Case No 2302875: 2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr Y Mengestab**

First Respondent: **H Smith (Engineers) Ltd**
Second Respondent: **RCE Services Limited**
Third Respondent: **Bayoak Demo Ltd**

Heard at: **Birmingham** **On:** **6 June 2017**
9 August 2017
(In Chambers)

Before: **Employment Judge Woffenden**

Representation
Claimant: Mr I Lovejoy, legal executive
First Respondent: Mr. K Roshier managing director
Second Respondent: Mr. D Cooper, solicitor
Third Respondent: Mr P Livingston of Counsel

RESERVED JUDGMENT

1 The claimant was not an employee or a worker of the first respondent. The claims against the first respondent are dismissed.

2 The claimant was not an employee of the second respondent within section 230 (2) Employment Rights Act 1996 but was in its 'employment' within section 83 (2) (a) Equality Act 2010.The claim of wrongful dismissal is therefore dismissed.

3 The 3rd respondent is not liable for the actions of:
3.1 Mr Jones;
3.2 Mr Delimat); or
3.3 Any other agency workers engaged by the 3rd respondent.

REASONS

1 On 16 December 2016 the claimant presented a claim form (accepted by Birmingham Employment tribunal on 12 January 2017) in which he claimed wrongful dismissal failure to pay compensation for untaken annual leave unauthorised deduction from wages direct race discrimination harassment related to race and victimisation which was served on the first and second respondents.

2 On 2 March 2017 Employment Judge Garnon held a preliminary hearing (case management) and ordered that there be an Open Preliminary Hearing to determine the issues set out in paragraphs 3.17 and 3.27 of the Order sent to the parties on 3 March 2017.

3 The Open Preliminary Hearing came before me. On 5 June 2017 I caused a letter to be written to the parties to ask them to confirm the number of witnesses and a timetable. It was apparent from their replies (and should have been apparent to the parties) that a time estimate of one day was insufficient. In the time available evidence was given and submissions made.

4 For the claimant I had a witness statement and heard evidence from him.

5 For the 1st respondent I had a witness statement and heard from Mr. K Roshier, its managing director and Mr N Francis, a Project Manager. I also had a witness statement from Mrs O Arif who did not attend to give evidence.

6 For the 2nd respondent I had a witness statement from Mr R Eaton, its sole director and shareholder, who did not attend to give evidence.

7 For the 3rd respondent I had a witness statement and heard evidence from Mr C Lowen, a site supervisor.

8 There was also an agreed bundle of documents of 34 pages.

9 As far as those witnesses who did not attend the hearing were concerned I gave their evidence as much weight as was appropriate in the circumstances.

10 The agreed issues to be determined by me were as follows:

Employment Status

10.1 Regarding the 1st respondent, was the claimant:
10.1.1 An employee?
10.1.2 A worker?
10.1.3 Neither?
It was accepted that if the claimant was neither an employee nor a worker of the 1st respondent, the claimant's claim against the 1st respondent will be dismissed.

10.2 Regarding the 2nd respondent, was the claimant an employee? It is accepted that the claimant was a worker.

10.3 Regarding the 3rd respondent, it is conceded that the claimant was neither an employee nor a worker. It is accepted that if the claimant was "employed" by the 2nd respondent (under section 41 Equality Act 2010), that he was a contract worker supplied to the 3rd respondent for the purposes of that provision.

Liability for individuals

10.4 The following liability is accepted by the parties:
10.4.1 That the 1st respondent is liable for Mr N Francis (although the claimant makes no complaints of discrimination against him).
10.4.2 That the 2nd respondent is liable for Mr R Eaton.
10.4.3 That the 3rd respondent is liable for Mr C Lowen.

10.5 Is the 3rd respondent liable for the actions of:
10.5.1 Mr Jones (agency worker supplied to the 3rd respondent);
10.5.2 Mr Delimat (agency worker supplied to the 3rd respondent);
10.5.3 Any other agency workers engaged by the 3rd respondent against whom the claimant makes a claim?

10.6 i.e. Were the agency workers “agents” acting with the authority of the principal (the 3rd respondent) for the purposes of section 109 (2) Equality Act 2010?

