Case Number: 1806256/2017

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr P Reeve		**N G Bailey Facilities Limited**

Held at Ashford **On Monday, 14 January 2019**

BEFORE: Regional Employment Judge Hildebrand (Sitting Alone)

Representation

For the Claimant: **Mr H Wildman, Consultant**

For the Respondent: **Mr A Line, Counsel**

JUDGMENT

The Judgment of the Employment Tribunal is: -

1. The application of the Claimant for further discovery is refused.

2. The case was not struck out by reason of breach of the Unless Order, at paragraph 1 of the Order of Employment Judge Crossfield made on 6 August 2018, signed on 7 August 2018 and sent to the parties on 20 August 2018.

3. The preliminary issues set out in the Order of Employment Judge Wallace made on 27 March 2018, signed on 28 March 2018 and sent to the parties on 10 April 2018 are determined as follows: -

    1. To the question was the Claimant an employee pursuant to the definition in Section 230, the Claimant was not an employee.

    2. To the question was the Claimant a worker pursuant to the definition in Section 43 (k), the Claimant was not a worker.

    3. To the question was the Claimant a worker pursuant to the definition in Regulation 2 and/or 36, the Claimant was not a worker.

4. The Claimant accordingly and by reason of dates did not have service in order to claim unfair dismissal.

5. The parties are at liberty to apply for any further directions required in the event that they consider that there are claims outstanding to be determined.

REASONS

1. At a preliminary hearing on 6 August 2018, Employment Judge Crosfill dealt with an application by the Respondent for Unless Orders. It was said that the Claimant had failed to comply with the Order of EJ Wallis made on 27 March 2018 in that he had not provided any meaningful statement in relation to the disabilities he said affected him, he had failed to provide further information as provided in paragraph 5 of the Order, he had failed to provide a Schedule of Loss and he had not given any disclosure in accordance with paragraph 8. Employment Judge Crosfill ordered that no later than 16.00pm on 3 September 2018, the Claimant was to comply with paragraph 2 of the Order made by EJ Wallis and claim under the Equality Act should be struck out. Employment Judge Crosfill made a number of variations to the Order of EJ Wallis. I do not take these to be Unless Orders and they are not therefore part of the present consideration.

Application of the Claimant for disclosure of documents

2. This case was listed for an open preliminary hearing to deal with the issues set out at paragraph 24 of Employment Judge Wallis' Order made on 27 March 2018.

   The issues for the preliminary hearing are as follows: -

   i) For the purposes of his claims under sections 100, 101A and 103A of the Employment Rights Act 1996, was the Claimant an employee pursuant to the definition in Section 230;

   ii) For the purposes of his claim of detriment under Section 47B, was the Claimant a worker pursuant to the definition in Section 43K;

   iii) For the purposes of his claims under the Working Time Regulations, was the Claimant a worker pursuant to the definition in Regulations 2 and/or 36;

   iv) If the Claimant was an employee, did the Claimant have two years' service in order to claim unfair dismissal under Section 98;

   v) To make directions in respect of any claims that are to proceed to a full merits hearing.

3. By email dated 18 December 2018, Mr Wildman for the Claimant informed the Respondent's representative that he considered the Respondent should complete disclosure relevant to the issues to be determined at the preliminary hearing by 19 December. He stipulated that this included all emails between the Respondent's management and staff and the Claimant, all timesheets and the like that related to the Claimant, all documents sent to PRS to confirm what payment should be made to the Claimant and any other documents that the Respondent had relating to the Claimant including communication between the Respondent and PRS where the Claimant was mentioned.

