Neutral Citation Number: [2010] EWCA Civ 1308

Case No: A2/2009/2611/EATRF

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**
**HIS HONOUR JUDGE McMULLEN QC**
**UK/EAT/0358/09**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2010

**Before :**

**LADY JUSTICE ARDEN**
**LORD JUSTICE ELIAS**
and
**LORD JUSTICE PITCHFORD**

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**Between :**

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| **TILSON** | **Appellant** |
| **- and -** | |
| **ALSTOM TRANSPORT** | **Respondent** |

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**Ms Catherine Rayner and Mr Mark Sahu** (instructed by **Messrs Harold Benjamin**) for the **Appellant**
**Ms Anya Palmer** (instructed by **Messrs Zatman and Co**) for the **Respondent**

Hearing date : 5 October 2010

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# Approved Judgment

**Lord Justice Elias :**

1. This appeal raises again the question whether an agency worker, the appellant to this appeal, had a contract of service with the end user, the respondent Alstom Transport ("Alstom"). It was necessary for the appellant to establish that he did in order to confer jurisdiction on the Employment Tribunal to hear his claim for unfair dismissal against Alstom. The Employment Tribunal held that he did have such a contract and could pursue the claim, but that decision was overturned by the EAT (HH Judge McMullen QC, sitting alone). He now appeals that decision.

*The background.*

2. Alstom runs a train business operating, so far as is relevant, out of two depots in north west London, at Wembley and Golders Green. It provides maintenance services for a train operating company. The appellant began working on 23 August 2004 as a technical engineer at Wembley but he was subsequently promoted to a managerial position as Fleet Health Manager at Golders Green until his relationship with Alstom was summarily terminated at the instruction of Alstom on 7 November 2006. He alleges that this termination constituted a dismissal in law which was unfair.

3. It is not disputed that throughout his period of service with Alstom, the appellant was very fully integrated into its business. The employment judge made certain findings to that effect (para 16):

> "In terms of work, the Claimant was fully integrated as a manager in the Respondent organisation. He had a line manager to whom he was responsible. He had Respondent employees reporting to him. He worked Monday to Friday each week. He was authorized by his line manager to recruit staff including full time permanent employees. He was responsible for the business and operational aspects to his job. He was authorised by his line manager to discipline and dismiss permanent employees. He signed time sheets for permanent employees. He ordered materials for and on behalf of Alstom. He has represented the Respondent in negotiating contracts. He had a Respondent company phone, computer and network access. He had to apply to the line manager before taking annual leave. He had full access to technical information and operational reports. In terms of work, then, the relationship displayed all the characteristics of employment. He was not at liberty not to turn up to work or to field a substitute to replace himself at work."

4. Absent any agency arrangements, there can be no doubt that even if there were no express contract, one would readily be implied given this working relationship. To all intents and purposes the appellant was performing work in just the same way as any other employee would do. Moreover, the mutual obligations of work for pay, coupled with the significant degree of control, manifestly satisfy the test for determining whether there is a contract of service laid down in the seminal case of *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497. Not surprisingly, therefore, Ms Palmer, counsel for Alstom, realistically

accepts that if there is a direct contractual relationship between Alstom and the appellant, it will be a contract of service.

5. However, there is a complex agency relationship, in place, which I examine below, under which the appellant's services were provided to Alstom by a third party contractor. Alstom's case, therefore, is that although a casual observer might have assumed that Mr Tilson was one of their employees, in fact he was not. Indeed, it was his choice that he should not be. As the employment judge found, Alstom offered the appellant a permanent job as an employee under an employment contract but he was unwilling to accept this, or at least he was unwilling to do so unless he was guaranteed significantly more hours than employees typically worked. This was because he was on a significantly higher rate of pay under the agency arrangements than he would have received as an employee. In addition, as the employment judge noted, the appellant also perceived there to be tax advantages in this arrangement.

*When can a contract be implied?*

6. The appellant's case is that notwithstanding his unwillingness to enter into an employment contract, in fact as a matter of law he had been engaged by Alstom pursuant to such a contract. There was no express contract in place between Alstom and the appellant, but it was necessary to imply one.