11 From the evidence I saw and heard I make the following findings of fact:

11.1 The claimant is a black man of Eritrean origin. From April 2016 until 2 September 2016 (when he resigned) the claimant worked at a construction site at 103 Colmore Row, Birmingham (“the site”) where demolition work was being done. He has been working in the construction industry since around 2013. He obtains work either through employment agencies or by visiting sites and asking if work is available.

11.2 The first respondent is a contractor on the site and engaged the third respondent as a subcontractor to carry out some demolition work including the provision of traffic marshals. The third respondent engaged the second respondent as a subcontractor to deal with some general work such as gatekeeping cleaning up and fencing but there was no written contract between them.

11.3 Mr. K Roshier is the first respondent’s managing director. Mr. N Francis is employed by the first respondent as project manager for the site.

11.4 Mr Barry Eaton owns the third respondent .Mr. C Lowen is employed by the third respondent as the site supervisor.

11.5 Mr Ron Eaton is the director and sole shareholder of the second respondent which employed 5 other people on the site.

11.6 Mr C Lowen underwent a site induction conducted by Mr. Francis on 6 July 2015. The first respondent’s record sheet for the induction has a heading ‘*Employer Details’* beneath which is a box headed ‘*Company Name:*’ next to which is inserted the name ‘*H Smith*.’ Mr Ron Eaton underwent a site induction conducted by Mr. Lowen on 28 September 2015. The record sheet has a heading ‘*Employer Details’* beneath which is a box headed ‘*Company Name:*’ next to which is inserted the name ‘*H Smith*.’ I accept the evidence of Mr Roshier that all personnel on site are required by the first respondent to undergo an induction for health and safety purposes.

11.7 The claimant came to the site in April 2016 looking for work. Mr. Francis was at the gates and told him to speak to Mr Ron Eaton. Mr Ron Eaton told him there was no work available but took his details and told him he would call him if there was anything. The claimant assumed both Mr. Francis and Mr. Ron Eaton were employed by the first respondent which was signposted as carrying the works on the site.

11.8 On 6 April 2016 Mr Ron Eaton rang the claimant and told him there was work available as a gateman at the site and to attend the following day for induction. Mr. Ron Eaton's witness statement about what he told the claimant at interview and in particular the terms offered to the claimant and the identity of his prospective employer was lacking in detail and unpersuasive. Notably he omits any evidence about what if anything he told the claimant about the second respondent. In the absence of Mr. Ron Eaton I prefer the claimant's evidence under cross-examination that no interview took place.

11.9 On 7 April 2016 the claimant attended site underwent a site induction conducted by Steve Casement (an employee of the first respondent). The record sheet for the claimant identifies the company name of the employer as '*H Smith'* and states the claimant's job title/description as "*traffic marshall*.' It is the claimant's evidence that it was Mr Casement who filled in the paperwork for his employment including the necessary forms for him to be paid through the Construction Industry Scheme. However no such forms have been disclosed by any of the respondents and I accept Mr. Roshier's evidence that the first respondent's accounts department has no records of the claimant. The claimant was not paid by the first respondent but by the second respondent (see paragraph 11.10 below).I conclude on the balance of probabilities that Mr. Casement completed only the record sheet for the claimant's induction.

11.10 Thereafter the 2nd respondent issued Subcontractor Monthly Statements to the claimant under the Construction Industry Scheme (the first being dated 5 May 2016). There were 6 such statements in all .The claimant had not received such statements prior to working on the site; he had received ordinary wage slips. He first knew of the existence of the second respondent when he saw the name on the statements which he got by post from the first respondent's office but so far as he was concerned he was working for the first respondent and raised no complaint about it. I conclude on the balance of probabilities that at some point the claimant must have provided to Mr Eaton his national insurance number and unique tax payer reference to enable him to be paid and Mr Ron Eaton decided that the second respondent would utilise that Scheme to pay him.

11.11 The claimant wore a hi-vis jacket safety glasses and a hard hat with the first respondent's name on it. He wore his own safety shoes. .He was responsible for delivery control. The claimant's day to day supervisors were Mr. C Lowen and Mr. Ron Eaton. The latter controlled the area where the claimant worked and gave the claimant a document for drivers to sign in and out of the site. He would contact Mr Ron Eaton if a delivery was coming. Mr Lowen was responsible for supervising the staff on the roof and on 10 August 2016 moved the claimant to work alongside him there. Staff on the roof included Gareth Jones and Martin Delimat who were agency staff supplied to the third respondent. The claimant assumed Mr Lowen was an employee of the first respondent.

