



EMPLOYMENT TRIBUNALS

Claimant

Mr. G. Richards

AND

Respondent

(1) London Borough of Enfield

(2) Source 24/7 Recruitment Ltd.

HEARD AT: Watford Tribunal (via CVP)

ON: 13 April 2023

BEFORE: Employment Judge Douse (Sitting alone)

Representation:

For Claimant: In person, assisted by Mrs. Richards

For First Respondent: Ms. McFarlane, Solicitor

For Second Respondent: Ms Cashel, Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. Claims 3310762/2022 and 3311683/2022 are consolidated.
2. The complaints of holiday pay and breach of Agency Workers Regulations 2010 in claim 3310762/2022 are duplicates of the claims within in 3311683/2022.

Those complaints in claim 3310762/2022 are therefore struck out as an abuse of process.

3. The complaint of arrears of pay related to underpaid wages is dismissed upon withdrawal.
4. The complaint of unpaid holiday pay is dismissed upon withdrawal.
5. The complaint of breach of Regulation 16 AWR 2010 against the first and second Respondent are dismissed for lack of jurisdiction.
6. The complaint of breach of Regulation 17(1) AWR against the first and second Respondent are dismissed for lack of jurisdiction.
7. The complaint of breach of Regulation 5 AWR against the first and second Respondent have reasonable prospects of success and therefore proceed.
8. The complaint of breach of Regulation 17(2) AWR against the first and second Respondent have reasonable prospects of success and therefore proceed.
9. The complaint related to failure to pay a bonus has reasonable prospects of success, and proceeds against the second Respondent.

Background

First claim

1. On 17 August 2022, following ACAS conciliation from 1 August 2022 to 12 August 2022, the Claimant presented a claim form in relation to Source 24/7 Recruitment. Whilst they are the sole Respondent on this claim, they are the second Respondent in relation to the second claim detailed below, so I will refer to them as this throughout to avoid any confusion. This is claim number 3310762/2022. Within this, the Claimant selected that he was bringing claims for holiday pay, other payments, and for breach of agency worker regulations.
2. A response was required by 19 September 2022. It was received by the Tribunal on 23 September 2022, and was rejected because it was late on 7 December 2022.

Second claim

3. On 17 September 2022, following ACAS conciliation from 1 August 2022 to 12 September 2022, the Claimant presented a claim form in relation to the first and second Respondent. This is claim number 3311683/2022. Within this, the Claimant selected that he was bringing claims for holiday pay, arrears of pay, and for breach of agency worker

regulations. In this claim the breaches were specified as not providing written terms and conditions as requested, and unlawful reasons for not being given work.

4. On 27 January 2023, the second Respondent applied for the claims to be consolidated.

5. On 31 January 2023, the first Respondent applied to have the claim against them struck out as being without merit and having no reasonable prospect of success.

6. This case was before me for a preliminary hearing to determine the following issues:

- a. Clarification of the Claimant's claims;
- b. Whether the claims should be consolidated;
- c. Whether any of the claims should be struck out because:
 - i. They are duplicates and an abuse of process
 - ii. They have no reasonable prospect of success

d. Whether any of the claims should be subject to a deposit order because they have little prospects of success

e. Whether the rejection of the response to claim 3310762/2022 should be reconsidered

Procedure, documents, and evidence heard

7. I was provided with a bundle of 240 pages, plus a further 20 page bundle from the first Respondent. The additional bundle contained witness statements from Sue Davies and Lambrou Stefanou, and associated exhibits.

Findings of fact

8. Based on the evidence heard and the submissions made, I found the following facts.

9. The Claimant was employed by the second Respondent – the temporary worker agency - under a contract for services dated 1 July 2021.

10. The first Respondent's Waste Service engaged the Claimant via the second Respondent, and he was regularly provided with work.

11. In May 2022, the Claimant became aware of

12. Claims were presented as detailed above in August and September 2022.

13. In their response, the first Respondent asserted that:

13.1 The Claimant was entitled to information under AWR, not terms and conditions

13.2 They were entitled not to provide an agency worker with work

14. In their response, the first Respondent asserted that:

14.1 The Claimant had been paid all arrears of pay associated with underpayments

14.2 The Claimant had been paid all arrears of holiday pay

14.3 Whilst the Claimant had not been provided any further work by the first Respondent, he remained employed by the second Respondent and had been provided with other work

14.4 They were not aware of a request to them for terms and conditions

15. On 19 December 2022, the Tribunal asked the Claimant to confirm if they were alleging breach of the Agency Workers Regulations (AWR 2010), and directed them to specify which Regulations.

16. On 2 January 2023, the Claimant provided further information about his claims:

"I am claiming for breach of Agency Workers Regulations 2010 specifically:

1. The failure to provide Glen Richards equal treatment after 12 weeks of doing the same job in relation to the key elements of pay.

