reality of this situation was that it allowed the claimant to remove himself as available for work for the respondent when he wanted to (i.e for four weeks whilst he travelled to Ghana).

28. However, the corollary of this was that the claimant was no longer an employee assigned to the Arla Food contract. It meant that the claimant could be offered work at any of the respondent's client's sites, or indeed, none of them. Equally the claimant was not obliged to attend work and could accept work from another employer. He had the right to accept or decline each offer of work which was made by the respondent. This can be seen by the offer to work at Marks and Spencer which was made and which the claimant was not obliged to accept.

29. By accepting the change to a casual contract status, the claimant was in fact relinquishing his right to claim unfair dismissal if he were terminated from this work, as he was no longer an employee as defined by s.230(1) ERA.

30. This was not made clear to him by Mr Fawzi, nor was he advised to obtain legal advice. However, that is not the legal responsibility of the employer in such situations. The claimant agreed to change his contract, because he was told that was the only way in which he could now take four consecutive weeks' holiday. This was the focus of the claimant's concerns at the time and he freely agreed to do so. His failure to take advice was his own decision.

31. The claimant's assertion that he was an employee who was dismissed by the respondent is therefore incorrect in law. He agreed to give up his employment status in order to enter into a series of short term assignments with the respondent for any work undertaken. The advantage to the claimant being that he could stop work when he wanted to, in order to have an extended holiday.

32. Having changed his employment status to that of a casual worker, the claimant was not consulted on the redundancy situation at the Arla Foods site, as this was only applicable to employees. The respondent was within its rights to merely stop offering the claimant work at the site, in line with the agreement for casual contract status. The claimant's belief that this was

incorrect of the respondent is due to his misunderstanding of the change in his legal position.

33. Similarly, the respondent did not discipline the claimant for failure to attend work as the claimant was no longer obliged to attend.

34. The claimant made it clear that he did not wish to be bound by the Marks and Spencer contract to start on 15 July. He was entitled to do so. He was not offered any other work by the respondent, having declined this offer, until November 2019 when a vacancy arose at the Arla Foods site. If the claimant had accepted this offer, then he would have been reinstated as a permanent employee. However, when this offer was made, there was a misunderstanding between the parties as to the terms of the offer. In any event the claimant made it clear that he did not want to work with one of the remaining employees on the site and declined the offer to be re-employed.

35. The claimant therefore remained a worker and not an employee. Although no formal termination of that contract occurred, it came to an end when the claimant indicated that he was not prepared to work with the respondent's employee at the Arla Foods site, having previously rejected other work for the respondent. No further work was offered by the respondent and the claimant obtained work elsewhere.

36. The claimant therefore was not an employee and cannot claim unfair dismissal and the claim is therefore dismissed.

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Employment Judge Cowen

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Date 16 July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22 July 2021

S. Bhudia

FOR EMPLOYMENT TRIBUNALS