



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON

BETWEEN:

Mr Sinka

Claimant

AND

Payco Services Limited

Respondent

ON: 9 October 2018

Appearances:

For the Claimant: In person, through a Hungarian interpreter

For the Respondent: Mr K Chaudhuri, Representative

JUDGMENT

1. It is not possible to determine the issues arising in the preliminary hearing without joining as additional respondents to the claim 247 Granby Chambers and Day Aggregates.
2. The Claimant does not have two years' service with the Respondent or any other potential respondent to the claim. His claim for a redundancy payment is therefore dismissed.

Reasons

Introduction

1. By a claim form presented on 18 April 2018 the Claimant presented to the tribunal claims of race discrimination and payments in respect of notice pay, holiday pay, unpaid wages and unpaid statutory sick pay. He also indicated that he was claiming a redundancy payment. He brought his claim against two Respondents, Payco and 247 Staff Granby Chambers ("247"). His claim against 247 was not accepted as he did not have an early conciliation certificate in respect of that entity. He also stated in his claim form that he also wished to bring his discrimination claim against Day Aggregates, whose name and address he included in his claim form, but it appears from the Tribunal file that there was no early conciliation certificate for Day Aggregates either.
2. The claim therefore proceeded against Payco only and following a preliminary hearing for case management a one day preliminary hearing was listed to determine the issues set out in the list below. The Claimant was also ordered to give certain further particulars of his claim, which he did.
3. At the hearing the Claimant gave evidence on his own behalf with the assistance of a Hungarian interpreter, who was very helpful to the Tribunal. The Claimant called no other witnesses. He had prepared a statement and given further particulars of his claim in English, with the assistance of a non-legal representative, Krisztina Toth, who was named on the claim form but did not represent the Claimant at the hearing.
4. The Respondent's evidence was given by Stephen Thomas, a Director of the Respondent.
5. There was a bundle of documents and any references to page numbers in this judgment is a reference to page numbers in that bundle.

The issues

6. The issues for the hearing were as follows:
 - a. Was the Claimant an employee or worker of the Respondent?
 - b. Were those who performed the acts which the Claimant relies on as acts of discrimination employees or agents of the Respondent?
 - c. Was the Claimant's engagement terminated and if so by whom?
 - d. Should the Claimant's claim against the Respondent be struck out as having no reasonable prospect of success?
 - e. Should the Claimant be ordered to pay a deposit as a condition of continuing with his claim on the grounds that his claim against the Respondent has little prospect of success?

The law

7. The Employment Rights Act 1996 defines the terms "employee" and "worker" as follows:

230.— Employees, workers etc.

(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.

(4) In this Act “employer” , in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment” —

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and “employed” shall be construed accordingly.

8. For the purposes of a claim for holiday pay under the Working Time Regulations 1998 the same definitions are adopted.
9. For the purposes of a claim of discrimination, two definitions under the Equality Act 2010 ("Equality Act") are relevant, that of "contract worker" under s 41 which provides as follows:

41 Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

- (3) A principal must not victimise a contract worker—
- (a) as to the terms on which the principal allows the worker to do the work;
 - (b) by not allowing the worker to do, or to continue to do, the work;
 - (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
 - (d) by subjecting the worker to any other detriment.
- (4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).
- (5) A “principal” is a person who makes work available for an individual who is—
- (a) employed by another person, and
 - (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
- (6) “Contract work” is work such as is mentioned in subsection (5).
- (7) A “contract worker” is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

and that of "employed" under s83 (2) which provides:

83 Interpretation and exceptions

- (2) “Employment” means—
- (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

10. The Equality Act also provides for employers and principals to be liable for acts of discrimination by employee and agents. S109 Equality Act provides:

109 Liability of employers and principals

- (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
- (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

11. Mr Thomas also referred in his evidence to s44 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") which provides as follows:

“44 Treatment of workers supplied by agencies

- (1) This section applies if—
 - (a) an individual (“the worker”) personally provides services (which are not excluded services) to another person (“the client”),
 - (b) there is a contract between—

