Case Number: 1401300/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr E Hawryluk

Respondents: 1) Omega Resource Group Ltd

2) Honda of the UK Manufacturing Ltd

Heard at: Bristol **On:** 28 April 2017

Before: Employment Judge O Harper

Representation
Claimant: In Person
Respondent 1**:** Mr Roberts, Counsel
2**:** Mr Huggett, Lead Lawyer EEF

RESERVED JUDGMENT

1. The claimant was not employed by the first or second respondent within the definition of Section 230 of the Employment Rights Act 1996.

2. The Tribunal therefore does not have jurisdiction to consider the claims of breach of contract and failure to issue a written statement of particulars of employment and those claims are dismissed against both respondents.

3. Both respondents concede that the claimant is entitled to pursue discrimination claims against both respondents as there existed between the claimant and the first respondent a contract personally to do work.

REASONS

1. By a claim form presented on 14 August 2016 the claimant brought claims for race discrimination and sexual orientation discrimination, breach of contract (wrongful dismissal) and failure to issue written terms and conditions of employment.

2. The claim is pursued against two respondents Omega Resource Group Ltd, the first respondent and Honda of the UK Manufacturing Ltd, the second respondent. The first respondent is a recruitment business. It placed the claimant to work as a Production Operative at the second respondent's premises.

3. At a Case Management Preliminary Hearing on 27 January 2017 before Employment Judge Roper the claims were clarified. As a result of that clarification the following claims against the first respondent were dismissed; harassment on the grounds of race and sexual orientation and victimisation on the grounds of race. The following claims were dismissed against the second respondent; breach of contract and failure to provide written statement of particulars.

4. It was noted that the claim for direct discrimination was on the basis that it was on the grounds of race only and limited to the act of dismissal. That claim is pursued against both respondents.

5. The allegations of harassment and victimisation were clarified as being confined to actions of the second respondent. Directions were given for further clarification of those allegations. Both respondents deny the claims. Neither accepts that it was the employer of the claimant. Following a discussion at the preliminary hearing regarding the claimant's employment status today's preliminary hearing was listed to consider the following matters:

    (1) To establish the claimant's status as against each respondent, that is whether the claimant was an employee, or a worker, or under a contract personally to do work, or a contract worker or an agency worker.

    (2) Whether the Tribunal has jurisdiction to hear any or all of the claimant's claims and if so against which respondent.

    (3) To make any further necessary case management orders.

6. Shortly before the listed preliminary hearing the claimant wrote to the Tribunal asking to "amend the Case Management Order" apparently seeking to now pursue a claim of victimisation against the first respondent. That claim has been dismissed. Therefore the appropriate course of action is an application for reconsideration to Employment Judge Roper in respect of his order dismissing the claim.

7. The claimant will have to make the appropriate application in writing giving cogent reasons and the legal basis for now seeking to pursue such a claim when he had clarified that no such claim was being pursued against the first respondent.

8. Directions are given by Case Management Order which accompanies this Reserved Judgment.

9. Following clarification by the claimant of his allegations of harassment in a schedule, the second respondent has applied for today's preliminary hearing to also consider out of time issues in relation to those allegations. The parties were advised that this application could be considered at today's hearing.

10. However, it became apparent that in view of the significant documentation for today's hearing, the bundle of documents was extended from 150 pages to

250 pages, the number of witnesses (three including the claimant) and the fact that the witness statements did not deal with the out a time issue, I concluded that it would not be possible to deal with those issues today. Those matters can be considered at another preliminary hearing which will be listed in due course to deal with the prospect of the success of the claims and thereafter listing for a full hearing.

11. If the claimant pursues his application for reconsideration by Employment Judge Roper and a hearing is necessary to determine that issue then the preliminary hearing can be listed before Employment Judge Roper to deal with the reconsideration application (if it is pursued).

12. At the commencement of the hearing both respondents conceded that the claimant was entitled to pursue claims of discrimination against each of them. Both conceded that the claimant was working under a contract with the first respondent personally to do work, thus falling within the wider definition of employee under Section 83(2)(a) of the Equality Act 20110. Both continue to dispute that the claimant was an employee as defined by Section 230 of the Employment Rights Act 1996.

13. The claimant was asked whether in the light of the concessions made, he still continued to pursue that he was an employee as defined by the Employment Rights Act 1996 of either or both the respondents. He indicated that he continued to pursue that argument and therefore it was necessary for me to hear evidence from witnesses to determine that issue.

14. I heard evidence from the claimant and from Ms Aitken, Accounts Manager of the first respondent and Mr Pye, Section Manager for the Associate Relations Section of the respondent. I was referred to a collection of agreed documents which included the master vendor contract between the second respondent and the first respondent, and the terms of engagement between the first respondent and the claimant.

15. I find the following facts proved on the balance of probability. The first respondent is a recruitment business. It has an agreement with the second respondent (a Master Vendor Contract) for the supply of direct production staff. The agreement defines the first respondent as the contractor and the second respondent as the client. The purpose of the contract is to fulfil the second respondent's need for temporary workers. The contract itself is an uncontroversial document. There is no evidence before me that it was a sham. I find that the claimant was supplied as a temporary worker to the respondent in accordance with terms of the Master Vendor Contract.