4. On 20 December 2018, Mr Wildman emailed the Tribunal stating that the disclosure he sought was all relevant to the matters to be resolved at the preliminary hearing. The application attached interpartes emails. Further interpartes correspondence was provided to the Tribunal. The Respondent's position was set out in the email of 19 December 2018 at 20.00. This was that the Claimant had not made clear why all the emails between the Respondent and the Claimant were relevant to the issues to be determined at the preliminary hearing. The Claimant had also sought all timesheets that related to the Claimant and the Respondent observed that the amount of work undertaken was not an issue to be determined at the preliminary hearing and a sample of timesheets had been enclosed in the Bundle. A similar comment about the generality of the request was made in relation to the payment information sought and in relation to the correspondence between the Respondent and PRS. There is an underlying dispute in the early correspondence whereby Mr Wildman appeared to suggest that the Respondent should disclose all documents relevant to the proceedings in advance of the preliminary hearing. It appears that the Claimant subsequently accepted that the discovery for the preliminary hearing was, as is customary, limited to the issues for the preliminary hearing.

5. At the preliminary hearing, the Respondent's submission was that the wide requests for additional disclosure were an opportunistic attempt to delay matters and that disclosure must be necessary and proportionate.

6. Having heard the arguments of the parties I did not consider that it was necessary for the wide-ranging unfocused disclosure sought by the Claimant to be provided in relation to the issues to be determined at the preliminary hearing. Sample material of the categories identified was perfectly adequate to resolve the preliminary issues. The Claimant's application for further discovery before the preliminary hearing could proceed therefore failed.

The Unless Order

7. The Unless Order was made by Employment Judge Crosfill on 6 August 2018. It required the Claimant to comply with paragraph 2 of the Order of EJ Wallis made on 27 March 2018 by 16.00 on 3 September 2018.

8. Paragraph 2 of the orders of Employment Judge Wallis required the Claimant to provide to the Respondent and the Tribunal statements signed by the Claimant setting out the impairments relied on, the precise nature of the extent of the

effects it is alleged that each impairment has or had on the ability to carry out normal day to day activities, the periods over which those effects have lasted and whether or not there has been treatment for each impairment and what difference if any such treatment has had on the effects of the impairment.

9. Mr Wildman notified that he was representing the Claimant on 3 September 2018 at 12.09 and asked for an extension of 7 days to comply with the Order. The Respondent opposed the extension by email dated 17.43 on 3 September. The further particulars in relation to knowledge and acts of discrimination dated 10 September appear to have been supplied to the Respondent on the 11th September, together with a Schedule of Loss.

10. On 4 October 2018, the Respondent's representative wrote to indicate that the application for an extension of time had not been determined. The Respondent applied for consequential extensions.

11. On 16 November 2018, Mr Wildman supplied to the Tribunal a letter dated 8 November 2018 from the Claimant's medical practitioner giving detail of his medical condition and treatment undertaken, together with an indication of the daily activities affected. That therefore appears to cover the impairment and the nature of the effects alleged. The letter also states that the condition had been present since childhood and details were given of some unsuccessful medical intervention and medication administered. This material was referred to the judiciary by the administration in London South on 19 November 2018, but before any direction was given further correspondence was received and a direction was given on 4 January to indicate that these matters would all be considered at the hearing on 14 January 2019.

12. At one level, the Claimant did not comply with the terms of the Unless Order within the time stipulated. The document is not signed by him. It is a letter from a medical professional and in that sense exceeds the obligation placed on the Claimant. The Claimant did however instruct a representative who applied for an extension of time and before the extension of time was determined, the deficiency was rectified in the sense described above. I do not therefore consider that the Claimant is in default in relation to the Unless Order. Insofar as I am incorrect in that conclusion I consider that it is appropriate to deal with this issue as an application for relief from that sanction and in the circumstances of the case, given that the deficiency has now been rectified I do not believe it would be appropriate to refuse relief.

The Preliminary Hearing Issues

13. Finally, I turn to the substantive issue for determination today. As stated above the issue for determination is employee and worker status for the purposes of the Employment Rights Act, Section 230, Section 47K and the Working Time Regulations. I had the benefit of three bundles of documents and heard testimony from the Claimant and from Mr Richard Cameron, a Project Manager for the Respondent and Mr Alistair Lewis, Commercial Director. Neither of the Respondent's witnesses had any direct personal knowledge of the Claimant and therefore spoke to the generalities of the Claimant's engagement.