- (i) the client or a person connected with the client, and
 - (ii) a person other than the worker, the client or a person connected with the client (“the agency”), and
- (c) under or in consequence of that contract—
- (i) the services are provided, or
 - (ii) the client or any person connected with the client pays, or otherwise provides consideration, for the services.
- (2) But this section does not apply if—
- (a) it is shown that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person, or
 - (b) remuneration receivable by the worker in consequence of providing the services constitutes employment income of the worker apart from this Chapter.
- (3) If this section applies—
- (a) the worker is to be treated for income tax purposes as holding an employment with the agency, the duties of which consist of the services the worker provides to the client, and
 - (b) all remuneration receivable by the worker (from any person) in consequence of providing the services is to be treated for income tax purposes as earnings from that employment.
12. Mr Chaudhuri also referred me to a number of cases, which for reasons that will become clear it has not been necessary for me to refer to in this judgment.

My findings

13. Based on the witness and documentary evidence I find as follows. I have made only limited findings of fact and have made it clear where I am doing so.
14. I find the following as facts: the Claimant is an excavator operator and a Hungarian national. The Respondent is a commercial contracting business and an umbrella company specialising in engagement of staff and tax regulation. It provides services to employment businesses such as 247. Mr Thomas described it as providing “commercial opportunities for sub-contractors, freelancers and other self-employed professionals as well as engaging umbrella employees within a host of industries such as construction, engineering, power and waste management, medical, logistics and media”. In an umbrella company arrangement the individual worker is engaged through an employment business (in this case 247) and has a contractual relationship of some kind with the umbrella company (in this case the Respondent) which then takes responsibility for paying tax and national insurance to HMRC in relation to work done for an end user client (in this case Day Aggregates). The nature of the Claimant's contractual relationship with

the Respondent was one of the issues I was asked to decide.

15. It was the Respondent's case that the Claimant had been engaged by it as a self-employed subcontractor and not an employee or worker. It maintained that the Claimant had no relationship with it that conferred rights either as a worker or an employee. Its terms and conditions for subcontractors were set out at pages 32 – 48 and consisted of a contract for services which was accompanied by guides to 'status and the tax rules', 'substitution, 'invoicing and payment', 'insurance cover and claims', 'the health and safety manual' and policies on the apprenticeship levy, data protection and privacy. Only the contract for services and the guides on status and the tax rules, substitution and invoicing and payment were included in the bundle.
16. Whilst the nature of this documentation is clear enough, I have found it difficult to make clear findings about the process by which the Claimant was engaged, or the extent to which he was aware of or entered into the documentation which the Respondent maintains was relevant to him. The Respondent did not dispute that the Claimant had not signed and returned a contract for services and I find as a fact that he did not. The process by which he was engaged to work, which according to Mr Thomas was not typical, was described by the Claimant. I accepted his evidence on this part of the process and rest of this paragraph sets out findings of fact. In or around June 2017 the Claimant saw a newspaper advertisement for an excavator operator working for Day Aggregates at its depot in Brentford. He showed a copy of the advertisement to the tribunal. The advertisement sought an individual with a licence to drive a 10 tonne plus tracked machine and other mobile plant. It gave a contact name of Eric Harding and a mobile phone number. The Claimant thought that the work would be suitable for him as he has the necessary licence and he contacted Mr Harding. Mr Harding offered him a trial operating a mini-digger as the company already had enough excavator operators and the Claimant was happy to take on other work. At the end of the trial Mr Harding decided to keep him on and referred him to an employment agency, 247, to be enrolled, telling him that could not engage the Claimant directly. The Claimant was pleased to have been offered work and eager to start and he contacted the phone number he had been given the same day. The Claimant started working for Day Aggregates on or around 17 August 2017 and most of the paperwork followed afterwards
17. I had no evidence about the interactions between the Claimant and 247 or the process that followed other than the Claimant's evidence. There were no relevant documents in the bundle, unsurprisingly, as 247 was not a party to the claim. Although the newspaper advertisement had invited applicants to download an application form from the Day Aggregates website, the Claimant described a process whereby a person called Natalia Jozefiak (who Mr Thomas said was an employee of 247) sent him an email on 14 August, a copy of which I was not shown. Nor was I shown the response to that email that the Claimant said he sent on 19 August. It seemed that that email from Ms Jozefiak had either attached or contained a link to a form. The Claimant's evidence about this form was not completely clear or consistent. It seemed to me that he was giving truthful evidence but having difficulty recollecting the