7. The principles for determining when such implication can take place are now well established and they were not in dispute before us. First, the onus is on a claimant to establish that a contract should be implied: see the observations of Mance LJ, as he was, in *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.

8. Second, 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 v Greenwich London Borough Council* [2008] ICR 545 which considered two earlier decisions on agency workers in this court, *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437 and *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: (paras 23 - 24). 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:
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> > "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."

> As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that 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."

9. 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.

10. It is important to emphasise that if these principles are not satisfied, no contract can be implied. It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him. Statute has imposed certain obligations on an end user with respect to such workers, for example under health and safety and discrimination legislation, even where no contract is in place between them. But it has not done so with respect to claims for unfair dismissal. It is impermissible for a tribunal to conclude that because a worker does the kind of work that an employee typically does, or even of a kind that other employees engaged by the same employer actually do, that worker must be an employee. As HH Judge Peter Clark observed in *Heatherwood and Wrexham Park Hospitals NHS Trust v Kulubowila and Others* UK/EAT/0633/06:

> " ..it is not enough to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated as an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment."

11. Nor is it legitimate for a tribunal to imply a contract because it objects to the practice of employers entering into arrangements of this kind in order to avoid incurring the obligations they owe to their employees. In many cases that is undoubtedly the reason why employers enter into agency arrangements, although certainly not all. Some employees prefer these arrangements because they are perceived overall to be more beneficial to them, as this case demonstrates. But even where employers are seeking to avoid liabilities with respect to workers who would prefer to enter into an employment relationship, if as a matter of law the arrangements have in fact achieved the objective for which they were designed, tribunals cannot find otherwise simply because they disapprove of the employer's motives. Section 203 of the Employment Rights Act 1996 renders void contractual terms under which employees contract out of their statutory rights, as the employment judge in this case rightly observed. But if there is no contract in place, then the rights do not arise in the first place and the section has no bite.

*The contractual arrangements.*

12. I turn to consider the nature of the contractual arrangements in this case. The appellant's services to Alstom were provided under a complex quadripartite relationship involving three contractual relationships. First, the appellant himself entered into a contractual relationship with Silversun Solutions Limited (Silversun). He did not sign any contractual documentation and consequently there is no formal

written contract. There was a verbal agreement, under which he agreed to pay Silversun 3% of his salary and whereby Silversun would receive remuneration paid to him and pass it on less that 3% service charge. The employment judge described this as a "payment mechanism, nothing more".

13. The second relevant contract was between Silversun and Morson Human Resources Limited ("Morson"). Under the terms of what was termed a "contract confirmation note", Silversun were to provide the services of the appellant to Morson. Clause 3.1 of the contract is important:

> "Neither the company nor the client shall be entitled to or seek to exercise any supervision, direction or control over the contractor or the operatives in the manner or performance of the project."

14. The company in this context is Morson, the client is Alstom, the contractor is Silversun, and the operative is the appellant. (The reference to "the project" is somewhat inapt term for the provision of the appellant's service, but that is the language used.) So under this clause Morson is undertaking that it will not be entitled to exercise supervision, direction or control the appellant. Alstom, however, is giving no such undertaking since it is not a party to that contract. Rather, Morson is in effect representing to Silversun, and perhaps indirectly through Silversun to Mr Tilson, that Alstom will not exercise such control. (Whether this, being a representation as to future conduct, is a representation capable of giving rise to an action in misrepresentation brought by Mr Tilson against Morson is doubtful, and it is unnecessary to determine the content of any contractual undertaking by Morson with respect to the client.)

15. By clause 8 it was specifically provided that the contract did not constitute a relationship of employer and employee, either between the operative and the contractor (Morson) or the operative and the client (Alstom). However, whether any such relationship is created is a matter of law. As I have noted above, if that is the true nature of the relationship then the clause seeking to deny that effect is void by reason of section 203 of the 1996 Act.

