EMPLOYMENT TRIBUNALS

Claimant: Mr P Pemberton

Respondents: 1. Alder Hey Children's NHS Foundation Trust
2. Hay's Specialist Recruitment Limited
3. Sterling Solutions Umbrella Limited

Heard at: Liverpool **On:** 6 and 7 December 2017

Before: Employment Judge Wardle
Mrs C Try
Mrs J C Ormshaw

Representation
Claimant: In person
Respondent 1: Mr E Williams – Solicitor
Respondent 2: Mr N Siddall – Counsel
Respondent 3: Mr A Fryer - Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims that (1) his rights as an agency worker under Regulation 5 of the Agency Workers Regulations 2010 entitling him to the same basic working and employment conditions as a directly recruited employee have been infringed and that (2) he suffered unauthorised deductions from his wages and that (3) he was not paid holiday pay to which he was entitled are not well-founded and fail.

REASONS

1. By his claim form dated 23 December 2016 the claimant has brought the following complaints (i) a breach of the equal treatment provisions of the Agency Workers' Regulations 2010 ("AWR") (ii) unlawful deductions from wages contrary to sections 13-23 of the Employment Rights Act 1996 ("ERA") and (iii) claims for holiday pay pursuant to Regulation 30 of the Working Time Regulations ("WTR") and/or pursuant to sections 13-23 ERA.

2. The first and second respondents by their responses admitted the claimant's claims in part and it is their case that by two payments of £17,450.70 and £1,149.78 made to him that they have discharged all sums owing to the claimant

in respect of his complaint under the AWR. It is further their case that they are not the claimant's employer and that his holiday pay and unlawful deductions claims should be advanced against the third respondent, who is his employer.

3. Following a Case Management Hearing on 28 February 2017 the third respondent was joined as a party to the proceedings. A judgment was then issued against the third respondent under Rule 21 in relation to the holiday pay and unlawful deductions claims but this judgment was then revoked as the claim had not been served on the correct address of the third respondent. Upon the claim's correct service the third respondent entered a response by which it accepted that the claimant was employed by it between 15 September 2014 and 29 August 2016 during which period he carried out work as a Reactive Maintenance Engineer with the first respondent having been supplied to it by the second respondent. However it asserted that the claimant had been paid all sums due to him and it also challenged the Tribunal's jurisdiction to consider his claims against it having regard to the date of service of them on it.

4. In respect of the precise matters about which the claimant complains as gleaned from the terms of his ET1 Mr Siddall in the second respondent's skeleton argument suggested that they were as follows: (i) whether the claimant's rate of pay when commencing work at the first respondent was unlawfully lower than that of a directly employed worker contrary to Regulation 5 AWR (ii) the deduction of employers' National Insurance Contributions ("NICs") and umbrella fees by the third respondent (iii) the incorrect calculation of overtime and (iv) the failure to uplift his pay properly to reflect his holiday pay entitlement. The second respondent's understanding of these matters as outlined in the skeleton argument were as follows: (i) this remained a live issue in response to which it disputed that the claimant had been unlawfully paid; asserted that any such failure was the responsibility of the first respondent (as the hirer) and asserted the reasonable steps defence in accordance with Regulation 14(3) AWR (ii) this was asserted to be a matter between the claimant and the third respondent as his employer (iii) this was admitted but it was contended that the correct payments have now been made and (iv) this was asserted to be a matter between the claimant and the third respondent as his employer. On this basis it was submitted that the liability issues remaining in dispute as regards the first and second respondents were as follows: (1) was the claimant's rate of pay lower than that which would have been paid to a directly engaged worker (2) if so, to what extent are the first and second respondents each responsible for the same (3) if the second respondent is responsible for the same to any extent has it taken such steps so as to satisfy Regulation 14(3) AWR and thereby avoid any liability in that regard.