11.12 The 3rd respondent included the claimant (described as traffic marshall) in a record of day works dated 17 July 2016 (taking down a crane) for the 1st respondent which was given to Mr Francis.

11.13 On 8 August 2016 the claimant reported to Mr Lowen and then Mr Francis that he had been assaulted and racially abused by Gareth Jones. He did not report it to Mr. Ron Eaton because he was on holiday. Mr N Francis investigated and on 11 August 2016 the claimant provided him with a statement written on the

first respondent's Accident and Incident Witness Form. Mr. Francis also called the police and telephoned Gareth Jones who had left the site.

11.14 On 9 September 2016 the claimant went to see Mr Francis about resigning and was told to go and speak to Mr. Eaton .He complained to Mr Ron Eaton that he had been picked on and resigned.

12 The parties made oral and (in the case of the third respondent) written submissions which I have considered.

13 Under section 230 of the Employment Rights Act 1996:

'(1) In this Act "employee" means an individual who has entered into or works having under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4)In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5)In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly'.

14 Under section 83 (2) (a) Equality Act 2010 employment means –'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.'

15 Under section 109 Equality Act 2010.

‘(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2)Anything done by an agent for a principal, with the authority of the principal must be treated as also done by the principal.

(3)It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4)In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a)from doing that thing, or

(b)from doing anything of that description.’

16 Under section 41 Equality Act 2010:

‘(1)A principal must not discriminate against a contract worker—

(a)as to the terms on which the principal allows the worker to do the work;

(b)by not allowing the worker to do, or to continue to do, the work;

(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d)by subjecting the worker to any other detriment.

(2)A principal must not, in relation to contract work, harass a contract worker.

(3)A principal must not victimise a contract worker—

(a)as to the terms on which the principal allows the worker to do the work;

(b)by not allowing the worker to do, or to continue to do, the work;

(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d)by subjecting the worker to any other detriment.

(4)A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5)A “principal” is a person who makes work available for an individual who is—

(a)employed by another person, and

(b)supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6)“Contract work” is work such as is mentioned in subsection (5).

(7)A “contract worker” is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).’

16 In **Ministry of Defence v Kemeh [2014] EWCA Civ 91** the Court of Appeal held that in relation to the liability of a third party employer for the racially discriminatory acts of an individual who was employed by a contractor but performed works for the third party employer liability for an agent’s discriminatory acts was governed by common law principles. This case was decided under the Race Relations Act 1976 but the material provisions under the Equality Act 2010 are almost identical. The Court of Appeal (Elias LJ) said that ‘In my judgment, Parliament must have intended that the principal will be liable whenever the agent discriminates in the course of carrying out the functions he is authorised to do”. He went on to say it is quotes necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principles authority.” “In my view it cannot be appropriate to describe as an agent someone who is employed by contractor simply on the grounds that he or she performs work for the benefit of the 3rd party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents.” Elias LJ said Per Curiam “the result is that, because of the different sets of rules relating to contract workers and employees, the claimant falls in a gap in the statutory protection. Section 7 confers rights on contract workers to bring a claim against the employer for whose ultimate benefit they provide services but the Act does not impose liabilities on that person for the acts of the contract worker. Parliament may wish to consider this lacuna, although if it provides a remedy, it will have to decide whether it is the immediate employer rather than the end-user of the services who should bear the legal responsibility.”

17 The burden of proof in relation to the existence of a contractual relationship on which jurisdiction is based falls on the claimant. Though the parties made no submissions about the relevant test in identifying a contract of employment ,tribunals must consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account (**O’Kelly and ors v Trusthouse Forte plc 1983 728,CA)**.case law has stablished that there is an irreducible minimum (comprising control mutuality of obligation and personal performance) without which there can be no contract of employment.

18 I first have to consider whether a contract exists at all before I am able to go on to consider where the terms of any such contract are to be found decide what the terms are and the characterisation of the relationship those terms give rise to.

19 It is trite to say that for there to be a contract there must an agreement (usually offer and acceptance of that offer) made between two parties with the intention of creating legal relations supported by consideration.

