



Reserved judgment

THE EMPLOYMENT TRIBUNALS

Between

Miss A Jones

Claimant

and

Sanctuary Personnel Limited

Respondent

Hearing at London South on 3 March 2017 before Employment Judge
Baron

Appearances

For Claimant: The Claimant was present in person

For Respondent: David Hill – Director of the Respondent

JUDGMENT

It is the judgment of the Tribunal that the claim is dismissed.

REASONS

Introduction

- 1 On 22 January 2016 the Claimant presented a claim form to the Tribunal. She ticked the box to indicate that she was making a claim for holiday pay. The details of the claim were set out as follows:

I have been working for Sanctuary as a employee I have been PAYE for tax purposes, I believe that I am owed holiday money in relation to the AWR regulations, Sanctuary disputes this and have informed me that I am LTD and am my own employer therefore I need to pay myself holiday pay.

I am seeking my holiday pay I have not had a break between working with Sanctuary I work as a Social worker for the Local Authority and Sanctuary contracts me out. I have regular supervision, I am not able to set my own hours I do not manage my invoices and there is no one else that can perform my duties.

- 2 As will be seen below that is not an accurate summary of the legal relationships. In particular the Claimant did not pursue the point that she was as an individual an employee of the Respondent.

- 3 The basis of the defence of the Respondent was succinctly set out in the first paragraph of the details of the response as follows:

The Defendant is not obliged to pay the Claimant holiday pay because there has never been a contract of employment between the Defendant and the Claimant.

- 4 I held a hearing of the claim on 23 May 2016 and dismissed the claim in an oral judgment. However, when preparing the written reasons for it I

concluded that I had not taken full account of the provisions of the Agency Workers Regulations 2010. I therefore decided to reconsider the judgment. I arranged for a letter to be sent to the Claimant on 23 June 2016 seeking clarification of exactly what her claims were. On 28 June 2016 the Claimant replied saying that she was claiming the same leave as a non-agency employee. Further details were requested by me in a Note dated 28 November 2016.

- 5 In an email of 19 February 2017 the Claimant said the following:

I am claiming holiday pay for the time that I have been a LTD company and the boroughs that I have worked in during these times are Redbridge, Southwark, Croydon and Hillingdon.

....

The nature of my claim is that I have been employed by Sanctuary as a Locum Social Worker during this time and have a LTD company. I believe that under the AWR regulation I am entitled to 5.6 weeks of holiday pay which is my claim. I am also claiming VAT at 20% and interest for unpaid funds at 5%. In addition, I am also reclaiming the fees that I paid to the tribunal to lodge this claim which totals £390.

- 6 The Claimant also sent an Excel spreadsheet to the Tribunal. That commenced with the week commencing 6 April 2014 and continued up to and beyond the date of presentation of the claim to the Tribunal. There are six periods shown, not taking account of one which was entirely after the date of presentation of the claim. The methodology in respect of each period is the same. The Claimant has totalled up the gross pay received during the period, and then divided it by the number of weeks to provide an average amount of weekly pay. She has then calculated the number of weeks of leave accrued due during that period, and the resulting amount of holiday pay alleged to be due. To that she has added VAT at 20%. The exact calculations are not material at present. The periods can be summarised as in the table below, and the significance of the second column is explained below:

06.04.14 – 29.06.14	Nokota Limited	London Borough of Bexley
06.07.14 – 14.09.14	Nokota Limited	London Borough of Redbridge
21.09.14 – 08.03.15	A Jones Consultancy Limited	London Borough of Redbridge
15.03.15 – 29.03.15	A Jones Consultancy Limited	London Borough of Croydon
05.04.15 – 29.11.15	A Jones Consultancy Limited	London Borough of Southwark
20.12.15 – 28.02.16	A Jones Consultancy Limited	London Borough of Croydon

