Case Number: 3304261/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Templar	v	(1) JSA Services Ltd (2) Securing Teachers Ltd

Heard at: Watford **On**: 29 August 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Mr Simon Pettet, Representative

For the first respondent: Mr James Harris, Compliance Manager

For the second respondent: No appearance and not represented

RESERVED JUDGMENT

Neither the first respondent nor the second respondent owes the claimant any unpaid wages

REASONS

Introduction

1 The claimant is a teacher. He claims unpaid wages from the first respondent, under section 23 of the Employment Rights Act 1996 ("ERA 1996"). I heard oral evidence from the claimant and from Mr Harris of the first respondent. I was also referred to a number of documents in the bundles of documents put before me

by both parties (the parties put their own bundles before me, and there was some overlap, and if so, then I refer below to the version which I found it easier to read). Having done so, I made the following findings of fact.

The facts

2 The claimant was employed by the first respondent at the request of the second respondent. The first respondent (as Mr Harris put it in paragraph 1 of his witness statement) "provides payroll, employment and accountancy solutions to recruiters and freelance contractors working in the UK". The claimant described the first respondent's role in this way (see paragraph 2 of the claimant's witness statement):

> "The First Respondent is an Umbrella Company who directly employs individuals who then work on different assignments for agencies and end clients. The umbrella will engage under a contract for services with an agency which in turn, will have a contract for services with the end hirer."

3 The second respondent was the supplier of the services of the claimant to the end-user of those services here, which was Princes Risborough School ("Princes Risborough").

4 The claimant worked at Princes Risborough pursuant to his contract of employment with the first respondent from 4 September 2017 until he resigned (as he put it in paragraph 20 of his witness statement) "from the assignment at Princes Risborough on 6th December 2017 in line with the notice provisions set out in the assignment schedule ... and my last day of assignment was 19th December 2017".

5 The second respondent is apparently insolvent. Certainly, it did not pay the first respondent for the claimant's services after 10 November 2017. The factual background was stated succinctly in paragraphs 1, 3-14, 16 and 18 of the claimant's witness statement, which Mr Harris accepted was an accurate statement of what had occurred, and which I in any event accepted. Those paragraphs are as follows (the text being quoted without corrections; the same is true of all other quotations set out below):

> "1. I entered in to a contract of employment with the First Respondent JSA Services Ltd in, on 4th September 2017. (PT1, pages 24-28)
>
> 2. ...
>
> 3. It is my understanding that the First Respondent had a contract for services with the Second Respondent Securing Teachers Ltd who in turn had a contract for services with Princes Risborough School.
>
> 4. I was contacted by the Second Respondent in, or around, June 2017,

about a supply teaching vacancy at Princes Risborough School. I was subsequently offered the post on 6.6.17 following a successful interview and trial lesson (PT9 pages 78-79).

5. The Second Respondent entered in to an Agreement For The Engagement And Provision of Services with me on 13th June 2017 (PT2 pages 29-33). I completed a Registration Form on 31st August 2017. (PT3 pages 34-42)

6. The Second Respondent agreed an assignment schedule with me on 13th June 2017 to provide my services to Princes Risborough School as a Business Teacher frorn 4th September 20117 until July 2018. (PT4 page 43). The assignment required that I work Monday to Friday (hours to suit the school) at a rate of £170 per day to be paid every Friday one week in arrears. The school required that I work 7.5 hours per day Monday to Friday. However I did not work when the school was closed to students or if I was sick so I did not always work a five day week.

7. Although I had agreed a rate of £170 per day with the Second Respondent (PT10 pages 80-82) it subsequently transpired that the Second Respondent had negotiated a daily rate of £165 with the school which I felt I had little option but to agree.

8. The Contract of Employment with the second Respondent (PT1 pages 24-28) states at Section 4 that I will only be paid for the hours I work and will always receive at least National Minimum Wage. Paragraph 4.2 states that at the discretion of the Company I may be paid a bonus. However my payslips from week ending 8th September 2017 to week ending 10th November 2017 (PT5 pages 44-63) evidence that I was not paid hourly but was paid for 'standard days'. You will see that each 'standard day' equated to one 'unit' at a rate of '£165'. A 'unit', therefore, equated to one day. There is no mention on the pay slips of National Minimum Wage or a Bonus.