14. I found that the Respondent employed approximately 800 people, of whom about 350 are electricians and 90 of these work on a contract with Morrisons Plc, the contract to which the Claimant was assigned. The contractual arrangements under which the Claimant provided its services appear, as it has to be said that the disclosure has not been complete, to involve the Claimant contracting with a company called SRA, which utilised a payment vehicle called Ship Shape. SRA was entered arrangements with a company called PRS, Phoenix Resourcing Services, and that company assigned the Claimant to work for the Respondent at Morrisons.

15. The Claimant's evidence was that he found an advertisement for a mobile electrician. He was not able to produce the advertisement and could not supply any satisfactory information about it. It led him to telephone the agency PRS who asked for his qualifications. About this time, he learnt that he would be working in Morrisons Stores and he was to go to Reigate and meet an NGB Electrician. The Claimant asserted that he started on 19 October 2015.

16. The Claimant positively asserted that he did not sign any contract with PRS. He did not assert that he had ever signed a contract with the Respondent. His assertion that he was an employee of the Respondent is based on the fact that each week he had to email the timesheets for the Respondent ("NGB"), a timesheet for PRS and an expense claim form to NGB. NGB then adjusted his timesheets and decided what he was to be paid. He contended that NGB would then email PRS with attachments and PRS would calculate the pay and expenses and made payment directly to him. As evidenced in the Claimant's initial witness statement, it does not make reference to SRA Electrical Ltd or the payment agent used by SRA Electrical Ltd, Fastbook, presumably to effect payment to the Claimant. The Claimant subsequently accepted that SRA Electrical Ltd was a company of which he was the sole shareholder and the recipient of payments form PRG. The Claimant contends that his work was undertaken at the direction of NGB, the Respondent, NGB provided the van and materials and tools other than hand tools, NGB received notification of his proposed holiday dates and approved them, the agency PRG contacted the Claimant to say that NGB had dismissed him.

17. In relation to SRA, the Claimant said he no longer had access to the portal operated by Ship Shape and/or Fastbook, the two payroll companies apparently used. He did not have a copy of any contract with SRA Electrical and/or Ship Shape or PRG. He did not have any correspondence with SRA Electrical Limited and Ship Shape, nor did he have a contract of employment and denied that any contract had ever existed. He also did not have any documents regarding charges paid to Ship Shape which he accepted he had paid, and he did not have the email to PRS by which he emailed his qualifications to that organisation.

18. It appears that the Respondent, possibly shortly before the hearing, identified that SRA Electrical Limited was a significant company in this arrangement. The Claimant was a director of that company and he was asked for documents relating to his relationship with Ship Shape and SRA Electrical. Payslips have

been produced showing payments to the Claimant from which corporation tax has been deducted by SRA.

19. On the basis of the evidence received and taking into account the evidence of the Respondent's witnesses, I find no evidence to suggest that the Claimant entered into any contractual relationships with the Respondent. He was an agency electrician supplied to them by PRS allocated to their contract with Morrisons.

Submission of the Parties

20. Mr Wildman submitted for the Claimant that the Claimant's limited company was irrelevant and that the contract had been formed directly with the Respondent before the limited company came into position. The Claimant was not equipped to deal with business questions and relied on professionals who found him a post and said they would deal with his tax and payments. He got on with his work as an electrician. The missing ingredient was that there was no contract express or admitted between PRS and the Claimant. He contended there was a contract by the conduct of the parties between the Claimant and the Respondent. Business efficacy required a contract because the Claimant was working directly at the direction of the Respondent. If there were complaints by the Claimant about underpayment these were dealt with by PRG. The Respondent deducted money from payments claimed by the Claimant and evidence in relation to this would need to be considered.