16. Finally, there was a separate contract between Alstom and Morson. The evidence both before us and before the employment judge identified a general contract under which Morson undertook to provide a wide range of services to Alstom and different rates were set for different services. One of the services was the provision of individual workers. This contract envisages that a separate assignment contract setting out the terms and conditions governing a particular assignment would be provided. However, no such document has been produced. The general contract tells us virtually nothing about the relationship between the appellant and Alstom, although it is relevant to note that it does not include any undertaking or representation to the effect that Alstom would not exercise supervision or control over any operative supplied to them.

17. The employment judge did note that whenever there was a change in the appellant's hourly rate, such as occurred on promotion, a new contract confirmation note would be issued from Morson (presumably to Silversun). That was consistent with the contractual terms.

*The decision of the Employment Tribunal.*

18. The employment judge concluded that a contract should be implied in the particular circumstances of this case. The core of his reasoning is provided in the following paragraphs of his judgment:

> " …
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> 26. Is the contract documentation that there is genuine? I have come to the conclusion that it is not. Of course, the Claimant was not party to any of the contract documentation, although he knew he was regarded as an independent contractor. But even leaving that aside, I am compelled to the conclusion that the contract between Silversun and Morson is not a genuine reflection of the relationship between the parties by virtue not least of clause 3.1 which provided that 'Neither the Company nor the client shall be entitled to or seek to exercise any supervision, direction or control over the Contractor or the operatives in the manner or performance of the Project.' The purpose of that clause was to seek to negative the control element of the definition of employment apparent in for example the Ready Mixed Concrete case. But the clause is entirely bogus. The Claimant was subject to the supervision, direction or control of the Respondent. The contracts that did exist created no more than a mechanism for payment. The mechanism involved an attempt to engineer a structure that deflected the possibility of an interpretation of employment. Both the claimant (whether or not he knew the precise terms of the contract) and the respondent were party to that attempt principally for tax and cost reasons. But, as stated, the contract between Silversun and Morson was bogus. The person providing the work was the claimant and the person receiving it and paying for it was the respondent. This was a case where the respondent knew precisely how much the worker was being paid because it determined the hourly rate of pay. In this case it is senseless to describe Silversun as 'the Contractor' when all that company did was to sign the contract and pass on payment less a 3% service charge. It also, it seems to me, makes little sense to refer to the 'Project' as the 'Technician', namely the claimant.
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> 27. Accordingly, the contract between Silversun and Morson may not be relied upon as genuinely determining or reflecting the relationship between the Claimant and the Respondent in this case. However, the Claimant was absorbed in the Respondent's organisation as described in paragraph 16 above and there is plainly a need to imply some sort of contract as regulating the relationship because the relationship was not gratuitous. …..The nature of the relationship was entirely consistent with employment within the Ready Mixed Concrete sense. The relationship was not consistent with the Claimant

> being in business on his own account. Accordingly, in my judgment it is necessary to imply a contract of employment as defining the relationship between the parties and giving business efficacy to it."

19. The reasoning therefore is along the following lines. Clause 3 of the Silversun/Morson contract was bogus; as a consequence the contract between Silversun and Morson was not genuine. The inference was that the other contracts did no more than create a payment mechanism. The relationship between the appellant and Alstom could not be explained by the contractual arrangements in existence. In those circumstances it was necessary to imply a contract to explain the basis on which the appellant was working for Alstom, and that contract could only be a contract of service.

*The decision of the Employment Appeal Tribunal.*

20. Ms Palmer, who represented Alstom at both stages below, submitted to the EAT that the Employment Tribunal decision was flawed and that the judge was wrong to find that there was any contract in existence at all between the appellant and Alstom.

21. She advanced three main submissions. First, the judge was not entitled to conclude that clause 3.1 of the contract between Morson and Silversun was a sham. That was essentially what he had done when he described that clause as "bogus." She asserted that counsel for Mr Tilsom had expressly disavowed that he was running a "sham" argument, and it was accordingly unfair for the employment judge to consider that issue at all. At the very least the judge should have given counsel notice that he was proposing to deal with the matter notwithstanding counsel's unwillingness to run it, and he did not do so.