16. The claimant having seen an advert for work available at Honda applied to Omega and signed a document headed "Terms of Engagement for Agency Workers (Contract for Services)". The relevant provisions of the contract are as follows:

> *2.1. These terms constitute the entire agreement between the employment business and the agency worker for the supply of services to the hirer and they should cover all assignments undertaken by the agency worker. However no contract shall exist between the employment business and agency worker between assignments. These terms shall prevail over any other terms put forward by the agency worker.*

2.2. During an assignment the agency worker will be engaged on a contract for services by the employment business on these terms. For the avoidance of doubt, the agency worker is not an employee of the employment business although the employment business is required to make the deductions from the agency worker's pay. These terms shall not give rise to a contract of employment between the employment business and the agency workers or the agency worker and the hirer. The Agency worker is supplied as a worker and is entitled to certain statutory rights, but nothing in these terms shall be construed as giving the agency worker rights in addition to those provided by statute except where expressly stated.

3.1 The employment business will endeavour to obtain suitable assignments for the agency worker to perform the agreed type of work. The agency worker shall not be obliged to accept any assignment offered by the employment business."

17. The claimant's relationship with the first respondent operated in accordance with those terms and in particular in relation to Clause 3.1 when the claimant's assignment at the second respondent came to an end the first respondent offered him a potential assignment with another client called TS Tech. The claimant did not pursue that potential placement because he considered that the terms and conditions of the assignment and distance from his home were not suitable.

18. There is some dispute as to whether or not the claimant received a copy of the terms of engagement. I find that it is likely that he did receive the documents. It is the first respondent's normal practice to provide a copy and the claimant signed and dated the agreement on 7 May 2015. At the same time he confirmed by placing his initials in the appropriate section of the document, that he had read and understood and received a copy of the terms of engagement for agency workers and agreed to abide by them.

19. When questioned in Tribunal as to his understanding of the arrangement, it became apparent that he had hoped to secure, in due course, a fixed term contract of employment with Honda, after having worked as an agency worker. He understood how the second respondent's recruitment process worked. At the time that he was supplied by the first respondent to the second respondent there were a number of agencies supplying workers to the second respondent on a similar basis.

20. The claimant was assessed for his suitability by the first respondent. In accordance with the terms of engagement which he had signed on 7 May, he was offered and accepted an assignment as a Production Operative at the second respondent. He was offered the assignment on the 2 July. By virtue of the obligations in his terms of engagement with the first respondent, he was required to cooperate with the Honda's reasonable instructions and accept direct, supervision and control to any responsible person in the second respondent's organisation. He was to observe any relevant rules and regulations of the second respondent's establishment. In accordance with that agreement when he started working at the premises of the second respondent he was required to abide by the second respondent's procedures and policies.

21. He was paid by the first respondent. On a day-to-day basis he was controlled by the second respondent. He was allocated his duties by the second respondent's managers. The second respondent's method of recruitment is to take on temporary contract workers and then carry out an assessment after six months to determine, whether or not, a contract worker is suitable for fixed-term employment with the second respondent. The second respondent has a fluctuating need for workers. It requires workers to be flexible and to work across a range of production processes. To that end it moves workers from time to time.

22. It also ensures that workers are suitable for the tasks on which they are engaged. To that end it requests that all workers, whether temporary or employed, to complete a health questionnaire to ensure that individuals are placed in roles suitable for any specific health conditions. The claimant was required to complete this health questionnaire for the second respondent. I do not consider that this is a factor indicative of employment. The claimant referred in evidence to a letter from the first respondent dated 28th July regarding a bonus being paid to all returning employees after the annual summer shutdown. The letter made reference to "employees". The claimant received the bonus. He contends that this supports his case that he was an employee. I consider this to be of little significance. The wording used in that letter is at odds with all the other documentation and on its own, without supporting factors, is not indicative of employment.

23. The second respondent carries out an appraisal at the end of six months to consider whether the temporary worker is suitable to be offered a fixed-term contract. If it is apparent at that stage, that the worker is unlikely to be suitable due to not having achieved the appropriate level of scoring, then the assignment is terminated at that stage. In certain circumstances where some improvement is required (as in the claimant's case), the assignment can be extended for a further short period before determining suitability. That period is up to three months.

24. In addition to the above process of appraisal the second respondent provides information, on a monthly basis, to the first respondent regarding the performance of its agency workers. Those scores are collated by the first respondent. Any serious issues which could impact upon the continuation of the assignment are referred to the first respondent by the second respondent for the first respondent to meet with the temporary worker to discuss those issues.