- 7 Although not specifically articulated by the Claimant, it is apparent that the Claimant is seeking to be paid accrued leave pay to which she would have been entitled under regulation 14 of the Working Time Regulations 1998 as if she had been an employee of the borough in question on termination of that employment.
- 8 It transpired during this hearing that that table contained two errors. The first is that the Claimant is not seeking any remedy in respect of the first

two periods mentioned above because she accepted that she received leave pay during those assignments, a point to which I will return. The second error is that the Claimant was not assigned to the London Borough of Croydon for three weeks commencing on 15 March 2015, but to the London Borough of Southwark. There is a third point which is this. The claim form ET1 was presented on 22 January 2016. The assignment with the London Borough of Croydon was current at the time. As the claim is for accrued leave pay any claim can only arise on the termination of the assignment. There are therefore only two assignments which are relevant.

The Agency Workers Regulations 2010

- 9 I set out below those parts of the 2010 Regulations which are material to the claim being made. The definition of 'hirer' is in regulation 2, that of 'agency worker' is in regulation 3, and that of 'temporary work agency' in regulation 4.

2 Interpretation

In these Regulations—

....

"hirer" means a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person;

3 The meaning of agency worker

- (1) In these Regulations "agency worker" means an individual who--
- (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
 - (b) has a contract with the temporary work agency which is--
 - (i) a contract of employment with the agency, or
 - (ii) any other contract with the agency to perform work or services personally.
- (2) But an individual is not an agency worker if--
- (a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or
 - (b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.
- (3) For the purposes of paragraph (1)(a) an individual shall be treated as having been supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer if--
- (a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and
 - (b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.
- (4) An individual treated by virtue of paragraph (3) as having been supplied by a temporary work agency, shall be treated, for the purposes of paragraph (1)(b), as having a contract with the temporary work agency.
- (5) An individual is not prevented from being an agency worker--
- (a) because the temporary work agency supplies the individual through one or more intermediaries;
 - (b) because one or more intermediaries supply that individual;
 - (c) because the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;

- (d) because the temporary work agency pays for the services of the individual through one or more intermediaries; or
 - (e) because the individual is employed by or otherwise has a contract with one or more intermediaries.
- (6) Paragraph (5) does not prejudice the generality of paragraphs (1) to (4).

4 The meaning of temporary work agency

- (1) In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of--
- (a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or
 - (b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.
- (2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers.

- 10 The rights provided to agency workers are set out in regulations 5 and 6. There is a qualifying period of 12 weeks set out in regulation 7, supplemented by regulation 8.

5 Rights of agency workers in relation to the basic working and employment conditions

- (1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer--
- (a) other than by using the services of a temporary work agency; and
 - (b) at the time the qualifying period commenced.
- (2) For the purposes of paragraph (1), the basic working and employment conditions are--
- (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;
 - (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,
- whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.
- (3) Paragraph (1) shall be deemed to have been complied with where--
- (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
 - (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.
- (4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place--
- (a) both that employee and the agency worker are--
 - (i) working for and under the supervision and direction of the hirer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
 - (b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.
- (5) An employee is not a comparable employee if that employee's employment has ceased.
- (6) This regulation is subject to regulation 10.

6 Relevant terms and conditions

- (1) In regulation 5(2) and (3) "relevant terms and conditions" means terms and conditions relating to--

- (a) pay;
- (b) the duration of working time;
- (c) night work;
- (d) rest periods;
- (e) rest breaks; and
- (f) annual leave.

(2) For the purposes of paragraph (1)(a), "pay" means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

(3) [Not applicable]

(4) – (5)

- 11 The liability of the temporary work agency and the hirer is in regulation 14.

