

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100548/2017 Held at Glasgow on 7 July 2017

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Employment Judge Shona MacLean

Mr F Lubamba

Claimant  
In Person

Brightwork Limited

Respondent  
Represented by:  
Mr B Caldow  
Solicitor

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

10 The judgment of the Employment Tribunal is that (a) the claimant did not make a protected disclosure in terms of section 43A of the Employment Rights Act 1996 and (b) the claimant was not an employee of the respondent.

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**REASONS**

**Introduction**

1. This case was listed for a preliminary hearing to determine the following issues:-

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a. Whether the claimant made a “protected disclosure” in terms of section 43A of the Employment Rights Act 1996 (the ERA)?

b. Whether the claimant was an employee of the respondent?

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**E.T. Z4 (WR)**

2. The claimant appeared in person. Ms Ramburum interpreted the proceedings for him. Mr Caldow represented the respondent. He was instructed by Ms Bellshaw, HR advisor.

5 3. The parties produced a joint set of productions. The respondent also produced written witness statements for Kim Hill, Managing Consultant and Rebekah Graham, Candidate Manager. These had been provided to the claimant by email on 30 June 2017. There was no order for the claimant to produce a witness statement.

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4. The claimant was not present at 10am. The clerk contacted the claimant and was told that he would be attending. While waiting for the claimant to arrive the Tribunal read the witness statements.

15 5. At the start of the preliminary hearing the Tribunal referred the claimant to paragraph 5 of the note of the preliminary hearing on 1 June 2017. The claimant confirmed that Mr Caldow had sent by email a document which was said to be his contract. The claimant still wished the Tribunal to decide whether he was an employee of the respondent. The respondent's position was that the claimant was a worker in terms of section 43K of the ERA.

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6. The claimant gave evidence on his own account and was cross examined in the usual way. The witness statements of Ms Hill and Ms Graham were treated as their evidence in chief. The claimant was given an opportunity to cross examine the respondent's witnesses.

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7. In relation to the issues that it had to determine the Tribunal found the following facts to have been established or agreed.

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**Findings in Fact**

8. The respondent is a limited company carrying on business as recruitment agency. It handles temporary, contract and permanent vacancies in a wide range of sectors including cleaning and facilities.
9. The respondent employs full time and part time employees to run the business and place people in work either by permanent recruitment or as temporary placement. The respondent employs Ms Hill and Ms Graham as Managing Consultant and Candidate Manager respectively.
10. When the respondent places a candidate with a client for permanent work it is acting as an employment agency. The candidate is employed directly by the client and the respondent is paid a fee.
11. When the respondent acts as an employment business it helps clients, who need staff on a temporary basis. The respondent considers the people on temporary placements to be agency workers.
12. The claimant contacted the respondent through its website (production 1/1-6).
13. On 22 June 2016, the claimant completed and signed a Candidate Registration Form (production 2/7 – 10). The form stated (production 2/9),
- “Please note: In the event you agree to undertake a temporary assignment, Brightwork will engage you under a contract for service, a template copy of which is available on request”.*
14. The claimant also signed a Temporary Workers Working Time Regulations 1998 Declaration (production 5/16).

15. Ms Graham took copies of the claimant's passport. She sought a reference from a former employer which states that the respondent was considering the claimant for "temporary work" (production 6/17). The claimant was seeking cleaning work.
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16. The claimant also signed a "*Contract for Service – Contractors/Temporary Workers*" (the contract) (production 4/12 - 15). The claimant was not given a copy of the Contract. He did not request a copy.
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17. The Contract states that it is not a contract of employment. There is no obligation on the respondent to obtain any work for the claimant. There is an obligation on the claimant to accept any work offered by the respondent. To obtain payment for the hours worked the claimant has the responsibility to properly complete timesheets signed by an authorised client representative.
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18. The claimant was free to sign up with any other agency or work for anyone else.
19. Around 1 July 2016 the claimant was placed on an assignment in the Golden Jubilee Hospital in Clydebank. The claimant worked under the control and direction of the respondent's client.
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20. Much of the respondent's work in the cleaning and facilities sector requires PVG testing. It was in the claimant's interests for the respondent to process a PVG application on his behalf.
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21. On 5 September 2016 the claimant met with Ms Hill. He paid £20 and signed a document authorising the respondent to process his PVG application and authorising the balance due of £39 to be deducted from his wages at £10 per week (production 11/24).
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22. On 16 September 2016 Ms Graham sent an email to the claimant providing a list of six "immediately available jobs" (production 12/25). The claimant