- details of the process and in particular the dates on which various things occurred. He had been more focused on starting work than on the details of the paperwork, which I find that unsurprising in the circumstances. There was an email at page 28d which showed that on 16 August he sent a copy of his passport, verifying his identity, to a Payco email address. My only finding of fact in this paragraph is that that email was sent.
18. The registration form completed by or on behalf of the Claimant was at pages 28a and b. The form contained various sections: Personal Details; Work Details; Tax Position; Payment Details and Insurance Details. In cross examination the Claimant was adamant that he had filled in only the sections entitled "Personal Details" and "Payment Details". The Respondent's case was that this could not have been the case and the Claimant must have completed the rest of the form in order to have generated the document at page 28a and thus to have been registered for payment. The Claimant could not recall whether or not he had completed the form online. At first he said he had not and then when pressed in cross examination he said it was possible. He did not at any time physically sign either a registration form or, as noted above, a contract for services.
 19. The Respondent referred the tribunal to a blank example of its online registration system at page 65, which replicated the questions at page 28a and (b). The Claimant's evidence was that he had never seen the online form at page 65, that he had needed help with the registration process and that he had phoned the agency for assistance. I found it credible that he needed help as the Claimant's first language is Hungarian and although he was able to communicate in English to some extent during the hearing he was plainly dependent on the interpreter. Mr Thomas confirmed that the Respondent provides its documentation in a number of different languages, but not Hungarian.
 20. I find as a fact based on the Claimant's evidence that he called a number that he had been given by Mr Harding and sought assistance with completing the details necessary to register with the Respondent. However he did not know whether he was calling the Respondent itself or 247. As the Claimant's evidence on this was confused it is not clear to me how exactly the form was completed after this point and who was involved in completing it. The statement the Claimant had prepared for the hearing (page 25) had been prepared with the assistance of his non-legal representative Ms Toth and the Claimant appears to have relied to some extent on her understanding of the process by which he was recruited as opposed to having come to his own view. At several points during his evidence he disagreed, or was not sure about, what was said in that statement.
 21. As I observed earlier in this judgment, the Claimant had been keen to start work and it is not surprising that his main focus was not the paperwork. It is possible that he opened the form on the Respondent's website, but then had to telephone 247 or the Respondent for help in completing it. It is therefore also possible that he was guided by someone at either 247 or the Respondent as to how to complete the various sections of the form online, or it may be that

someone else completed those sections for him. There was a document at page 28c that suggested that the Claimant's online registration had been submitted on 12 August 2017. The Claimant explained that after he had completed the form as best he could and submitted it, it was returned to him for further details to be completed. However he said that some information had been filled in for him. The details appearing at pages 28a and b, with which I find that the Claimant had needed assistance, stated that the Claimant's job title was "employed" with a start date of 14 August, that the Agency/Company and Agency Branch was the Respondent. Mr Thomas himself found those particular responses to be "puzzling" and thought that it showed that whoever filled the form in misunderstood what a job title is and who the agency was. The form also indicated that the Claimant did not have his own public liability or personal accident insurance and that he did not wish to opt out of the "Conduct of Employment" which I take to be a reference to the Conduct of Employment Business and Employment Agency Regulations 2003. It also indicated that he agreed to "Terms and Conditions". In the Tax section there was an "X" next to an option that stated "This is now my only job but since last April I have had another job, or received taxable Job Seeker's Allowance, Employment and Support Allowance or taxable Incapacity Benefit...". The first page of the form also indicated that it had been completed by "the individual registering". The other options in this section were "a consultant for the agency/client registering on behalf of the individual; a friend/relative registering on behalf of the individual and a Payco Customer Services Adviser".