9. Payment for the work I did was meant to follow the contractual chain as follows; Princes Risborough School paid the Second Respondent (via Easy Pay) who in turn, paid the First Respondent for its' services. This was called the 'assignment fee'.

10. From the assignment fee, the First Respondent deducted its' profit margin and calculated any employment related costs after which, it calculated the Gross Salary payable to me. From the Gross Salary, the First Respondent deducted Income Tax and National Insurance, and then paid me a Net Salary. My bank statements showing incoming payments are at PT6 pages 64-69.

11. Each week I submitted timesheets. (PT7 pages 70-76)

12. I was paid correctly, in line with the process I have described up to week ending 10th November 2017. (PT5-7 pages 44-76)

13. In early December 2017 I discovered that I had not received any payment from the First Respondent after 10th November 2017. I met with representatives of the School's senior management who advised me that they paid the Second Respondent via a Company called Easy Pay. I discovered, upon research, that Easy Pay are an intermediary who lend monies to agencies who work on narrow margins and have cash flow issues due to this.

14. The School advised me that they had stopped paying Easy Pay because Easy Pay had informed them that they had ended their contract with the Second Respondent due to alleged fraudulent practices. (PT13 page 166) ...

16. On 22nd December 2017 the First Respondent supplied me with a payslip (PT5, pages 62-63) which covered weeks ending 17th November, 24th November, 1st December, 8th December and 15th December 2017. You will see that 'units' were then calculated in hours whereas previously they had been calculated in days. ...

18. The 22nd December Payslip (PT5 pages 62-63) shows that the First Respondent paid me for a total of 138.75 hours at £8.41 per hour. This amounted to £1166.90 gross. From this the First Respondent deducted employment costs of £102.77 leaving me with taxable pay of £1,064.13 from which tax and national insurance was deducted leaving me with a net payment of £958.40. This was paid in to my account on 22nd December 2017. (PT6, page 69)"

6 The first respondent's defence of the claim was to the effect that it was entitled to pay the claimant what it paid him for the period from 11 November 2017 onwards. That depended on the terms of the contract between the first respondent and the claimant about pay. The contract was at pages 24-28 of the claimant's bundle, and the material terms were clauses 4.1 and 4.2:

"4.1 You will be paid only for the hours that you work on an assignment (subject only to any statutory obligations the Employer may have). You will always receive at least the applicable National Minimum Wage for each hour worked.

4.2 At the discretion of the Company, you may be paid a bonus payment in addition to your entitlements under clause 4.1".

7 As indicated above, the claimant accepted that those subclauses were in his contract of employment with the first respondent. His claim was stated in box 9.2

of the ET1 claim form in this way:

> "The Claimant agreed a pay rate of £165 per day which equates to £22 per hour. However 138.75 hours of those he worked were only paid at an hourly rate of £8.41 which amounted to £1166.90. He was, therefore, underpaid by 1,885.60
>
> In addition he was not paid at all for two days work on 18th and 19th December which amounts to £330
>
> The total gross amount outstanding and claimed is, therefore £2215.60."

8 The parties agreed that in the circumstances, if all that the claimant was entitled to was the national minimum wage, then there was no failure to pay him his wages within the meaning of section 27 of the ERA 1996.

9 The nub of the first respondent's defence to the claim was stated in paragraph 7 of the first respondent's grounds of resistance, namely:

> "JSA charges a fee to its clients for the provision of the services of its employees, and agrees a separate salary with its employees. The salary paid to employees of JSA is not dependent on the fee charged by JSA to its clients, and in this case, whilst the Second Respondent has failed to make any payment to JSA for our services, JSA has paid the Claimant's salary to the Claimant."

10 That case was expanded upon in paragraphs 11 and 12 of the grounds of resistance, namely:

> "11. JSA has not received any fee from Securing Teachers, and so, has not been able to pay any bonus payment to the claimant (per clause 4.2 above). However, despite not receiving any funds from the Second Respondent, JSA has paid the Claimant his contractual salary (per clause 4.1 above).
>
> 12. JSA has commenced legal proceedings against the Second Respondent, and is unable to make further payments to the Claimant until a payment has been made to JSA."