25. In accordance with that process a meeting took place with the claimant at the end of 6 months. Ms Aitken told the claimant that he had not been successful in gaining a fixed-term contract with Honda at that stage because there were issues regarding his attitude towards his team leader/manager. He was advised that his assignment was extended for a short period for him to make some improvement. On another occasion the claimant was spoken to by Ms Aitken regarding a disagreement between the claimant and a colleague. The final meeting with the claimant was to advise him that he had not been successful passing the appraisal in April 2016 to gain fixed term employment and that therefore his assignment was terminated. The first respondent had been advised by the second respondent that the claimant had not passed the fixed term appraisal in April 2016 as his scores were insufficient to be taken on by the second respondent.

26. After the termination of the assignment with the second respondent, in accordance with the claimant's terms of engagement, the respondent proposed a placement at another of its clients, TS Tech. The claimant did not take up the proposal as he considered the terms and conditions of that placement unacceptable. I find those to be the relevant facts.

Relevant Law

Section 230(1) Employment Rights Act 1996

27. This defines an employee as an individual who has entered into a contract under (or where the employment has ceased, worked under) a contract of employment.

28. Section 230(2) provides that a contract of employment means a contract of service or apprenticeship, whether express or implied, and if it is expressed whether oral or in writing.

29. Dealing with the claimant's first contention that he was an employee of the first respondent (the agency). The leading case is that of *Dacas v Brook Street Bureau UK Ltd 2004 EWCA Civ 217*. I note that the Tribunal must be satisfied that the claimant has a contract with the respondent and if so, whether it satisfies the requirements of an irreducible minimum of mutual obligation necessary for a contract of service, ie an obligation to provide or work to perform it, coupled with the presence of control. In the absence of a contract, or a contract having those features, the claimant cannot qualify as an employee, even though it may well be surprising not to regard the claimant as an employee.

Findings of Fact which I have made

30. Firstly, I have found that the claimant entered into a contract with the first respondent, which stated that it was a contract for services and clarified that he was not an employee of the first respondent. He understood that, accepted it and signed the relevant documentation. The contract provided that the claimant was not obliged to accept any assignment offered by the employment business, neither was there an obligation on the employment business to provide assignments. This is consistent with how the contract was actually performed because the claimant was offered the assignment at Honda and accepted it and after that assignment was terminated he was offered the opportunity for an assignment with another client of the first respondent which in accordance with the agreement he chose not to take up because it was not suitable for his needs. There was therefore no mutuality of obligation.

31. So far as control is concerned there was no day-to-day control by the first respondent over how the claimant carried out his duties at the second respondent's factory. All such control including whether or not the claimant would be taken on as a fixed-term worker lay with the second respondent. Although some induction was carried out by the first respondent that was largely of an administrative nature. The claimant was subject to the second respondent's policies and procedures whilst he was working at the factory.

32. The contract between the claimant and the first respondent was not a sham. I conclude that the circumstances of the arrangement between the claimant and the first respondent was very similar to that in the Dacas case. I find that there was no mutuality of obligation and that the first respondent did not exercise day-to-day control over the claimant. On that basis the claimant was not an employee of the first respondent.

33. Turning to the claimant's contentions regarding employment with the second respondent. There is no contract between the claimant and the second respondent. The basis of the claimant's contentions essentially are that contract of employment should be implied between him and the second respondent. The leading case of *James v Greenwich London Borough Council [2007] ICR 577 EAT* considered circumstances in which it is possible to imply a contractual relationship between an agency worker and the end user. I bear in mind that one can only be implied where it is necessary to do so. Mr Justice Elias laid down the following guidance to assist Tribunals in deciding whether to imply an employment contract between an agency worker and an end user.

    - The key issue is whether the way in which the contract is performed is consistent the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end user.

    - The key feature in agency arrangements is not just the fact the end user is not paying the wages but that it cannot insist on the agency providing the particular worker at all. It will not be necessary to imply a contract between the worker and the end user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be in consistent with the relationship.

    - It would be rare for the employment contract to be implied where agency arrangements are genuine and, where implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied there must have been, subsequent to the relationship commencing, some conduct that entitled the Tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually been performed.

    - The mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two.

    - It would be more readily open to a Tribunal to imply a contract where like in Cable and Wireless Plc v Muscat [2006] ICR 975, Court of Appeal the agency arrangements are super imposed on an existing contractual relationship between the worker and the end user.

34. I refer to the facts that I have found. The claimant was subjected to the daily control of the second respondent however, that was in accordance with the terms of his engagement with the first respondent (he had to abide by the direction of the second respondent whilst at his premises) and was in

accordance with the Vendor contract between the second respondent and the first respondent. Any issues regarding his performance that required addressing were dealt with by the first respondent having been provided with information as to performance or issues by the second respondent. I found that this was a genuine agency relationship that hadn't changed throughout its existence. The claimant was taken on as an agency worker and remained an agency worker.

35. This was a genuine agency relationship. There is no necessity to imply a contract of employment between the claimant and the second respondent. In those circumstances he was not employed by the second respondent and cannot pursue his claims for breach of contract and failure to issue a written statement of particulars of employment against either respondent and those claims are dismissed.

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Employment Judge O Harper

__5 May 2017_____

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

...17 May 2017.....

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FOR EMPLOYMENT TRIBUNALS