replied advising that he now had a PVG and was interested in job 4 (production 12/26). The claimant was subsequently advised by email sent on 19 September 2016 that he was on a contract for services (production /28-29). His assignment started on 20 September 2016 and was a temporary role until 23 September 2016 as a cleaner at Clydebank Health Centre. He was paid £7.50 per hour. He was referred to the Temporary Worker/Contractor Guide (production 35/103 - 115). The claimant worked this assignment under the control and direction of the respondent's client.

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10 23. In September and October 2016, the claimant had further assignments in Clydebank Health Centres and Drumchapel Health Centre. The claimant worked under the control and direction of the respondent's client.

15 24. The respondent's employees are not at the clients' premises. The clients determine the length of the assignment and the rate of payment. The clients decide how and when the claimant worked. The clients dictate what the claimant has to do in terms of policies and procedures at their premises. If the claimant did not like the assignment he did not need to complete it. He did not need to give notice. The claimant used the respondent's online portal to complete his timesheets to obtain payment. He received payslips (production 15/41 - 47). Tax and national insurance contributions were deducted. Payment was made direct to the claimant's bank account.

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25 25. On 10 November 2016, Ms Graham sent an email to the claimant with a list of four cleaning job roles for the following week. The claimant expressed interest in jobs 2, 3 or 4. Ms Graham sent an email to the claimant on 10 November 2016 confirming a contract for services for an assignment from 11 November 2016 as a cleaner at Student Loans Company (SLC) at the rate £7.85 per hour. It was an ongoing temporary role so an anticipated end date was not provided as the assignment was to continue until further notice (production 14/37 - 40).

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26. The claimant started the SLC assignment on 11 November 2016. The claimant and another cleaner (Joe) reported to a supervisor Mrs Leen. Mrs Leen worked for SLC she allocated the cleaning duties.

5 27. On 14 November 2016, Mrs Leen was working in the kitchen. The claimant saw her putting a red bucket on the kitchen table and used a cloth taken from inside the red bucket to clean kitchen equipment. The claimant believed that using a red bucket in the kitchen was wrong as a red bucket should be used only in the toilets. He believed that by using the red bucket  
10 Mrs Leen was placing people at risk of cross contamination of germs. The claimant asked Joe to tell Mrs Leen that she should not use the red bucket in the kitchen. The claimant made no enquiries of Joe. The claimant did not know if Joe did as the claimant asked. The claimant said that Mrs Leen continued to use a red bucket in the kitchen until 18 November 2016. The  
15 claimant took no further action. After that Mrs Leen allocated the claimant to clean the kitchen. The claimant worked in the kitchen until 6 January 2017. He did not use the red bucket in the kitchen. Mrs Leen worked elsewhere in the premises.

20 28. On 6 January 2017 Mrs Leen advised the claimant that his placement had come to an end. The claimant informed Ms Graham of this by email (the Email) (production 17/57 - 58). The Email also stated:-

25 *“However I felt that I have to report that I saw there from the beginning on the 11/11/2016. Leen was using a red bucket in the kitchen to clean, not for one day but everyday (putting it on the table, everybody and CCTV could see that).*

30 *When I noticed that, and I knew it was totally wrong, I told Jo my colleague also working for Brightwork to let her know, we don't use red bucket in place like a kitchen, by precaution to avoid any contamination as a red bucket is always used for a toilet. I didn't wait*