11 Mr Harris's witness statement contained this paragraph about the manner in which the first respondent paid the claimant:

> "7. When payments are issued, with the payslip, we also send a reconciliation which shows a full breakdown of JSA's billings to our client and details of the company payroll costs (please refer to pages 35-54 of the Respondent's bundle). Whilst JSA is under no obligation to do so, these comprehensive pay statements are provided to employees to

show details of company receipts, costs and profit margin, so as to ensure full transparency. Importantly, only the second page is the PAYE payslip, which shows salary paid to the employee. The charge rate shown on the reconciliation is JSA's fee to the agency, not the Claimant's entitlement to pay."

12 The documents in the bundle to which Mr Harris referred bore out what he said in that paragraph. By way of example, on page 41 of the first respondent's bundle there was one of the pages showing the "Period Details", which were shown not to be part of the PAYE payslip by the use the words "(PAYE Payslip on Page 2)" immediately after the words "Period Details". That page (i.e. page 41) had a box stating the claimant's "Taxable Pay this Period" as £717.56, with, under a line with that statement, this information:

"**JSA Income**: £825.00

Less

-JSA Margin: £26.50

-Employment Costs: £80.95."

13 I could see that on 14 September 2017, after the claimant had started working at Princes Risborough, he was sent an email by Kye Morbey of the first respondent. The email was at pages 27-29 of the first respondent's bundle of documents. It started: "Thank you for your application to join JSA's **Workwise Plus Umbrella** solution." It was obviously a standard email, and it said that the claimant "should have already registered to use the portal when [he] first joined JSA", and that if he had not done so then he should now do so.

14 On page 28 of the first respondent's bundle, there was this paragraph in the email:

"**Payroll Information**

Once JSA have received instruction and cleared funds from your agency we will run your payroll (for the previous week worked)."

15 The email also had this paragraph on that page:

"**Employment Costs**
The assignment rate provided by the recruitment agency includes the provision of certain employment costs (such as Employers National Insurance) that JSA must calculate and deduct before the gross salary is calculated."

16 There was also this paragraph on that page:

> "**JSA Margin**
> JSA retain a margin from the assignment income paid by the agency. The margin is calculated Weekly at 7% capped at £26.50."

17 At pages 78-82 of the claimant's bundle there was an exchange of emails between the claimant and Scott Griffiths of the second respondent about the claimant's "daily rate", during which the claimant wrote that his daily rate was £170 but it had not risen in 6 years, and Mr Griffiths (in the email on page 81) wrote this:

> "I don't think I will be able to get you more than that as they were looking around £150.
>
> I can agree £170 but can't go higher. Is that OK?
>
> What umbrella company do you use?"

18 That exchange of emails occurred on 6 and 12 June 2017, i.e. before the claimant started working at Princes Risborough.

19 While the claimant referred to the agreement between the second respondent and him as being at pages 29-33 of the claimant's bundle, it looked to me as if it extended to page 43, or at least as if the documents at pages 29-43 were part of the same series. The agreement was said (at the top of page 29) to have been 'made on 13th June 2017 ("the Effective Date")'. Although it was stated (at the top of page 29) to be between the second respondent and the claimant, it was written as if it were intended to be between the second respondent and a company, referred to in the agreement as "the Contractor". There was, however, no definition of the term "the Contractor", except in the Assignment Schedule where, at page 43 of the claimant's bundle, next to a box with the words "Name of Contractor Ltd", there was this: "Racs". Below that line there was a line with a box on the left containing the words "Representative of Contractor", and in the box to the right of it the name of the claimant.

20 The agreement was not signed physically, but it was (or parts of it were) completed by the claimant digitally on 31 August 2017. The claimant's evidence in paragraph 5 of his witness statement (which is set out in paragraph 5 above) referred to him completing a registration form on 31 August, but he did so digitally (the form was at page 34 of the claimant's bundle), and he also signed pages 36, 39, 40, and 42 digitally on 31 August 2017.

21 The agreement stated to be between the second respondent and the claimant provided for the payment by the second respondent to "the Contractor" of "Charges/Fees". Clause 7.1 on page 31 of the claimant's bundle provided this:

> "Subject to the receipt of the Contractor's Invoice in accordance with clause

> 6 and subject to clause 7.3, the Employment Business shall pay the Contractor for the Services in accordance with the fees specified in the Assignment Schedule, plus VAT where appropriate."