14 Liability of temporary work agency and hirer

(1) Subject to paragraph (3), a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

(2) The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

(3) A temporary work agency shall not be liable for a breach of regulation 5 where it is established that the temporary work agency--

(a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer--

(i) about the basic working and employment conditions in force in the hirer;

(ii) if needed to assess compliance with regulation 5, about the relevant terms and conditions under which an employee of the hirer is working where--

(aa) that employee is considered to be a comparable employee in relation to that agency worker for the purposes of regulation 5(4), and

(bb) those terms and conditions are ordinarily included in the contract of such a comparable employee;

and

(iii) which explains the basis on which it is considered that the employee referred to in sub-paragraph (ii)(aa) is a comparable employee;

(b) where it has received such information, has acted reasonably in determining what the agency worker's basic working and employment conditions should be at the end of the qualifying period and during the period after that until, in accordance with regulation 8, the agency worker ceases to be entitled to the rights conferred by regulation 5; and

(c) ensured that where it has responsibility for applying those basic working and employment conditions to the agency worker, that agency worker has been treated in accordance with the determination described in sub-paragraph (b),

and to the extent that the temporary work agency is not liable under this provision, the hirer shall be liable.

(4) . . .

(5) Where more than one temporary work agency is a party to the proceedings, when deciding whether or not each temporary work agency is responsible in full or in part, the employment tribunal shall have regard to the extent to which each agency was responsible for the determination, or application, of any of the agency worker's basic working and employment conditions.

(6) – (7)

- 12 The right to present a complaint to the Tribunal is set out in regulation 18, which contains provisions as to time limits. In the light of my conclusion on the merits of the claim it is not necessary to set out these provisions. In particular I do not need to consider whether the Tribunal has the jurisdiction to decide any claim relating to the termination of the

engagement with the London Borough of Redbridge in March 2015 taking into account the statutory time limit.

The facts

- 13 The Claimant is a qualified social worker. She has worked as locum with various London boroughs as set out in the table above. In the response the Respondent stated that it was an 'employment business'. The terminology is confusing. That phrase appears in the Employment Agencies Act 1973, which also uses 'employment agency'. The relevant term in the 2010 Regulations is 'temporary work agency'.
- 14 The chain of contractual arrangements is complex, but no doubt there is commercial logic behind them. I was not provided with all the relevant documentation, and some of the documents had not been fully completed. I am satisfied, however, that I have the evidence to make appropriate findings of fact.
- 15 The work of the Claimant on a day-to-day basis was for the two local authorities during the periods shown above. The London Borough of Redbridge contracted with an organisation referred to by Mr Hill as 'Matrix SCM' for the provision of temporary staff, which in turn contracted with the Respondent. The London Borough of Southwark had a similar arrangement with Comensura. I was not provided with details of those contracts. The Respondent in turn contracted with Nokota Limited, and from 21 September 2014 with A Jones Consultancy (UK) Limited ('AJCL'). Those companies in turn contracted with the Claimant personally, but I was again not provided with any documents.
- 16 AJCL was incorporated on 1 August 2014, and the Claimant was the sole director and shareholder. From 11 August 2014 the Claimant's daughter, Katrina Tepper, became the sole director and shareholder in her place. However the Claimant referred to the company as being her, and vice versa.
- 17 When starting her assignment with each of the London Borough of Redbridge and the London Borough of Southwark the Claimant completed a form prepared by the Respondent headed 'Booking Confirmation – Candidate Ltd'. The form provided for the start date of the assignment and other basic details. It also had set out in it the 'Actual Rate of remuneration i.e rate which you will be paid in this Assignment.' That is misleading. What it meant was that that was the rate to be paid by the Respondent to Nokota Limited or AJCL as the case may be.
- 18 There was in the bundle an incomplete copy of a contract which the parties accepted was probably the document governing the relationship between the Respondent and AJCL at all material times.¹ The only provision to which my attention was drawn was clause 3.3 which provided that AJCL was an independent contractor, and that the responsibility for complying with obligations towards its employees lay with AJCL.

¹ There was also a further contract, again only partially completed, but signed by the Claimant and dated 10 December 2015. That is after the periods with which we are concerned.