2. Glen Richards being subject to detriment after enquiring and informing other colleagues about rights after 12 weeks."

17. On 2 February 2023, following the applications from the first and second Respondent, the Claimant provided further information. This said that the claims being brought were:

17.1 breach of AWR 2010 regarding failure to provide equal treatment as a result of incorrect/insufficient information related to pay.

17.2 Breach of section 47B Public Interest Disclosure Act 1998

The law

18. Regulation 5 of the Agency Workers Regulations 2010 states:

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

5.—(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—

(a) other than by using the services of a temporary work agency; and

(b) at the time the qualifying period commenced.

(2) For the purposes of paragraph (1), the basic working and employment conditions are

—
(a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;

(b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where—

(a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and

(b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(a) both that employee and the agency worker are—

(i) working for and under the supervision and direction of the hirer, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(5) An employee is not a comparable employee if that employee's employment has ceased.

(6) This regulation is subject to regulation 10.

19. Regulation 16 of the Agency Workers Regulations 2010 states:

Liability of temporary work agency and hirer

14.—*(1) A temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.*

(2) Subject to paragraph (3), the hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

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

(a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force in the hirer;

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

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

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

(4) Where the temporary work agency or hirer seeks to rely on regulation 5(3), relevant information in paragraph (3)(a) includes information that—

(a) explains the basis on which it is considered that an individual is a comparable employee; and

(b) describes the relevant terms and conditions which apply to that employee.

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

(6) The hirer shall be liable for any breach of regulation 12 or 13.

(7) In relation to the rights conferred by regulation 17—

(a) a temporary work agency shall be liable for any act, or any deliberate failure to act, of that temporary work agency; and

(b) the hirer shall be liable for any act, or any deliberate failure to act, of the hirer.

20. Regulation 16 of the Agency Workers Regulations 2010 states:

Right to receive information

16.—(1) An agency worker who considers that the hirer or a temporary work agency may have treated that agency worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

(2) A temporary work agency that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

(a) relevant information relating to the basic working and employment conditions of the workers of the hirer,

(b) the factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker at the time when the breach of regulation 5 is alleged to have taken place, and

(c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—

(i) explains the basis on which it is considered that an individual is a comparable employee, and

(ii) describes the relevant terms and conditions, which apply to that employee.

(3) *If an agency worker has made a request under paragraph (1) and has not been provided with such a statement within 30 days of making that request, the agency worker may make a written request to the hirer for a written statement containing information relating to the relevant basic working and employment conditions of the workers of the hirer.*

(4) *A hirer that receives a request made in accordance with paragraph (3) shall, within 28 days of receiving it, provide the agency worker with such a statement.*

(5) *An agency worker who considers that the hirer may have treated that agency worker in a manner which infringes a right conferred by regulation 12 or 13, may make a written request to the hirer for a written statement containing information relating to the treatment in question.*

(6) *A hirer that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—*

(a) all relevant information relating to the rights of a comparable worker in relation to the rights mentioned in regulation 12 or, as the case may be, regulation 13, and

(b) the particulars of the reasons for the treatment of the agency worker in respect of the right conferred by regulation 12 or, as the case may be, regulation 13.

(7) *Paragraphs (1) and (3) apply only to an agency worker who at the time that worker makes such a request is entitled to the right conferred by regulation 5.*

(8) *Information provided under this regulation, whether in the form of a written statement or otherwise, is admissible as evidence in any proceedings under these Regulations.*

(9) *If it appears to the tribunal in any proceedings under these Regulations—*

(a) that a temporary work agency or the hirer (as the case may be) deliberately, and without reasonable excuse, failed to provide information, whether in the form of a written statement or otherwise, or

(b) that any written statement supplied is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that that temporary work agency or hirer (as the case may be) has infringed the right in question.

21. Regulation 17 of the Agency Workers Regulations 2010 states:

Unfair dismissal and the right not to be subjected to detriment

17.—(1) *An agency worker who is an employee and is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).*

(2) *An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).*

(3) *The reasons or, as the case may be, grounds are—*

(a) that the agency worker—

(i) brought proceedings under these Regulations;

(ii) gave evidence or information in connection with such proceedings brought by any agency worker;

(iii) made a request under regulation 16 for a written statement;

(iv) otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person;

(v) alleged that a temporary work agency or hirer has breached these Regulations;

(vi) refused (or proposed to refuse) to forgo a right conferred by these Regulations; or

(b) that the hirer or a temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) *Where the reason or principal reason for subsection to any act or deliberate failure to act is that mentioned in paragraph (3)(a)(v), or paragraph 3(b) so far as it relates to paragraph (3)(a)(v), neither paragraph (1) nor paragraph (2) applies if the allegation made by the agency worker is false and not made in good faith.*

(5) *Paragraph (2) does not apply where the detriment in question amounts to a dismissal of an employee within the meaning of Part 10 of the 1996 Act.*

22. Regulation 17 of the Agency Workers Regulations 2010 states:

Complaints to employment tribunals etc

18.—(1) *In this regulation “respondent” includes the hirer and any temporary work agency.*

(2) *Subject to regulation 17(5), an agency worker may present a complaint to an employment tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2).*

(3) *An agency worker may present a complaint to an employment tribunal that a temporary work agency has—*

(a)breached a term of the contract of employment described in regulation 10(1)(a); or

(b)breached a duty under regulation 10(1)(b), (c) or (d).