22. The online process seemed to me to be aimed at a reasonably sophisticated person who was in business on their own account and as the forms were not available in Hungarian the Claimant would have been even more dependent on help to complete them. I was therefore sceptical as to whether the Claimant himself chose the answer "Yes" in answer to the question at the bottom of page 28b, indicating that he accepted the Respondent's terms and conditions. It is not clear from the form at page 28b what those terms and conditions were, but the version at page 71, which according to the Respondent replicates the form as seen online, the box indicated that the person completing the form accepted the Respondent's contract for services for self-employed sub-contractors. The Respondent confirmed that it was possible to answer "Yes" to that question without clicking on the link to the terms and conditions in question, but relied on the Claimant having ticked the "Yes" box as indicative of his having agreed to those terms. The Claimant said that he did not answer "Yes" on his own because he did not understand what the form meant. Nor did the Claimant read the documents at page 33 which I have listed above at paragraph 13. I find that unsurprising given that the documents were not available in Hungarian and he had needed assistance to complete the application form itself.
23. The Respondent's case was that the contractual arrangements set out on its website were a response to the requirements of tax legislation (section 44 ITEPA, which I have set out above) and it did not follow from those arrangements that the Claimant was the Respondent's employee or worker. In principle I accept that this is possible. In fact that Respondent went to some

- lengths in its documentation to suggest that the Claimant was a self-employed contractor who was, for example, entitled to use staff and other substitutes to carry out his work. It was the Claimant's case however that he never sent a substitute to carry out his work and that he did not understand it to be the case that he was entitled to do so.
24. The Claimant took his instructions from Mr Harding whilst at work and I find as a fact based on the limited evidence I was shown, that the Claimant did not receive instructions on how to carry out the work from the Respondent. Nevertheless, even if it had been the case that the Claimant had entered into a contract for services on the Respondent's terms - and it is not clear on the available evidence whether he did so - the written contract for services did not reflect the actual arrangements under which the Claimant described himself as working in a number of respects. In particular the references to the Claimant's staff (page 36 paragraphs 8 and 17), the suggestion that the Claimant would have discretion as to the methods used to provide his services (page 36 paragraph 11) and the suggestion that the Claimant would be responsible for providing public liability insurance (paragraph 15) did not seem to reflect the reality of his working arrangements with Day Aggregates. He described himself as having been under the control and direction of Eric Harding and expected personally to attend work every day.
25. I am aware of the possibility that even if the Respondent's documentation did not accurately describe the arrangements under which the Claimant was actually working, it would not necessarily follow that the Claimant had a relationship of employee or worker, with the Respondent. However the Respondent clearly envisaged that there would be a contractual relationship of a kind. Mr Thomas told me that there is more than one way for an individual to engage with the Respondent and the question of which route is adopted is one that it discusses with its agency client. The contract for services described the Claimant as providing services to the Respondent, but it seems that at some point in the process a decision was taken that the Claimant should be engaged as a self-employed subcontractor as opposed, for example, to being a direct employee of the Respondent. Mr Thomas suggested that it would have been 247 that signposted the Claimant to the self-employed contractor route, which contradicted his assertion that the route taken was a matter for discussion between the Respondent and the agency. I also note that paragraphs 29 and 30 of the contract for services envisaged that the Respondent would guarantee a minimum number of hours of work over a 12 month period and that the Claimant would be obliged to take work when offered (contrary to Mr Chaudhuri's submission that there was no mutuality of obligation between the Claimant and the Respondent). The contract therefore purported to be a contract between an independent business and its client (the Respondent) but also contained some of the characteristics that might be found in a relationship between an employer and a worker or employee, in particular the mutuality of obligation at paragraph 30 and the guaranteed minimum level of work. The contract nevertheless purported to exclude employee or worker status.
26. The situation is further complicated by the fact that the Claimant did not sign

the contract of services that contained these provisions, or on his own evidence, even read it. The Claimant's evidence was that in practice he took his instructions from Day Aggregates and not from the Respondent and was not seemingly under the Respondent's control in any respect. The Respondent's role in relation to the Claimant was, according to Mr Thomas, principally to administer the payments made to him in respect of the work for Day Aggregates and to deduct the correct amount of tax in accordance with tax legislation. But the documentation seemed designed to ensure that no employment rights arose as a consequence of that arrangement as between the Claimant and the Respondent, which begs the question why the Respondent thought that such rights might arise. Whatever the purpose of the drafting of the documentation I consider that the documentation was not accurate in depicting the Claimant as a self-employed contractor who provided his own insurance and was free to arrange for his work to be done by others, including his own employees.