22. Second, and in any event, even if clause 3.1 was a sham, that did not justify the conclusion that the whole contract between Silversun and Morson was not genuine and was incapable of being relied upon. The contract could still explain the basis on which the appellant's services were being provided by Silversun to Morson, who thereafter contracted them out to Alstom.

23. Finally, Ms Palmer submitted that even if the clause were a sham and the contract could fairly be described as not genuine, that did not justify the Employment Tribunal inferring a contract between the appellant and Alstom. In particular, it was wholly inappropriate to do so where the worker had in terms, on more than one occasion, specifically rejected an approach from Alstom inviting him to become an employee. It was impossible to imply a contract on the principle of necessity so at odds with the appellant's intentions.

24. HH Judge McMullen QC accepted all these submissions. He found that the issue of sham was not live before the judge and should not have been considered by him, certainly not without canvassing the views of the parties. Further, even assuming that clause 3.1 was a sham, this did not justify the inference that the whole of the contract between Silversun and Morson could be ignored as not being genuine. Quite independently of this, he held that the evidence did not sustain the finding of an implied contract. The contract between Morson and Alstom had not been impugned

and there was no reason why it should not explain the relationship between the two parties. The core of his reasoning on this last point is as follows:

> "17. Also, significant, following the judgment of the Court of Appeal in Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld [2009] ICR 1183, is to examine the conduct of the parties after the relationship began to see how it reflects the would-be contract. In my judgment, two significant events occurred. These were the Claimant's flat refusals of invitations to join the Respondent's workforce. It is axiomatic that since the Respondent was offering a contract of employment, it was its view hitherto that the Claimant was not in the workforce, but it wanted him in. It also follows from the Claimant's refusal to join that he regarded himself as an independent contractor. As I indicated earlier, unusual in this case is the fact that the would-be employee has at all times asserted the opposite, with his eyes wide open and articulately understanding the advantages to be gained from remaining as an independent contractor.
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> 18. Why should the law not give effect to the outlook of both Alstom and the Claimant as to what he was doing when he worked with them? The Claimant knew exactly what he was doing; so did Alstom. The Claimant did not wish to change. Alstom did, but knew of course that a change was required in status to bring the Claimant within the workforce and this never happened. Although there are indicia in this judgment which might on their own point to an employment relationship, such as integration into the organisation of Alstom, supervision and control, the starting point has to be what documents there are or are not, and then the conduct of the parties once the relationship had started. All of those point firmly against an employment relationship."

25. Had the EAT upheld the appeal simply on the first two grounds, that would have necessitated a remission to a fresh tribunal to hear the matter again. But His Honour Judge McMullen QC decided to determine the issue himself and to substitute his decision for that of the employment judge. He justified this approach on the grounds that once the sham argument had been disposed of he was in as good a position to assess the case, on the basis of the facts found by the employment judge, as the employment judge himself. Hence he substituted his conclusion that there was no contract in place.

26. In approaching the matter in this way, the EAT erred in law. It is not entitled to substitute its own decision for that of the employment tribunal simply on the basis that it is in as good a position as the employment judge to make the necessary determination. This was precisely what the EAT did in *Wilson v Post Office* [2000] IRLR 834 and the Court of Appeal held that it was wrong to do so. Buxton LJ said this (para 36):

> "The [employment] tribunal is not merely a fact-finding body, it is an industrial jury. That is not merely a phrase, but a concept that has to be taken seriously. It is only going to be in an extreme case, one that is very clear, that it is going to be possible for an appellate body properly to say that a jury would have inevitably reached the conclusion that the EAT reached, when in the original case, albeit proceeding upon an incorrect basis, the [employment] tribunal had come to a contrary conclusion. I do not think it is possible to say confidently in this case that if the matter is remitted on the basis that this court has indicated, it is inevitable that an industrial jury will consider that Mr Wilson was fairly dismissed."