(4) Subject to paragraph (5), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

(a)in the case of an alleged infringement of a right conferred by regulation 5, 12 or 17(2) or a breach of a term of the contract described in regulation 10(1)(a) or of a duty under regulation 10(1)(b), (c) or (d), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;

(b)in the case of an alleged infringement of the right conferred by regulation 13, with the date, or if more than one the last date, on which other individuals, whether or not employed by the hirer, were informed of the vacancy.

(5) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of calculating the date of the infringement, detriment or breach, under paragraph (4)(a)—

(a)where a term in a contract infringes a right conferred by regulation 5, 12 or 17(2), or breaches regulation 10(1), that infringement or breach shall be treated, subject to sub-paragraph (b), as taking place on each day of the period during which the term infringes that right or breaches that duty;

(b)a deliberate failure to act that is contrary to regulation 5, 12 or 17(2) or 10(1) shall be treated as done when it was decided on.

(7) In the absence of evidence establishing the contrary, a person (P) shall be taken for the purposes of paragraph (6)(b) to decide not to act—

(a)when P does an act inconsistent with doing the failed act; or

(b)if P has done no such inconsistent act, when the period expires within which P might reasonably have been expected to have done the failed act if it was to be done.

(8) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

(a)making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;

(b)ordering the respondent to pay compensation to the complainant;

(c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(9) Where a tribunal orders compensation under paragraph (8)(b), and there is more than one respondent, the amount of compensation payable by each or any respondent shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates.

(10) Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement or breach to which the complaint relates; and

(b) any loss which is attributable to the infringement.

(11) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and

(b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

(12) Subject to paragraph (13), where a tribunal orders compensation under paragraph (8)(b), any compensation which relates to an infringement or breach of the rights—

(a) conferred by regulation 5 or 10; or

(b) conferred by regulation 17(2) to the extent that the infringement or breach relates to regulation 5 or 10,

shall not be less than two weeks' pay, calculated in accordance with regulation 19.

(13) Paragraph (12) does not apply where the tribunal considers that in all the circumstances of the case, taking into account the conduct of the claimant and respondent, two weeks' pay is not a just and equitable amount of compensation, and the amount shall be reduced as the tribunal consider appropriate.

(14) Where a tribunal finds that regulation 9(4) applies and orders compensation under paragraph (8)(b), the tribunal may make an additional award of compensation under paragraph 8(b), which shall not be more than £5,000, and where there is more than one respondent the proportion of any additional compensation awarded that is payable by each of them shall be such as the tribunal considers just and equitable having regard to the extent to which it considers each to have been responsible for the fact that regulation 9(4)(a) applies.

(15) Compensation in respect of treating an agency worker in a manner which infringes the right conferred by regulation 5, 12 or 13 or breaches regulation 10(1)(b), (c) or (d), or breaches a term of the contract described in regulation 10(1)(a), shall not include compensation for injury to feelings.

(16) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(17) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(18) If a temporary work agency or the hirer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under paragraph (8)(c) the tribunal may, if it thinks it just and equitable to do so—

(a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (8)(b); or

(b) make an order under paragraph (8)(b).

Submissions

Claimant

23. Mrs. Richards submitted on behalf of the Claimant that it had always been their intention to bring one claim against both Respondents, rather than duplicate them. This happened because they received the ACAS conciliation certificate for the second Respondent first and so issued the claim. Once they received the certificate for the first Respondent, the second claim against both respondents was issued.

24. In relation to who is liable, the Claimant and his representative were unsure. They simply knew that something was not right, but could not say who was responsible for each of the things that had happened.

First Respondent

25. It was submitted on behalf of the first Respondent that:

25.1 There are no proper claims against them even after clarification

25.2 A deposit order should be considered, if claims not struck out

25.3 Further and better particulars should be ordered if any claims proceed

Second Respondent

26. It was submitted on behalf of the second Respondent that:

26.1 The claims should be consolidated

26.2 Time should be extended for presentation of a response on relation to 3310762/2022

Conclusions

Consolidation

27. The Claimant confirmed that it was not their intention to bring claims in more than one claim form – this had happened simply because they had received the conciliation certificate for the second Respondent before the certificate for the first Respondent, so lodged that claim first. On this basis, it makes practical sense for these claims to be consolidated.