22 The "Assignment Schedule" was at page 43 of the claimant's bundle. The "fees specified In the Assignment Schedule" were stated in the box on the right of the box on page 43 of the claimant's bundle with the words "Contractor Fee - standard hours" in it, as "£170 per day". In the section at the bottom of page 43, headed "Confirmation of Agreement", there were spaces for the "Contractor Signature" and for the "Employment Business Signature". The latter "Employment Business" was indicated (correctly) to be the second respondent. The "Contractor" section was evidently intended to be completed by the insertion of the "[Contractor Company Name]", but that section had not been amended digitally. There were no signatures on that page.

The applicable law

23 There are two lines of cases which need to be taken into account here. One is that which concerns the payment of a discretionary bonus. The other is that which concerns the relevance of the manner in which the parties to a contract have in fact operated it.

24 The effect of the first line of cases is seen most effectively in paragraphs 38 to 47 of the judgment of the Court of Appeal (it was that of the whole court) in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] ICR 402. I paid particular regard to that passage. The nub of it is that a contractual discretion to pay a bonus to an employee must be exercised rationally, in good faith and in accordance with the implied term of trust and confidence, and taking into account relevant factors and not taking into account irrelevant factors.

25 The second line of authority is best described by reference to the decision of the House of Lords in *Carmichael v National Power plc* [1999] ICR 1226. The nub of that case was that the way in which the parties to a contract operate it may be taken into account in deciding what was its contractual effect. The case concerned the interpretation of the claimants' letters of appointment. As the headnote puts it:

> "it was only appropriate to determine the issue solely by reference to the documents if it appeared from their own terms and/or from what the parties said or did subsequently that such documents were intended to constitute an exclusive record of the parties' agreement".

26 There is a third line of authority that is helpful here, but only by way of background. It concerns the status of a worker who is supplied by an agency. The question whether that worker should be regarded as an employee of the end-user of his or her services has been the subject of much case law. In *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] IRLR 302, the Court of Appeal

ruled that that should occur only when it is necessary to imply a contract of employment between the worker and the end-user. The following passage in section AI of *Harvey on Industrial Relations and Employment Law* is illuminating:

> '[**191]** ... The Court of Appeal subsequently indicated in *Smith v Carillon (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467 that there was to be no movement away from the strictness of the 'necessity' test (even on the sensitive facts of the case which involved alleged blacklisting of a construction industry agency worker).
>
> **[192]** This significant turn-around by the Court of Appeal (at least in tenor, given that technically their previous decisions are indeed distinguishable) should mean that there is now much less chance of a longstanding client becoming the direct employer of an agency-supplied worker, even over a relatively long period of time. This will be particularly the case if:
>
> (a) the agency relationship remains in existence, including as the means of payment;
>
> (b) there is a contract of employment with the agency; and/or
>
> (c) there has been no distinct change of circumstances or contractual arrangements since the initial hiring-out to the client by the agency.
>
> Of course, there will continue to be arguments as to whether agency workers *should* have employment rights against the client. Some of these were rehearsed by Mummery and Thomas LJJ in *James* but with the major caveat that litigants should not have unrealistic expectations as to how far any such change can be brought about by the court as opposed to by legislation (EU or domestic). This point was picked up again in the Court of Appeal in *Tilson v Alstom Transport* [2010] EWCA Civ 1308, [2011] IRLR 169 where the 'necessity' test was applied to hold that a senior manager provided to the end user through two intermediaries (and who had refused an offer of permanent employment because he could earn more as an agency worker) was not the direct employee of that end user and the Court particularly pointed out that it was not open to a tribunal to find employment status on the basis either that the individual looks like an ordinary employee or that it is against public policy for agency arrangements to be entered into to avoid contractual status and therefore employer exposure to statutory rights. In *Smith v Carillon (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467 (para [191] above) Elias LJ made this point particularly clear when he said at [22]:
>
> > "…it is not against public policy for a contractor to obtain services this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed. … A contract cannot be implied merely because a court disapproves of the employer's conduct."'

