EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Donald Akhigbe **v** **McGinley CEP Limited & Dan Moss**

Heard at: Watford **On:** 27th March 2019

Before: Employment Judge C Palmer

Appearances:

For the Claimant: In person
For the Respondent: Millie Polimac, Counsel

JUDGMENT having been sent to the parties on 27 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The claims and issues

1. The claimant has brought three claims which arise out of a protected disclosure that he made in May 2016 when working for Hill Partnership (the end user).

2. The first claim, filed on 7 August 2017, (3200926/2017) was against Hill Partnership Ltd (Hill), McGinley Cep Ltd (McGinley) and Orbital Umbrella Ltd (Orbital), McGinley and Orbital being joined on 26 September 2017.

3. At a preliminary hearing on 11 December 2017, Employment Judge Pritchard held that McGinley was not an appropriate respondent as they were not a relevant employer and the claimant was not their worker for the purposes of s43K Employment Rights Act ERA.

4. On 10 January 2018, this first claim was subsequently settled by Hill, (for whom the claimant carried out work) and Orbital, which was basically a payroll service, for £5,000.

5. The second claim, filed on 12 March 2018, was against the current respondents, McGinley and Mr Moss, Mr Moss being employed by McGinley. It relates to alleged detriments which occurred on 31 August 2017 and 26 January 2018, which arose out of the protected disclosure made by the claimant in May 2016. In brief, the claimant argues that when

McGinley found out that he had made a protected disclosure they stopped offering him work or putting him forward for jobs.

6. A third claim was filed on 4 December 2018 stating that the claimant had been subjected to a detriment as a result of protected disclosures during the course of settlement negotiations in respect of the second claim (3202457/2018). This has been settled with no compensation being paid.

7. The first issue to be decided is whether the question of status under s43K Employment Rights Act (ERA), i.e., whether the claimant is a relevant worker and whether McGinley is a relevant employer, has already been decided by the Tribunal. The Respondent argued that this issue was determined by EJ Pritchard on 11 December and it could not be re-opened (as it was res judicata). If it is res judicata, so cannot be re-opened, the decision applies to this case.

8. The second issue raised by the respondent was that the bringing of this new claim was an abuse of process (within the meaning of Henderson v Henderson). This rule states that a party is prevented from raising in subsequent litigation matters which were not, but could and should have been, raised in the earlier proceedings.

9. The claimant withdrew his application to waive privilege.

The facts

10. McGinley is a specialist construction recruitment company, which supplies temporary staff to corporate clients who have temporary resource requirements. In most cases McGinley will not have exclusivity over any vacancies notified to it by a client so may be competing with other agencies to fill the same vacancy. It is up to the client to decide whether to interview any candidate whose details are supplied and if it does and wishes to appoint a candidate introduced by McGinley, will advise them and they will formalise the temporary assignment.

11. The claimant was engaged, on an agency basis, to work for Hill Partnership Ltd as an Assistant Site Manager from 16 to 27 May 2016, when he was released. This work was sourced through McGinley which sends out lists of jobs to qualified people but does not decide on appointments. It does not have a contractual relationship with contractors in relation, for example, to pay nor does it have a relationship of supervision, direction or control over the contractors, such as the claimant. They had no say over the terms under which the claimant worked. Orbital paid the contractors.

12. The claimant's case was that his engagement was terminated because he had pointed out a series of health and safety infringements on site (while working for Hill), which qualify as protected disclosures.

13. On 11 December 2017 EJ Pritchard decided McGinley was not a relevant employer and the correct respondents were Orbital and Hill. EJ Pritchard stated, at paragraph 15, that s43K(1)(a) ERA properly construed could refer to Hill Partnership, which was the main participant because they

knew what happened on site, and Section 43K(b) ERA could apply to Orbital. EJ Pritchard said that McGinley only seemed to act as a finding agency and Orbital was little more than a payroll service as the claimant received a pay slip from Orbital. EJ Pritchard concluded: 'It therefore seems to me that McGinley is not a proper respondent to these proceedings, but that Hill and Orbital are respondents'.

14. On 10 January 2018 the first claim was settled by Hill and Orbital for £5,000.

15. On 12 March 2018 the claimant brought the second claim against McGinley and Dan Moss, their employee. He argued that when McGinley found out about his making a protected disclosure they stopped sending him details of vacancies. The respondents said, and I accept, that there were only two vacancies at the time, one in August 2017 for a client in Biggin Hill (which was filled by a candidate who responded more quickly). The second was on 26 January 2018 (Keepmoat-Barbican) which was filled by a candidate from another agency. The respondent continued to notify the claimant of vacancies but had no control over who was appointed.