5. In terms of the issues involving all three of the respondents these were, as agreed between them, suggested to be (a) if the claimant had been employed directly by the first respondent, at what pay point and in which pay band would he have been appointed, on the scale seen at page 160 of the hearing bundle (b) in particular, does the Tribunal agree that that the claimant would have been appointed at pay point 16, as contended by the first and second respondents (c) if so, does the Tribunal consider that there has been any breach of AWR by the first or second respondent (d) the respondents accept that the claimant was entitled to pay at 1.5 times the normal rate of pay when undertaking overtime and 2 times for overtime undertaken on a general public holiday; based on the answer to question (c), what would the applicable overtime rates have been in accordance with the differing hourly rates for 'premium', nights/Saturday and

Sunday shifts (e) if the Tribunal considers that the AWR have been breached which of the respondents is liable for any such breach (f) can the second respondent rely on the 'reasonable steps' defence under Regulation 14(3) AWR (g) was the claimant underpaid by the third respondent in respect of employers' NICs and if so, was this at a rate of 13.8% and (h) has the claimant been underpaid in respect of holiday pay at a proportionate rate and taking account of overtime.

6. The Tribunal heard evidence from the claimant and on behalf of the first respondent from Mr Neil Davies, Human Resources Business Partner, and on behalf of the second respondent from Ms Christine Gray, Regional Compliance Manager and on behalf of the third respondent from Ms Ellen Parkin, HR Director, which was given by written statements and supplemented by responses to questions posed. We also had before us a hearing bundle in two parts and a separate smaller bundle prepared by the third respondent.

7. Having heard and considered the evidence the Tribunal found the following material facts.

Facts

8. The claimant was for the purpose of these proceedings an agency worker, in respect of whom the first respondent contracted with the second respondent for his supply to carry out the role of Reactive Maintenance Engineer at its Alder Hey Hospital premises. The Temporary Assignment Confirmation at page 381 gives an agreed start date of 15 September 2014 and the agreed rates that the first respondent would pay to the second respondent, which were a basic hourly rate (termed 'premium' in the document) of £16.09 and for Saturdays and nights £21.40 and for Sundays £25.85. In turn the rates that the second respondent agreed to pay the claimant were as set out at page 392 were a basic hourly rate of £14.28 and for Saturdays and nights £17.92 and for Sundays £21.57.

9. Although the second respondent supplied the claimant to the first respondent it was not his employer. In this instance the second respondent had put the claimant in touch with the third respondent, which is part of the Sterling Group - an employment business which sub-contracts labour to agencies. Specifically the third respondent provides employees. The claimant had in respect of a previous engagement signed up to the third respondent's model in July 2010 working via another agency for a six week assignment.

10. As regards the contractual set-up, the individual contractor does not have a contract of any kind with the agency. Instead, they enter into a contract directly with the third respondent, which in this case was an employment contract, a copy of which was at pages 3-6 of the third respondent's bundle dated 3 October 2014, which the claimant had completed and sent back electronically on 22 September 2014.

11. The third respondent's website explains in detail how their contractors' pay is processed as shown by pages 9-10 of its bundle, which was outlined by Ms Parkin in her witness statement as follows: (i) the contractor's pay is calculated based on the National Minimum Wage (NMW) and the hours worked on assignment, as provided in section 7.1 of the employment contract (ii) holiday pay is then calculated based on the gross pay and is then either paid with their normal pay each week and retained by the contractor to cover future holidays,

which the claimant chose or retained by them and paid to the contractor at the point that they take holidays (iii) pension contributions are then payable by both them and the contractor provided they have not opted out (iv) as they employ the contractor they are required to retain an element of the overall income to cover Employer's National Insurance and Apprenticeship Levy, which is retained from the top hourly rate figure that they receive from the agency, not from the NMW figure that the contractor is entitled to (v) they also retain a margin to cover their administrative costs and insurances.

12. After these calculations have been made they are left with a balance out of the overall income received from the agency, which then forms part of the contractor's gross pay and is paid to him/her as a bonus, along with the NMW element subject to the usual deductions for tax and national insurance.

13. The pay slips in the main bundle at pages 914c – 924a for the claimant showed how this process worked in practice for him.

14. In addition, the third respondent enters into a separate contract with the agency (the second respondent here), under which it agrees to supply labour. The benefits of the model for individuals are that they have the flexibility of being a contractor, whilst at the same time enjoying the benefits of employment status such as holiday pay, statutory sick pay and insurance.

15. It is accepted by the first respondent that under the AWR the claimant was entitled, after the first 12 weeks of his engagement i.e. from 8 December 2014, to the same basic working and employment conditions that he would have been entitled to for doing the same job had he have been recruited by it directly. Thus it accepts that he was entitled to basic pay based on the annual salary he would have received if he had been recruited directly with effect from this date.