27. As this judgment of Buxton LJ makes clear, it is only where the employment tribunal, properly directing itself in law, could reach only one legitimate decision that the EAT can substitute that decision for the one improperly reached by the employment tribunal. This is a well established principle reflecting the approach of earlier courts: see e g the observations of Sir John Donaldson in *O'Kelly v Trust House Forte* [1983] ICR 728, 764 and *Hellyer Bros v MacLeod* [1987] ICR 526,547.

28. In fact, it seems to me that on a fair reading of Judge McMullen's decision, he was indeed concluding that on the facts found by the employment judge, the only correct decision was that there was no contract in existence linking the appellant and Alstom. To imply a contract was wholly at odds with Mr Tilson's own wishes and intentions. That is in fact the way in which the appellant has understood the decision, as counsel's notice of appeal to this court makes clear. On this analysis the EAT was indeed justified in substituting its decision for that of the employment judge. It follows, however, that an appeal against this particular aspect of the EAT's judgment should succeed if there was more than one decision that a properly directed tribunal could have reached on the facts.

29. I would observe in passing that I think there is much to be said for a relaxation of the established principles in the manner adopted by Judge McMullen, particularly where, as in this case, the proceedings have continued for a long time. (There had already been one appeal to the EAT on an earlier interlocutory point.) The overriding objective set out in the EAT rules seeks to save costs, amongst other matters, and it is not necessarily in the parties' interests to disable the appellate court from reaching a decision on the same evidence as would be available to the judge. However, we were not addressed on any of this jurisprudence and this is not an appropriate case to formulate a modification of the traditional rule.

*The grounds of appeal.*

30. The appellant submits that there was a proper basis for the decision of the employment judge, no material misdirection, and no unfairness. The employment judge made findings of fact which fully justified the conclusion he reached and the EAT was wrong to interfere with his decision.

31. As to the procedural issue, Ms Rayner does not accept that there was any material unfairness. She says that although the judge described clause 3 as bogus, that was not for the purpose of identifying bad faith or anything of that nature. The clause was

bogus because it represented a situation, namely that there would be no supervision over the appellant by Alstom as the end user, which was wholly at odds with the facts.

32. The key element in the judge's reasoning, it is submitted, was the fact of the divergence between contract and practice; the reason for that divergence - whether because there had been a deliberate intention to mislead or otherwise - was immaterial. The fact of this divergence was not and could not be challenged. Ms Palmer was not treated unfairly since the divergence between contract and practice figured as an important feature of the appellant's argument before the employment judge and Ms Palmer was able to deal with it in her submissions.

33. Ms Rayner also argued that the employment judge was entitled to conclude that once clause 3 of the contract between Silversun and Morson was found to be misleading, the contract itself could not be relied upon. In any event, I understood her to be submitting that whether that was so or not, the factual findings of the judge justified his conclusion that a contract should be implied.

34. I see some force in Ms Rayner's submissions on the fairness point. Of course, as the EAT correctly pointed out, a judge is not entitled to reach a conclusion on a matter not properly canvassed with the parties. That is particularly so where, as here, counsel indicated that he was not pursuing the sham argument. Furthermore the description of the clause as "bogus" does have pejorative overtones which a party may well want to rebut. But the implied criticism arising from the use of that term could not have been directed against Alstom; they were not a party to the contract in question. In those circumstances, it is difficult to see how Ms Palmer could make any effective representations about why the clause had been introduced into the contract or indeed whether it was bogus or not.

35. But whatever the merits of the appellant's submission on the procedural point, I do not accept Ms Rayner's contention that the employment judge was entitled to conclude that if clause 3 was bogus in the manner he described, this rendered the whole of the contract between Silversun and Morson invalid and justified the inference that the effect of the agency arrangements was simply to create a mechanism for payment. I see no grounds for the conclusion that because one clause of a contract contains a representation or contractual term which the parties know to be false, the whole contract is ineffective. And even if it were, Alstom were not a party to that contract, and I see no basis for concluding that their contract with Morson would thereby fall away, or should be construed other than at face value.

36. It follows that, in my judgment, Ms Rayner cannot sustain the reasoning of the judge. He reached his conclusion on a material misdirection.