20 Turning first to the first respondent the claimant’s case was that there was a contract between him and the first respondent .On the facts which I have found the offer of work was made by Mr. Eaton on 6 April 2016; he was not an employee of the first respondent (though the claimant thought he was) and the claimant has not alleged that he had the ostensible or actual authority to bind the

first respondent. Mr. Casement was an employee of the first respondent but he simply completed the record sheet used to record inductions.

21 Mr. Lovejoy placed particular reliance on the wording of the record sheet. I did not find that document persuasive evidence that the first respondent was the claimant's employer. It is common ground that Mr. Lowen was employed by the third respondent and Mr. Ron Eaton was employed by the second respondent yet they both underwent inductions and record sheets were completed for them which if Mr. Lovejoy was correct indicate that they too were the first respondent's employees. Because (like the claimant) they were present on site they too had to undergo inductions for health and safety purposes. Mr. Francis' conduct in relation to the claimant is entirely consistent (see paragraph 11.7 11.12 and 11.13 above) with his role as Project Manager for the site employed by the first respondent, the contractor. The claimant's wearing of a hi-vis jacket safety glasses and a hard hat with the first respondent's name on it is not in my judgment sufficient evidence on which to conclude that the claimant was the first respondent's employee again the provision of such items are consistent with the first respondent's role as the contractor with responsibilities for health and safety on site and the claimant's duties as the site's gateman/traffic marshall.

22 In any event the claimant turned up on the site on 7 April 2016 in purported acceptance of an offer of work which he believed to have been made by the first respondent but was in fact made by the second respondent .In my judgment no contract can come into existence between the first respondent and the claimant in those circumstances. The claimant has failed to discharge the burden on him to prove the existence of any contractual relationship between him and the first respondent. He was neither an employee nor a worker of the 1st respondent.

23 The second respondent has accepted the claimant was a worker. It follows it is accepted that a contract exists between the second respondent and the claimant .Is their contractual relationship that of employer and employee?

24 Mr. Lovejoy's primary contention was that the claimant was an employee of the first respondent. It was understandable therefore that it was with little enthusiasm that he submitted that the second respondent was the claimant's employer. He relied on Mr. Lowen's unchallenged evidence that Mr. Ron Eaton also supervised the claimant. He made no other submissions about the test the tribunal should apply in deciding whether the contractual relationship was one of employment or point to any facts to which the tribunal should have regard in applying any such test. Having been offered work by Mr Ron Eaton the claimant turned up on the site and was paid for his work by the 2nd respondent. The claimant was supervised day to day in his work by Mr Ron Eaton but it is common ground that Mr Lowen was also his supervisor and if the claimant subjected himself to Mr Ron Eaton's control and resigned to him this was no doubt because he believed him to be in the employment of the first respondent. Both Mr. Lowen and Mr. Ron Eaton gave him work to do. The claimant gave no other evidence about the degree of control to which he was subject or any evidence at all about mutuality of obligation (though the necessity for personal performance is evidently accepted by the second respondent-see paragraph 25 below). The second respondent did not provide him with any equipment; that was provided by the first respondent and he wore his own boots. Though this is not a conclusive factor that he was paid under the construction industry scheme points away from employment. In my judgment the claimant has failed to discharge the burden on him to prove the irreducible minimum necessary to establish that the

contractual relationship between him and the first respondent was that of employment for the purposes of section 230 (2) Employment Rights Act 1996.

25 However the second respondent accepts the claimant was a worker for the purposes of section 230 (3) Employment Rights Act 1996, one of the necessary elements of which is personal performance .The definition of employment under Section 83 (2) (a) Equality Act 2010 incudes a contract personally to do work. In the light of the concession made by the second respondent I conclude that the contract between the claimant and the second respondent comes within the definition at section 83(2) (a) Equality Act 2010.

26 Having so concluded I turn to the liability of the third respondent under section 41 Equality Act 2010 for Mr Jones Mr Delimat and other unnamed agency workers. Mr Livingston submitted that the claimant's position is directly comparable with the claimant in **Kemeh.** I agree. I have heard no evidence upon which I could conclude that Mr. Jones or Mr. Delimat or any other unnamed agency workers were acting on behalf of the third respondent and with its authority and were therefore its agents for the purposes of section 109 (2) Equality Act 2010.The only evidence before me was that they were simply carrying out work for its benefit. The claimant comes within the lacuna identified by Elias LJ.

Employment Judge Woffenden

11 August 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16 August 2017

FOR EMPLOYMENT TRIBUNALS