EMPLOYMENT TRIBUNALS

Claimant: Mrs C Keighley

Respondent: H F Trust Limited

HELD AT: Leeds **ON:** 29 August 2017

BEFORE: Employment Judge D N Jones
Ms J Lancaster
Mrs E C McEvoy

REPRESENTATION:

Claimant: Mr J Medhurst, Solicitor
Respondent: Mr C Sparling, Counsel

JUDGMENT

The application of the respondent of 28 April 2017 for the Tribunal to reconsider its judgment on remedy whereby it ordered the respondent to pay the claimant compensation of £14,000 and interest of £1,766 is dismissed.

REASONS

1. By its letter of 20 April 2017 the respondent's representative sought reconsideration of the remedy judgment. Acknowledging that neither he nor counsel for the respondent had raised the legal issue at the remedy hearing he nevertheless submitted that the Tribunal did not have jurisdiction to make the award for compensation. That was because section 49(6) of the Employment Rights Act 1996 (ERA) restricts the Tribunal's entitlement to award compensation in prescribed circumstances. Section 49(6) provides:

> "Where the complaint is made under section 48(1A) (this is such a complaint):

…

(b) the detriment to which the worker is subjected is the termination of his worker's contract; and

(c) that contract is not a contract of employment;

any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A."

2. The provision is to preclude a worker who is engaged under a contract of service from recovering a greater amount in compensation than an employee who is dismissed, insofar as the detriment which the claim relates to is the termination of the worker's contract. That would exclude the right to claim compensation for injury to feelings because such an award is not available in cases of unfair dismissal. As the only award recovered by the claimant concerned injury to feelings and interest, the respondent submits the interests of justice require the revocation of the judgment.

3. "Worker" is defined in the Employment Rights Act 1996 at section 230 as:

"An individual who works 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. The Tribunal's Rules specify the circumstances in which it will consider an application to reconsider a judgment, and under rule 70 it may do so where it is necessary in the interests of justice to do so, and rule 2 provides the Tribunal should consider any rule by reference to the overriding objective of hearing cases justly and fairly.

5. In the letter making the application for reconsideration the author moves seamlessly from reference to section 49(6) of the ERA to a statement that it was engaged in the circumstances as found by the Tribunal. He does not elaborate why it was engaged but rather suggests that it was implicit from the findings. Although the Tribunal required the respondent to submit written representations to explain whether the immediate and indefinite deregistration of the claimant from the respondent's list of casual workers was encompassed by section 49(6) of the ERA by 22 May 2017, no such submissions were filed, then or at all.

6. The claimant's representative has submitted a written argument in which he contends that the respondent cannot succeed in relying upon section 49(6) of the

ERA because of the basis upon which its case was advanced to the Tribunal in respect of the engagement of the claimant. In particular Mr Medhurst argues that in paragraph 68 of its reasons the Tribunal rejected the claimant's contention she was an employee and found that the letter in which she was told she would be put upon a list of casual workers embodied the terms of engagement. He contends that the wording of that letter, of 5 February 2014, emphatically stated that there was no obligation to offer work, or for the claimant to accept work, and that no terms of engagement would subsist between periods of work.

7. Mr Medhurst submits that letter cannot be construed as a global contract or an umbrella contract but that each period when the claimant accepted relief work became its own individual contract whereupon her rights as a worker under the ERA and elsewhere came into being. In reality, he submits, the last such engagement was in October 2014, and insofar as there was a termination of a contract for the purpose of section 49(6) of the ERA, it would have been then.

8. The argument raised against that by Mr Sparling is that looking at this from a broader perspective gives rise to the inference or implication that the process which was undertaken to deregister the claimant was tantamount to the termination of a contract. The difficulty for Mr Sparling, as he in fairness recognised, was that argument ran counter to the one which had been advanced in the liability hearing: that there was no legal requirement of the respondent to have any such process at all, because under the terms of engagement of the letter of 5 February 2014 it could simply have told the claimant that it would not be engaging her further.

9. This application is brought by the respondent, and it is for the respondent to satisfy the Tribunal that it is necessary in the interests of justice to revoke or vary the judgment.

10. We do not consider the respondent has satisfied the Tribunal that the claimant was subject to the detriment of the termination of her contract as a worker on 8 July 2015, as it contends today. It was very specific in the terminology it used when it undertook an investigation and informed the claimant she would receive no more relief work at that time, together with the terminology used in respect of the deregistration process. Neither purported to be for the purpose of terminating the claimant’s contract as a worker; and that was compatible with the terms of the 5 February 2014 because any such contract had ceased upon the end of the last relief session worked.

11. No doubt, for good reasons, the respondent keeps a list of those people it wishes to work as casual relief workers. The scheme chosen to remove people from that list was the deregistration process. That should not be confused with the contract of the worker, within the meaning of section 230 of the ERA. We accept the submission of Mr Medhurst that the decision to deregister the claimant from that list was not synonymous with the termination of her contract as a worker. Rather, it precluded the claimant from being considered in the future for any further separate and individual contracts, which came into being whenever the claimant was called upon to work a casual relief shift under the terms of the letter of 5 February 2014.

12. The deregistration was to be “immediate and indefinite”. That language, too, is carefully chosen. It explains the effect of deregistration. It is different to the termination of a contract of service of a worker, or dismissal of an employee, because of its continuing and lasting effect. That is to preclude consideration of the claimant indefinitely from working for the respondent.

13. Given the thrust of the arguments which were advanced in the earlier hearing we consider it is not open to the respondent now to argue that the claimant was engaged under a contract which came to an end by reason of the decision of 8 July 2015 and that fell within the wording of section 49(6) of the ERA. That is not only inconsistent with the submission that the 5 February 2014 letter comprehensively expressed the terms of engagement, but would necessitate hearing further evidence and new submissions. It is not in the interests of justice to allow the respondent to reformulate its case.

14. It must therefore follow that the application for a reconsideration is rejected because there is no proper basis upon which to overturn our original finding in respect of remedy.

Employment Judge Jones

Date: 31 August 2017