*for her reaction but I thought it was right for me to protect the health and safety of people working there.*

5                   *So from next Monday, Please lets my colleague Jo to be vigilant about that, it is possible she continues after I leave to do the same mistake.*

10                   *She also started by saying to my colleague knows that my placement is ending today, and my colleague seems to be happy for that. Then she told her friends the same thing about my placement ending today. I sincerely think she hadn't the right to speak about my placement to my colleague Jo from [Brightwork], neither to her friends working for SLC. I have been there to help and I did it. They must learn how to respect people coming there to help.*

15                   *It was my feedback. I prefer to write than speak as my first language is French."*

20                   29. Ms Graham acknowledged the Email thanking the claimant for his feedback and confirming that she had, "*passed this onto my client and they will deal with the situation form there.*"

25                   30. Offers of assignments were issued to the claimant until 28 February 2017 when the claimant name was removed from the respondent's list. The claimant was issued with a P45 around 17 March 2017 (production 31/92 - 95).

30                   31. For tax purposes the respondent issues proforma P45s when relationships are terminated. So far as the respondent is aware there is not a different proforma to be used for agency workers as they are taxed in the same way as employees.

*Observations on Witnesses and Evidence*

32. The Tribunal considered that the claimant gave his evidence honestly based on his perception and understanding of events.
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33. Ms Hill and Ms Graham were in the Tribunal's view credible and reliable witnesses. Neither showed any animosity to the claimant. The Tribunal's impression was that he was one of many "temps" with whom they dealt on a regular basis and there was nothing unusual about his appointment or the way he was allocated placements. The claimant was treated the same as any other candidate during the registration process.
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34. There were two areas of significant factual dispute. The first related to the Contract that was produced. The claimant said that he signed documents on 22 June 2016. He was not provided with a copy. The document that was produced contained his signature but as he was not provided with a copy at the time and this was not an original he could not say that it was the document he signed. The respondent's position was that this was a standard contract signed by people who are registered with it for temporary work. This document was retrieved from their computer records and bears to be signed by the claimant. A copy would have been provided at the time if it was requested.
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35. The Tribunal considered that it was highly probable that this was the contract that claimant signed. There was no reason to believe that the evidence was fabricated. The contract was consistent with the evidence about the way the claimant's relationship with the respondent.
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36. There was also conflicting evidence about comments made by Ms Hill to the claimant on 6 September 2016. The claimant said that she told him that when he received the PVG certificate he would become the respondent's employee and would be given jobs that day. Ms Hill denied that she told the claimant that he would become an employee.
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37. The Tribunal considered that it was highly unlikely that Ms Hill would have said that the claimant would become an employee. The Tribunal felt that as a holder of a PVG certificate the claimant would be eligible for more assignments. The Tribunal therefore considered that Ms Hill probably said that when she received the PVG certificate she would immediately be able to offer him more work.

### Deliberations

38. The Tribunal heard submissions from Mr Caldow to which the claimant was invited to respond.

39. The Tribunal was addressed first about the issue of whether the claimant was an employee. The claimant's position was that he was not given a copy of the contract that he signed on 22 June 2016 until a few weeks ago. He was provided with a P45. This was a legal document issued by the respondent and refers to him being an employee and the respondent being the employer.

40. Mr Caldow accepted that the respondent issued a P45. This was a factor in determining the relationship but was not conclusive. It was issued after the relationship ended. The respondent's position was that the claimant was engaged under the contract. This is a contract for services. It was signed by the claimant and reflected the way in which assignments were carried out.

41. Alternatively, the evidence was that the respondent did not have a sufficient degree of control over the claimant. There was no mutuality of obligation. The client decided when the contract was to be terminated. There was no fixed hourly salary as this was dependent on the client. The risk was shared by both parties. The Tribunal was referred to *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] ICLR 68*.