16. The terms and conditions applying to staff engaged directly by the first respondent and other NHS bodies are set out in the NHS Terms and Conditions of Service Handbook, otherwise known as Agenda for Change (AfC), which sets out a number of pay bands from one to nine and a number of pay points within those bands. The pay bands which were in force at the time that the claimant was supplied to the first respondent were at page 160. The role of Reactive Maintenance Engineer, which the claimant was undertaking, was as evidenced by an advert in 2016 at page 743 designated as a Band 5 role. Whilst adverts for roles in the NHS state the complete salary range for the role we were told and accepted that this is because the starting point depends on whether the successful candidate has continuous service within the NHS.

17. The applicable version of AfC at the material time at page 123 under the heading of Pay Progression provides that " incremental pay progression for all pay points, within each band, will be conditional upon individuals demonstrating that they have the requisite knowledge and skills/ competencies for their role and that they have demonstrated the required level of performance and delivery during the review period and provided the appropriate level of performance and delivery has been achieved….individuals will progress from pay point to pay point on an annual basis and for newly appointed or promoted staff, the incremental date will be the date they take up their post".

18. In both his ET1 and his witness statement the claimant had identified an actual comparator for the purposes of his complaint under Regulation 5 AWR by

the name of Barry Yeo, who was a direct employee of the first respondent with whom he shared his shift. However, the evidence in the form of an appointment letter at page 1083 showing that Mr Yeo had been employed by the first respondent from 14 February 2000 demonstrated that he was not an appropriate comparator as by dint of his continuous service he would have progressed through the pay points within the pay band and in any event the claimant appeared to suggest in cross-examination that he was not relying on him for the purposes of pay comparison but rather in respect of his terms and conditions of employment.

19. He had also contended in his ET1 at paragraph 15 that on the basis of his experience and qualifications and in accordance with the custom and practice at the first respondent as per the AfC agreement that had he been recruited directly, he would have started further up the pay scale at £14.28 per hour in addition to standard NHS benefits including enhanced holiday pay. In addition during cross-examination he suggested that the first respondent had some leeway in terms of starting points and that it had to have regard to market rates. However, when invited to point to where this was provided for within the AfC documentation in the bundle he acknowledged that there was nothing that supported his contentions.

20. Whilst the claimant had previous experience of working in the Black Country Mental Health NHS Foundation Trust he had done so as an employee of a third party (Rydon Group Limited) and he accepted in cross-examination that he had no previous continuous service with the NHS.

21. Having regard to these matters it appeared to us that had the claimant been recruited directly that he would have been placed on the first pay point of Band 5, which is pay point 16. The relevant annual salary on this pay point was £21,478.00. Progression thereafter would have been dependent solely on his building up continuous service. So, he would have remained on pay point 16 up until 14 September 2015 giving him an hourly rate of £11.01 (based on 260 working days of 7.5 hours per day) from 15 September 2014 to 31 March 2015 and from 1 April 2015 to 14 September 2015 following the implementation of a pay award that increased the pay point to £21,692.00 his hourly rate would have been £11.12. From 15 September 2015 to 31 March 2016 having progressed to pay point 17 and a salary of £22,236.00 his hourly rate would have been £11.40 and from 1 April 2016 to the end of his engagement on 29 August 2016 following a further pay award that increased the pay point to £22,458 his hourly rate would have been £11.51.

22. As against these figures the claimant was being paid a gross hourly rate of £14.28. However this rate included a sum in respect of holiday pay at a rate equivalent to the statutory minimum of 28 days per annum. After deduction for this his gross hourly rate was £12.74. Arrangements for the receipt of his holiday pay lay between the claimant and the third respondent. In this connection as stated the claimant had the choice of having his holiday pay paid with his normal pay each week or to have it retained by the third respondent and paid to him at the time of his taking holidays and chose the former method of payment, which was evidenced by his pay slips at pages 914c – 924a.

23. In regard to the claimant's holiday entitlement the first respondent accepts that the claimant was with effect from 8 December 2014 entitled to the same holiday entitlement as enjoyed by its directly appointed employees, which was on appointment 27 days annual leave plus 8 general public holidays in accordance

with AfC and that he was underpaid in respect of annual leave as his hourly rate included an element in respect of 28 days leave per annum, which should have been 35 days.