16. On 4 December 2018 the claimant brought a third claim, which has been settled.

17. At today's hearing the claimant agreed that the respondent had no power to say whether he would get any job. The claimant said that the only change in the relationship between him and the respondent, since December 2017, was that it went sour.

18. The relationship between the claimant and the various respondents in the claims was no different now to what it had been at the Preliminary hearing, presided over by EJ Pritchard.

The law

19. The statutory framework under the ERA was set out in detail in the respondent's skeleton.

S47B ERA states that:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority,
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.
But this does not prevent the employer from being liable by reason of subsection (1B).**]**

(2) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

20 To bring a claim the claimant needs to show that the detriment was caused by his employer or an agent acting with the employer's authority.

21 Section 43 defines workers and employers as follows:

(1) For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(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 for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

(2) For the purposes of this Part " employer " includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

Res judicata

22 Where a tribunal has already given a decision on an issue, a party cannot then raise this same issue again before the tribunal. This is known as 'res judicata' meaning (broadly speaking) that it is a matter that has already been decided by a judge.

23 In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160, SC* the Supreme Court said that (at para 17):

> 'there is a principle that even where the cause of action [the claim] is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.'

24 The wording of the whistle-blowing section of the ERA makes it clear that protection is given to 'workers'. The worker must be in an employment/worker relationship with the employer.

25 S47B refers repeatedly to 'worker' and 'employer'. There is reference to the agent of the worker's employer, but there must be an employer (under the extended meaning). Employer includes in relation to a worker, the person who substantially determines or determined the terms on which he is or was engaged (s43K(2)(a)) ERA.

26 In Day v Lewisham and Greenwich NHS Trust 2017 CIR 917 the Court of Appeal said that while whistle-blowing legislation should be given a purposive construction that does not permit the court to distort the language of a statute on the vague premise that action against whistle-blowers is undesirable. In *Day*, the court referred to *Fecitt* saying that if a body does not determine the terms and conditions of the worker's engagement at all, it cannot be an employer within the wider definition.

Abuse of process

27 A party cannot raise in subsequent litigation matters which were not but could and should have been raised in the earlier proceedings. Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

Submissions

28 Both parties provided written submissions.

29 The claimant argued that EJ Pritchard did not have the required information to make a decision and that the courts should adopt a purposive approach, relying on BP Plc v Elstone & Petrotechnics *UKEAT/0141/09.*

30 The respondent argued that the point had already been decided by Employment Judge Pritchard and should not be re-opened.

Conclusions

31 I find that EJ Pritchard determined, on 11 December 2017, the question of whether the claimant was a relevant worker and whether the respondent is

a relevant employer within the meaning of the ERA. This decision cannot be re-opened as there has been no change in the relationship between the 3 parties (McGinley, Orbital, Hill) since that date. The claimant agreed that the only change was that the relationship had gone sour. This is a matter that had already been judged (so is res judicata) and any challenge to it is through the appeal process.

32 In any event, having read the claims and responses and heard from the parties today, I would not find any differently. The claimant accepts that McGinley provided opportunities for work but that they had no say over whether the claimant should be accepted by the company seeking workers. There was no contract, verbal or written, between the claimant and the respondent and McGinley had no control or say over the work the claimant did for Hills or any other company for whom he worked.

33 McGinley were not the only company providing a finding service. Job vacancies were sent out by other companies as well, so they did not have exclusivity over the vacancies

34 I also find that as McGinley were not in any employment relationship with the claimant, there cannot have been any such relationship between the claimant and one of their employees, Mr Moss.

35 I find that McGinley's was not acting as an agent of the claimant's employer with the employer's authority contrary to s47B(1A)(b) ERA. McGinley were not making offers of work to the claimant with the employer's authority. The respondent had no control in relation to who was appointed. They were a finding agency.

36 As McGinley is not an employer or agent of Hill, the employer, this claim is dismissed.

37 In view of the above findings I do not need to consider the Henderson and Henderson point.

38 The respondent's application to strike out the claim succeeds, and this claim is accordingly struck out.

39 Reasons are provided at the request of both parties.

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Employment Judge Palmer

Date: …09.05.19……..

Judgment sent to the parties on

.....17.05.19.....

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For the Tribunal office