My conclusions

(1) A tentative observation

27 There may or may not be a good reason for the use of an "umbrella company" where an employee is engaged by an agency such as the second respondent. Certainly, such use simplifies the situation from the point of view of accounting to Her Majesty's Revenue and Customs for income tax and national insurance contributions. However, if the claimant had not had his pay for his work done at Princes Risborough paid via the second respondent and then the first respondent, then he might have been an employee of Princes Risborough. It might be thought to be desirable that educational institutions employ teachers in temporary positions directly rather than use an agency such as the second respondent to supply the teachers' services. However, that would involve an additional administrative burden for the educational institution in question, and certainly where an agency supplies a teacher for a short period of time, it is readily understandable why the institution would wish to pay the agency rather than the teacher.

(2) What happened here

28 Here, there was a clear expectation on the part of at least the second respondent that it would not employ the claimant, and that it, the second respondent, would act merely as a conduit for the claimant's pay.

29 The claimant cannot have been unaware of that, given in particular the text of the email which I have set out in paragraph 17 above. The claimant cannot have been (or at least should not have been) unaware of the fact that the first respondent would rely on the second respondent for the money which it would be paying the claimant, and that the first respondent would need to take from the daily rate (in the event, it was £165, which the claimant reluctantly accepted) paid to the claimant a fee to cover its own costs, and make a profit. That was made clear to the claimant (albeit only after he had started working at Princes Risborough) in the email to which I refer in paragraphs 13-16 above.

30 In fact, the first respondent took the risk of the second respondent not passing on what the second respondent received from Princes Risborough. The contractual web was complex and was clearly not properly implemented by the second respondent, but the claimant did not seek to say that he was in reality an employee of Princes Risborough and, as indicated above, he could have asserted that he was such an employee only if it had been necessary to imply a contract between him and the corporate body responsible for the conduct of that school. The apparent oddities in the contractual relationship to which I refer in paragraphs 19-22 above complicated the situation but did not affect the question whether or not the first respondent had underpaid the claimant.

(3) In conclusion

31 While the claimant's case was that he was entitled to a day's pay at the rate of (in the event) £165, that was in my view plainly not borne out by the contractual documentation to which I refer above. Rather, the claimant's entitlement to pay was as stated in clause 4 of the contract between him and the first respondent, which I have set out in paragraph 6 above.

32 In the circumstances, I could see no flaw in the exercise of the contractual discretion of the first respondent, conferred by clause 4.2 of that contract, to pay the claimant nothing more than the national minimum wage once the first respondent ceased to receive payment for the claimant's services from the second respondent. Assuming that that contractual discretion was lawfully exercised (which, for the avoidance of doubt, in my judgment it was), I could see no basis on which the first respondent could be said to owe the claimant anything by way of unpaid wages within the meaning of section 27 of the ERA 1996.

33 I heard no submissions about the relationship between the claimant and the second respondent, presumably because even if I had found that the second respondent was liable to the claimant, that would have been of no value to the claimant given that the second respondent is apparently insolvent. In fact, only if the claimant had been a worker (within the meaning of section 230(3) of the ERA 1996) of the second respondent could he have claimed unpaid wages from the second respondent. He did not claim that he was such a worker, and it was not easy to see how he could have argued that he was. However, the claimant did make a claim against the second respondent, so, technically, it needed to be dealt with by me.

34 My following comments on the relationship between the claimant and the second respondent are preliminary only, in that if it appears to the claimant that there is anything to be gained by pressing a claim against the second respondent then he can ask me to reconsider my judgment in that regard.

35 It appears that the document at pages 29-43 of the claimant's bundle was (or those documents were) intended to give rise to an obligation only on the second respondent to pay the first respondent the daily rate of £170. As I note in paragraph 22 above, the Assignment Schedule on page 43 was not signed, and (as I indicate in paragraph 29 above) the claimant must in my view be regarded as having agreed that the second respondent would pay the first respondent only £165 per day for his services. In any event, I concluded that the relationship between the claimant and the second respondent did not, in the circumstances, i.e. given the matters to which I refer in paragraphs 19-22 above, confer on the claimant a right to be paid anything personally, so that if only for that reason, section 23 of the ERA 1996 was not breached by the second respondent here.

36 Accordingly, the claim does not succeed.

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Employment Judge Hyams

Date 9 October 2018_____

JUDGMENT SENT TO THE PARTIES ON

12 October 2018.....

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FOR THE TRIBUNAL OFFICE