21. The Respondent supplemented the skeleton argument in oral remarks. There was no express contract between the Claimant and the Respondent alleged by the Claimant. The Claimant must therefore demonstrate it was necessary to imply such a contract at law. It was necessary to take a constructive view of the evidence. Some pieces were missing for which the Claimant had a lot to answer. If the Respondent had not investigated SRA Electrical would not be visible to the Tribunal. This was an important issue of credibility. The Claimant had denied a contractual relationship with PRG and Ship Shape in his supplemental statement. The Claimant had said in oral testimony that his email had been hacked and he could not get to his records. It is clear from the documentary evidence that the Claimant was engaged in a relationship with Ship Shape or Fastbook as he paid them for their services and they dealt with his tax at HMRC. Mr Lewis was clear in his evidence that there was no contract between the Claimant and NGB. The question was whether it was necessary for business efficacy to imply one. The cases of *James* and *Tillson* make it clear that the common law approach to implication of terms is required. If there is a clear explanation of terms it is not necessary for other terms to be implied. Reliance was placed on the case of *Hewlett Packard Ltd v O'Murphy*. It would be a misconception to focus on matters of status in what was an agency relationship.

22. The Respondent's skeleton argument set out at length the relevant authorities and legal principles. It is clear from a line of authorities in relation to agency workers and in particular Hewlett Packard Limited v O'Murphy [2002] IRLR 4, that the absence of any contractual relationship between the worker and the

ultimate employer was fatal to the claim. The definition in Section 230 requires the individual to work under a contract of employment. There are contractual terms between the parties and the Claimant was not in any sense an employee of the Respondent. There was limited control, the Respondent had no direct involvement in the Claimant's pay and the Claimant was paid by PRG either personally or through the vehicle of his own company SRA. As there was no contract of employment, the Claimant would need to establish that he came within the definition of a worker to make a claim under Section 47B of the 1996 Act. The Respondent accepted in relation to the definition of Section 43K that the Claimant was introduced by a third person, PRG and/or Ship Shape. It was not accepted that the terms were substantially determined by the Respondent. The Respondent had no control over the contract the Claimant entered into with Ship Shape or PRS.

23. Turning to the Working Time Regulations, the definition in Section 230 (3) of the 1996 Act is adopted for the Working Time Regulations. The Respondent submitted the definition did not apply because there was no express or implied contract between the parties. SRA appeared to have provided the services for which PRG paid. The Respondent accepted that the Claimant might fall within Regulation 36 specific to agency workers, The Respondent contended that PRS accepted in dealings with the Respondent the obligation to deal with payment under the WTR 1998. The obligation therefore fell on PRS and not on the Respondent.

24. Finally, the Respondent contended the Claimant did not have sufficient continuity of service to bring a claim under Section 94, because his assignment began on 15 October and his termination was on 9 October 2017 communicated on 10 October 2017.

Conclusion

25. On the first issue whether the Claimant was employed by the Respondent, for the purposes of his claims under Section 100 and 101A and 103, meaning was the Claimant an employee within the meaning of Section 230, the Claimant would need to establish that he was working under a contract of employment. Similar considerations apply to his claim for an ordinary unfair dismissal if the Claimant has sufficient service to bring such a claim. I accept the Respondent's submission that there were no express contractual terms between the parties. The relationship between the Claimant and SRA is unclear. The position between PRS and the Respondent is clear. PRS was supplying agency labour to the Respondent. There is no requirement as the Respondent submits to imply the relationship of employment. Issues such as control and integration are of limited relevance in circumstances where the Claimant was in accordance with the factual and legal realities an agency worker. The Claimant had set up a limited company as a vehicle for receiving payments. Control as it operates in the context of an employee was not present. The only effective sanction available to the Respondent was termination of the assignment. There was no direct relationship in relation to pay and the Claimant's tax affairs were his own concern. The assignments were for a fixed period. They were extended by submission of requisition.