37. Her third ground of appeal is directed against the positive finding of the EAT that it was not necessary to imply a contract between Alstom and the appellant to explain the relationship between them. As I have indicated, Ms Rayner merely has to show that a properly directed employment judge might have reached a different conclusion to succeed in having the case remitted to the employment tribunal. However, the fact that an employment judge could have reached the same decision notwithstanding a misdirection in law would not save his decision. If an employment judge reached his conclusion by applying the wrong legal principles, it is no answer to a challenge to his decision to say that there was evidence which would have entitled him to come to the

same decision had he approached the matter correctly. It may be that he would have reached a different conclusion if the right test had been applied. Accordingly, in the usual case there needs to be a remission in those circumstances. It is only if the decision is "plainly and unarguably right" notwithstanding the misdirection (see *Dobie v Burns International Security Services* [1984] ICR 812, 818 per Sir John Donaldson) that the Tribunal's decision can stand. This is essentially the same principle as that which dictates that an appeal court can substitute a different decision only if the employment tribunal decision is plainly wrong. I am not sure that Ms Rayner ever did go so far as to suggest that the decision of the employment judge was the only one available to him on the facts, but I will assume that this was one of her submissions.

38. The central issue in this appeal, therefore, is whether, given the facts before the employment tribunal, the conclusion of the employment judge was either a possible finding, in which case the issue will have to be remitted; or was the only possible finding, in which case we will have to restore the conclusion of the employment judge notwithstanding his misdirection. If, as the EAT found and as Ms Palmer submits, an employment judge was bound to conclude that there was no contract, the appeal must fail.

39. Ms Rayner submitted that there were three findings of the employment judge in particular which, when considered cumulatively, either justified or at least were capable of justifying the conclusion that there was an employment contract in place. First, there is the finding of the very extensive integration of the appellant into Alstom's business, as recounted by the Employment Tribunal in paragraph 16 of its decision. This, it is submitted, was a significant factor to which the employment judge was entitled to have regard when determining whether it was necessary to imply a contract or not.

40. A second and related point was the divergence between the representations in clause 3 of the Silversun/Morson contract as to how Alstom would treat the appellant and the actual reality of that relationship. Far from disavowing control over the manner in which the appellant was performing his duties, as clause 3 of the Silversun/Morson contract suggested would be the position, Alstom was strongly asserting control. The reality on the ground did not reflect the way in which the contractual documents envisaged that the contract would be preformed. This was a powerful factor pointing in favour of implying a contract even if the judge was wrong to say that none of the contract between Morson and Silversun could be treated as genuine.

41. Finally, there was the specific finding, referred to in paragraph 16 of the employment judge's decision; that the appellant had to notify his line manager before taking his holidays. Ms Rayner did not assert that this factor would on its own justify implying a contract, but it reinforced the employment judge's conclusion.

42. In relation to this part of the appeal, Ms Palmer essentially reiterated before us the arguments which had found favour with the EAT. She submitted that it contrary to fundamental contractual principles to imply a contract on the basis of necessity in circumstances where there was a clear and unambiguous stated intention on the part of the appellant that he did not wish to enter into any such contract.

*Discussion.*

43. The question is whether the three factors relied on by the appellant, to which I have referred, are capable of sustaining the employment judge's conclusion.

44. In my judgment, they are not, whether considered individually or cumulatively. First, the mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end user. Indeed, in most cases it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree, and this will inevitably involve control over what is done and, to some extent, the manner in which it is done. The degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service. But it is a factor of little, if any, weight when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows that in law he must be an employee.

45. The second factor is the effect of clause 3. It plainly did misrepresent in a blatant way the extent of the control which Alstom would exercise over the appellant. The relationship between the appellant and Alstom was not conducted remotely in the manner which that contractual term envisaged that it would be. Is it necessary to infer a contract to explain this divergence between contract and practice?