42. While the Tribunal acknowledged that the respondent did not produce the original Contract, the Tribunal considered that it was highly likely that the document that was produced was a copy of the document that the claimant signed on 22 June 2016. There was in the Tribunal's view no reason for the respondent to have departed from its usual procedure relating to candidates. The terms of the Contract were consistent with the relationship between the claimant and the respondent.
43. In the Tribunal's view a significant factor was that there was no obligation on the respondent to find work for the claimant and there was no obligation on him to accept work. In addition, when the claimant accepted work the respondent had no day to day control, direction or supervision of him. The fact that the respondent paid wages, deducting tax and national insurance contributions and issued a P45 on the basis that the claimant was an employee was in the Tribunal's view a neutral factor because it was a statutory requirement.
44. The Tribunal therefore concluded that the claimant was not an employee of the respondent.
45. The Tribunal then turned to consider whether the claimant had made a protected disclosure under the ERA.
46. The Tribunal referred to section 43B of the ERA which defined a qualifying disclosure as "any disclosure of information" relating to the specified categories of relevant failure. There is a distinction between information and allegations.
47. The Tribunal then referred to the case of *Cavendish Munro Professional Risks Management Ltd v Gelduld* 201 ICR 325 which established the clear principal that to amount to a disclosure of information for the purposes of section 43B the disclosure must convey facts. Expression of opinion is unlikely to satisfy section 43B.

48. Mr Caldow submitted that the Email contained information and allegations. All the facts that the claimant conveyed was that a red bucket was used in the kitchen. That was not enough to demonstrate a risk. Mr Caldow questioned whether the claimant made the disclosure in the public interest given the delay in so doing. Further Mr Caldow submitted that the claimant had not demonstrated that he had a reasonable belief that health and safety was being endangered. The burden of proof was on the claimant.
49. The Tribunal considered the Email. In the Tribunal's view the facts conveyed were that to avoid any contamination a red bucket is always used for the toilet. Mrs Leen was using a red bucket every day to clean in the kitchen and putting it on the table.
50. The Tribunal then turned to consider whether the disclosure in the Email was a qualifying disclosure: a disclosure of information, in the reasonable belief of the worker making the disclosure is made in the interest of the public and relates to the specified categories of relevant failure.
51. The Tribunal noted that it must be the reasonable belief of the worker making the disclosure. The Tribunal asked what the claimant considered to be in the public interest, whether the claimant believed that disclosure served that interest; and whether that belief was reasonably held.
52. The claimant considered that on 6 January 2017 it was in the public interest for there to be disclosure that in November 2016 he had seen Mrs Leen used a red bucket in the kitchen. A red bucket was used for the toilet. The claimant believed that this could lead to cross contamination which could affect the employees of SLC. The claimant believed that when his assignment was terminated it was possible that Mrs Leen would continue to use the red bucket in the kitchen and by making the disclosure he was safeguarding SLC's employees. The disclosure was made to the respondent who had no control over the site or Mrs Leen.

53. The Tribunal was not convinced that at 6 January 2017 the claimant's belief was reasonably held. The claimant did not raise the issue with Mrs Leen on 14 November 2016. He asked his colleague Joe to do so. It was unclear when that request was made. The claimant said that Mrs Leen continued to use the red bucket in the kitchen until 18 November 2016. The claimant made no enquiries of Joe. The claimant did not know if or when Joe spoke to Mrs Leen about using the red bucket. Mrs Leen allocated cleaning duties. While she did not clean the kitchen after 18 November 2016 she could have allocated herself that duty at any time the claimant was still on assignment. The claimant took no further action. The claimant did not raise the matter with SLC who employed Mrs Leen. The claimant did not explain why he believed that it was probable that Mrs Leen would continue to use the red bucket in the kitchen after he left.

54. The Tribunal concluded that the claimant had not made a "protected disclosure" in terms of section 43A of the ERA.

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Employment Judge: S MacLean  
Date of Judgment: 25 July 2017  
Entered in register: 27 July 2017  
and copied to parties

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