Basic but essential tools were not supplied to the Claimant. The Claimant did not have personal use of the Respondent's van. No procedural obligations were owed by the Respondent to the Claimant in relation to termination which was dealt with by notice to PRS.

26. It follows that there is no basis for construing a contract of employment between the Claimant and the Respondent with whom he had no direct contractual relationship in any form.

27. In the closing submissions it became clear from the Claimant's representative that this case was not argued as one where the contract should be implied, this was in fact a case where the Claimant believed from the onset that he was in a direct contractual relationship with the Respondent and being unfamiliar with affairs of business, had no idea of the contractual relationships now said to be in force. That analysis is difficult to accept given that it is clear there were several stages in the relationship, including an umbrella company and a personal service company, including an umbrella company, a personal service company and a payroll company. The Claimant says that he has lost all of his relevant emails from the time. It is difficult to accept that the Claimant was not aware of the relationships which he must have entered.

28. The second issue is whether the Claimant was a worker in the extended sense under Section 43 K for the purposes of his claim and Section 47B of the 1996 Act. As the Respondent submits there was no contract of employment so the Claimant does not come with Section 230 (3) (a). The Claimant did not have under Section 230 (3) (b) a contract to perform personally any work for another party to the contract. No such contract has been produced to the Tribunal. The Claimant alternatively might rely on Section 43K (1) (a). This provides: -

"(1) For the purposes of this part worker includes an individual who is not a worker as defined by section 203(3) but who –

(a) works or worked for a person in circumstances in which –

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person who whom he works or worked either third person or both of them."

29. The Claimant accordingly was not engaged on terms substantially determined by the Respondent. The Respondent had no control over or insight into the terms on which the Claimant was paid by Ship Shape. The Respondent had no insight into the relationship between SRA, Ship Shape and the Claimant. Indeed, the Claimant might have been paid a dividend or drawings or reserved funds in his company for payment on some other occasion. The Claimant was not therefore a worker for the purposes of his claim under Section 47B of the 1996 Act.

30. Finally, the issue arises whether the Claimant was a worker for the purposes of his claims under the Working Time Regulations 1998. It is clear from the first point considered that the Claimant did not fall within the definition of worker found in Section 230(3). The Claimant did not undertake to provide services personally. The relationship was with his limited company. Regulation 36 of the Working Time Regulations deals with agency workers who are not otherwise workers. The Regulation applies where an individual is supplied by the agent to do work for the principal but the individual is not a worker because there is no worker's contract between the individual and the agent or the principal. That would therefore appear to cover the Claimant's situation in this case. The additional condition is that the individual is not a party to a contract and which he undertakes to do the work for another party who status is that of a client or customer of any profession or business undertaking carried on. It is not said that that exclusion would apply in this case.

31. When this regulation applies it has effect as if there were a worker's contract for doing the work by the agency worker between the agency worker and whichever of the agent and the principal is responsible for paying the agency worker in respect of the work and if neither is so responsible whichever of them pays. It is clear from the contractual relationship between PRG and the Respondent, that PRG owes duties towards agency staff supplied under the Working Time Regulations by Clause 3.2 and by Clause 7 it assumed responsibility for the payment. It also appears that the Claimant was paid by SRA. The Respondent submits that this regulation does not impose any obligation on the Respondent and that is the analysis with which I concur.

32. The final point for determination of this preliminary hearing is whether the Claimant had sufficient continuity of service to bring an ordinary unfair dismissal claim. The Claimant made clear from his statement that on his view his start date was 19 October 2015. In paragraph 15 of his statement he stated that on the morning of 10 October he was told that the Respondent had dismissed him. Accordingly, the Claimant had insufficient service to bring a claim of ordinary unfair dismissal.

Regional Employment Judge Hildebrand

Date:31 January 2019