46. I do not accept that it is. It is pertinent to note that Alstom never made any representation to the appellant, or gave any contractual undertaking, that they would not seek to control his activities. That representation was made by Morson to Silversun, and perhaps indirectly to the appellant if an assumption is made in the appellant's favour that Silversun were acting as his agent. The fact that the appellant was subject to a considerable degree of control was no doubt inconsistent with clause 3.1 of the contract between Morson and Silversun. But even if it can be said that there was a representation or contractual promise effectively made to the appellant, through Silversun, that does not create any inconsistency between Alstom's conduct with respect to the appellant and any undertakings it has given.

47. The breach of the term in clause 3 might have justified the appellant in refusing to accept the placement with Alstom on the grounds that he had been misled by Morson as to the manner in which he would have to work. But he chose to work for Alstom notwithstanding that breach. The contract between Morson and Alstom under which Morson undertook to provide his services fully explained why he was working for Alstom, and there was no evidence before the Employment Tribunal that in their dealings with the appellant, Alstom acted inconsistently with the terms of that contract.

48. As to the final point, the need to apply to the line manager before taking annual leave is not sufficient to justify the implication of a contract. Ms Rayner did not contend otherwise. It is not, in fact, entirely clear whether the line manager has a veto over whether the leave can be taken, or whether it is simply necessary for the leave to be notified to permit appropriate steps to be taken to cover the position. The latter would not begin to suggest that viewed objectively the parties intended their relationship to be covered by contract. The former would potentially be a factor of stronger weight, but it would not, in my judgment, be sufficient to imply a contract on the principle of

necessity in circumstances where this was inconsistent with the stated intentions of the parties or, in some circumstances at least, one of them.

49. In my view, there is no legitimate basis to imply a contract on these facts, even when considered cumulatively. In my judgment the only proper inference is that the parties would have acted in exactly the same way if there had been no contract, and as Lord Bingham pointed out in *The Aramis* [1989] 1 Lloyd's Rep 213, that is fatal to the implication of a contract.

50. Moreover, this conclusion is strongly reinforced, as the EAT found, by the fact that there was no common intention or desire that there should be a contract between these parties, or at least, not on the wage rates the appellant was receiving. The appellant had expressly abstained from entering into an employment contract with Alstom. I do not suggest that a contract can never be implied if this is contrary to the wishes or understandings of a party or parties; whether a contract should be implied is ultimately a matter of law and involves an objective analysis of all the relevant circumstances. But the parties' understanding that there is no such contract in place explaining the terms of their relationship, and their inability to reach an agreement on the terms which such a contract should contain, are extremely powerful factors militating against any such implication.

51. I glean support for this conclusion from the decision of this court in *Baird Textile Holdings Ltd v Marks and Spencer plc* [2002] 1 All E R (Comm) 737. Baird supplied garments to the defendant clothing retailer for over thirty years on a seasonal basis. Marks and Spencer terminated the arrangement from the end of a particular season. Baird alleged that there was an implied umbrella contract under which they were entitled to reasonable notice before the arrangement could lawfully be terminated. The evidence before the court was that Marks and Spencer had on a number of occasions deliberately abstained from entering into a contract of the nature relied on by the claimant. Morison J at first instance had held that in these circumstances "to imply a contract …would seem to me to offend against the principle that the parties conduct must show an implied common intention to create legal relations." The Court of Appeal did not give this evidence quite the same weight as the judge, but it was a relevant factor in their conclusion that no contract could be implied on the principles of necessity in the circumstances of that case. Sir Andrew Morritt VC said with respect to this argument that he could "see force in the point but it was not conclusive either way" (para 23). Mance LJ observed that it was "unrealistic" to conclude that there was, objectively viewed, an intention to enter into a contract when Marks and Spencer were deliberately seeking to avoid that result (para 73); and Judge LJ said that it would be "rather surprising" to imply a contract in those circumstances (para 47).

*Disposal.*

52. It follows that, in my judgment, there was no proper basis on which any employment tribunal, properly directing itself on these facts, could find that there was a direct contractual relationship between Alstom and the appellant. The EAT was right so to conclude.

53. Accordingly, the appeal fails and is dismissed.

## Lord Justice Pitchford:

54. I agree

## Lady Justice Arden:

55. I also agree.