28. The result of what has happened is that some of the complaints contained in claim 3310762/2022 are duplicates of the complaints within 3311683/2022. Therefore, the complaints of holiday pay and breach of AWR 2010 in claim 3310762/2022 are struck out for abuse of process. This leaves the complaint of 'other payment' - the alleged Christmas bonus – remaining from the first claim.

Reconsideration of rejection/extension of time for a response

29. The claims having been consolidated, I reconsidered the rejection of the response to that, and alongside this the second respondent's application to extend time to present a response is granted.

30. It seems to me that having consolidated the claims, it would be impractical to maintain the rejection. Therefore, the second Respondent's application to extend time to present a response is granted.

31. Additionally, the first and second respondent are permitted to file an amended/ consolidated response within 28 days of this judgment being sent to them.

Clarification of claims

32. As the Claimant confirmed that the arrears of pay have been paid to him, that substantive claim is dismissed upon withdrawal.
33. As the Claimant confirmed that the backdated holiday pay has been paid to him, that substantive claim is dismissed upon withdrawal.
34. The Claimant maintains that direct employees of the first Respondent were paid a £500 Christmas bonus, and wishes to continue with that claim. I note the first Respondent's explanation that there is no formal bonus, and this may be a mistaken belief in relation to overtime in the New Year, but this is not accepted by the Claimant. As the Claimant was not employed by the first Respondent, any claim in relation to this
35. No substantive whistleblowing claim was brought within either claim. I considered whether reference to PID was an application to amend the claim to include this, but in all the circumstances it seems to me that this is just confusion with the provisions of that legislation and the provisions related to detriment within AWR 2010. The Claimant has always been clear that they are bringing complaints of breach of AWR, and would not be prejudiced by not being permitted to bring a separate claim of whistleblowing.

Strike out/deposit order applications

36. Whilst the substantive pay – arrears and holiday - issues have been resolved by payments being made, the Claimant is still entitled to bring a claim under Regulation 5 AWR 2010, in relation to the original failure. Liability for this may lie either with the temporary worker agency (second Respondent) or the hirer (first Respondent). Determination of this requires evidence to be heard, and may involve dispute of facts between parties – it is proper for any liability to be decided by the Tribunal. This claim does therefore have prospects of success against both parties, so the application for strike out is refused. In my view, the prospects exceed the threshold for a deposit order, so this application is also refused.

37. AWR 2010 does not provide recourse to the Employment Tribunal for a breach of Regulation 16, so there is no jurisdiction to consider this complaint. This claim is therefore struck out against both Respondents.
38. The Claimant may still rely on the issues related to his rights under Regulation 16, in support of his claim for breach of Regulation 5.
39. In relation to the allegation of breach of Regulation 17 AWR, the Employment Tribunal has jurisdiction to consider complaints in relation to breach of 17(2) - detriment because. Liability for this may lie either with the temporary worker agency (second Respondent) or the hirer (first Respondent). Determination of this requires evidence to be heard, and may involve dispute of facts between parties – it is proper for any liability to be decided by the Tribunal. This claim does therefore have prospects of success against both parties, so the application for strike out is refused. In my view, the prospects exceed the threshold for a deposit order, so this application is also refused.
40. AWR 2010 does not provide recourse to the Employment Tribunal for a breach of Regulation 17(1) - unfair dismissal - so there is no jurisdiction to consider this complaint. This claim is therefore struck out against both Respondents.
41. The Claimant may still rely on the lack of work in relation to his claim for breach of Regulation 17(2).
42. In relation to the bonus payment, whilst I note the explanation provided by the first Respondent, the figure of £500 provided by the Claimant is a very specific whole number. This is less likely to indicate payment for overtime, where the amount may differ between workers. That is not to say that the Claimant is correct, simply that they are entitled to present evidence to support their assertion, and the Tribunal should then determine this. This claim does therefore have prospects of success against both parties, so the application for strike out is refused. In my view, the prospects exceed the threshold for a deposit order, so this application is also refused.

Summary

43. The following claims proceed against the first Respondent

43.1 Breach of Regulation 5 AWR 2010

43.2 Breach of Regulation 17(2) AWR 2010

44. The following claims proceed against the second Respondent

44.1 Breach of Regulation 5 AWR 2010

44.2 Breach of Regulation 17(2) AWR 2010

44.3 Bonus payment

45. The case will be listed for a final hearing and case management orders will be made and sent along with the notice of that hearing.

Employment Judge K Douse

Dated: 24 July 2023

Sent to the parties on: 25 July 2023

GDJ

For the Tribunal Office

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