- 19 I find that the Respondent is a temporary work agency for the purposes of the 2010 Regulations certainly within regulation 4(1)(b), and possibly also with regulation 4(1)(a). I have noted the point made by Mr Hill that the Respondent provided limited companies, and not individuals, and it was those limited companies which supplied the individuals. If correct, that may exclude the provisions of paragraph (a), but not paragraph (b).
- 20 The Claimant told me that AJCL had been incorporated for the purpose of reducing the tax and National Insurance Contributions otherwise due and that, in effect, the company was the Claimant. After discussion about the distinct legal personalities of the Claimant as an individual and AJCL as a corporate entity the Claimant accepted that AJCL was also a temporary work agency because of the provisions of regulation 4(1)(a). I would have found that to be the case without the concession.
- 21 I find that the Claimant was an agency worker within regulation 3. Regulation 3(1)(a) requires that she must have been supplied by a temporary work agency, and regulation 3(1)(b) requires that there be a contract with that agency. The effect of the involvement of intermediaries of those provisions is set out in paragraphs (3), (4) and (5) of regulation 3.
- 22 Having established that the Claimant was an agency worker, and that in relation to her the Respondent was a temporary work agency, it is necessary to consider the rights of the Claimant and the liability, if any, of the Respondent to the Claimant in respect of those rights. Regulations 5(1) and 7 provide, in effect, that after a period of 12 weeks the agency worker has the same rights in certain respects as a permanent employee has. The qualifying period was satisfied in respect of each of the engagements under consideration.
- 23 The terms and conditions which are relevant are set out in regulation 6. One of the categories is 'pay' which is given a wide meaning by regulation 6(2). In particular it includes 'holiday pay or other emolument referable to the employment, whether payable under contract or otherwise'. The claim being made in these proceedings is for accrued leave pay payable under the 1998 Regulations on the termination of employment. I find that such pay falls within the definition of 'pay' in regulation 6(2) as an 'emolument referable to the employment'. I do not see how it could be otherwise, as what I might describe as 'actual' holiday pay is covered, as is the right to annual leave. The employees of the hirers will have been entitled to the benefit of the provisions of regulation 14 of the 1998 Regulations, and possibly had a more generous entitlement. There was no evidence to that effect and the Claimant relied upon the rights in the 1998 Regulations. The Claimant was in my judgment entitled to the benefit of regulation 14.
- 24 What then falls to be considered is which company or organisation is liable for the payment. Regulation 14(1) provides that a temporary work agency is liable 'to the extent that it is responsible for the breach'. It is clear also from regulation 14(5) that provision is made for the possibility of there being more than one temporary work agency included as respondents in such claims.

- 25 To me the answer is in the end quite clear. The reason why Miss Jones withdrew the claims against the Respondent in respect of the periods when Nokota was an intermediary was that when she was engaged by the hirers ultimately through that company, it was that company which paid her personally, and PAYE tax and NICs were deducted in the usual way. The Claimant's weekly payments were divided into two. She was paid what I might describe as 'normal' pay, and in addition there was a separately identifiable amount shown on her payslip as holiday pay. Thus she was being paid money on a weekly basis on account of the liability accruing due. Nokota had accepted the responsibility for making the necessary arrangements. After the involvement of AJCL the Claimant received a sum of money each week from AJCL but it was not separated into categories. That arrangement was administered by her accountant, and PAYE tax and NICs were deducted.
- 26 It is not my function in these proceedings to seek to analyse every one of the contractual relationships in the complex chain and apportion liability, and indeed I could not do so simply because of a lack of evidence. I do know that the Respondent agreed with the Claimant the hourly rate that would be paid by the Respondent to Nokota initially, and then to AJCL. What the rate was that was charged by the Respondent and any other intermediary and eventually paid by the hirer was not revealed. The Claimant has to show that the Respondent was itself responsible for the failure for her to be paid a sum on the termination of each engagement in question to represent accrued leave pay. She has failed to show that was the case. Although I do not have to decide the point, it appears that any liability is either on Nokota or AJCL, or possibly on the hirer. It has already been agreed that Nokota discharged that liability in practice. What the Claimant should have done was to procure through her accountants that AJCL retained sufficient funds to make a lump sum payment to her on the termination of an assignment, or adopt the practice of Nokota of paying separately on account of the accruing liability.

Employment Judge Baron

07 March 2017