Submissions

27. Both parties made submissions at the end of the evidence, for which I was grateful. I do not propose to go into detail about them here given the course of action that I have decided to adopt, which does not involve the final determination of any issues at this stage. I will simply say that I was unable to do what Mr Chaudhuri urged me to do, which was to base my findings on the terms of the contract between the Claimant and the Respondent, for the reasons that I will now explain.

Conclusions

28. Bearing in mind the issues I was asked to determine and having heard and read the evidence that was available to me about the process by which the Claimant was recruited, I was unable to make clear findings as to the respective roles in that process of 247 and the Respondent. Consequently I was not able to make definitive findings about the relationship between the Claimant and the Respondent.

29. The Respondent did not seek to say that there was no contractual relationship, but the one it described seems to me, based on the limited evidence I heard, to be remote from the reality of the way in which the Claimant was working. I was therefore unclear as to:

- a. what, if any, part the Respondent played in the process leading to the Claimant's recruitment;
- b. the nature of the ongoing relationship between the Claimant and the Respondent;
- c. the relationship between 247 and the Respondent;
- d. the relationship between 247 and the Claimant;
- e. the relationships between 247, the Respondent, the Claimant and Day Aggregates.

The facts of these different relationships are interlinked and it seems to me that none of the relationships can be properly understood without understanding the others.

30. The Claimant made it clear in his claim form that he wished to bring a claim against 247 and Day Aggregates and I have concluded that the only way in which his claims can be fully considered and definitive findings of fact made is by joining both entities to these proceedings. I consider that adopting this course would be the outcome that is most in the interests of resolving this dispute justly and in accordance with the overriding objective set out in Rule 2 of the Tribunal Rules. I therefore propose to exercise my power under Rule 34 of the Tribunal Rules to order that both 247 and Day Aggregates should be joined as respondents to the proceedings and a further preliminary hearing be held to identify the issues as between all four parties and make orders for further management of the case. The lack of Early Conciliation certificates against the two additional respondents is not an obstacle to joining them to the claim as the addition of parties is treated as an amendment to the claim (*Science Warehouse v Mills*; *Drake International v Blue Arrow*).
31. I consider that the Claimant may be able to show that he is a worker within the wider definition set out in s83 Equality Act. The significance of this is that he has complained of race discrimination against Eric Harding, an employee of Day Aggregates. It seems to me that even if the Claimant cannot establish a contractual relationship with Day Aggregates (and I make no finding on that) the Claimant may, if he is a worker under s83 Equality Act, also be able to show that he is a contract worker within s41 Equality Act and hence entitled to the protection of the Act as regards discriminatory conduct.
32. I consider that any decision about the potential liability of the Respondent for the actions of Mr Harding under s 109 Equality Act should be made once full findings of fact have been made in proceedings involving all three respondents.
33. There is also a question about where liability may lie for the absence of further engagements for the Claimant after Eric Harding sent him off site (if he in fact did so – I make no finding on that). Mr Thomas's evidence was that it was 247's responsibility to signpost a potential employee or worker to the right route for further work. The Tribunal will be unable to answer this question unless 247 is joined as a party to the proceedings.
34. I am also unable to deal with the Respondent's application for strike out or a deposit at this stage, although the Respondent may renew those applications at a later stage if it wishes to do so.
35. I therefore order that the proceedings should be served on Day Aggregates and 247 and that the case be listed for a two hour preliminary hearing for case management (a longer hearing is necessary as the Claimant will need to participate through an interpreter).

36. It is of course a matter for the Claimant whether he wishes to continue with his claim against all three Respondents.

Employment Judge Morton

Date: 16 November 2018