24. The first respondent also accepts that the claimant was entitled to overtime pay at 1.5 times the rate of his normal rate of pay after 8 December 2014 and that administrative errors resulted in him receiving underpayments of overtime pay.

25. In terms of ensuring that the claimant received the same basic working and employment conditions as he would have received had the first respondent recruited him directly the second respondent's David Shearer sent to the first respondent's Jean Hutfield, Compliance, Risk and Contracts Manager on 24 September 2014 an AWR pro forma at pages 380-390, which he asked her to complete with information in relation to the pay and benefits of the claimant's permanent comparator and to return as necessary, in respect of which the second respondent has no record of having received a reply.

26. On or around the end of June 2016 the claimant contacted the second respondent with concerns about his pay. Initially this centred around payments for hours worked by him on Sundays but by the end of August this was broadened out to include (1) underpayment for holiday under AWR (2) non-payment for two weeks' sick pay and (3) incorrect shift rates/overtime rates having been applied. The nature of the concerns was complicated and the second respondent decided to tackle matters in stages starting with the underpayment of Sunday hours. On 14 September 2016 the second respondent's Ms Gray had forwarded to her an email that had been received from Ms Hutfield clarifying the shift patterns that the claimant had worked each Sunday from the start of his assignment. At this point she took over the process of looking at all of the claimant's shifts for the Sunday hours and calculating when he had been paid at the incorrect rate.

27. After dealing with the Sunday hours query the second respondent began to look at the rest of the hours worked by the claimant to check if the correct shift rates had been applied. It was realised by Ms Gray that in order to work out whether the claimant had been paid incorrectly or not she needed to apply the same approach as she had to the Sunday hours' task and that she needed a full breakdown of the exact days he had worked and the exact shift patterns he had worked on those days in order to cross reference them with the hourly rates already paid and then double check if that rate corresponded with the relevant hourly rate under the NHS AfC document to ensure that that rate was compliant with their obligations under AWR.

28. On 21 September 2016 Ms Gray sent an email to Bethan Davies, Client Relations Manager asking her to obtain this information from the first respondent in the same way as for the Sunday hours task. In the meantime Ms Davies was trying to obtain information from Ms Hutfield as to the correct permanent comparator rate i.e. the pay band and spine point that the claimant should have been paid under AfC and also confirmation of the holiday entitlement for his permanent comparator under AWR.

29. On 4 October 2016 Ms Hutfield provided the second respondent with the information about the claimant's correct permanent comparator rate. She explained that his prior time working in the NHS would not count for the purposes

of AfC as he had not been directly employed by the NHS. She also confirmed that he would have been paid at Band 5, spine points 16-18 with point 16 being the entry level and that he would have received an annual increment for each year in the assignment and that his annual holiday entitlement should be 35 days. She supplied too clarification of the rates that he should have been paid during his assignment, including the different rates for Saturday and Sunday work and Bank Holiday work.

30. Based on what Ms Hutfield had provided Ms Gray was satisfied that the gross hourly rate, less the deduction for holiday pay, of £12.74 which had been agreed with the claimant at the start of his assignment, which equated to £24,843.00 (£12.74 x 260 x 7.5) and was equivalent to the Band 5 spine point 20 figure of £24,799.00 was more than his direct permanent comparator, which suggested to her that the only uplift in pay to which the claimant was entitled under AWR was in relation to the extra 7 days' holiday per year that his permanent comparator was entitled to.

31. She had already calculated that this would require an uplift of £0.40 to the claimant's basic rate arriving at this figure as follows. She multiplied £12.74 by 7.5 to obtain a day rate of £95.55, which she then multiplied by 7 (for the additional days holiday) and obtained the figure of £668.85, which was the additional sum that he would have to earn over the year to fund the additional 7 days' holiday. She then calculated the amount of available days the claimant was able to work in the year by deducting 35 days from 260 days which left 225 days in which he could accrue the funds to pay for his holidays. She then divided the figure of £668.85 by 225 to obtain the daily uplift of £2.97 which she then divided by 7.5 to obtain the hourly uplift of £0.396 which she rounded up to £0.40.

32. This was explained to the claimant in a letter sent to him by the second respondent on 14 October 2016 at pages 571-573, by which they informed him that by their current calculations, which they supplied in the form of a spreadsheet he was owed £7,476.09, subject to Statutory NI and tax deductions but that it was aware that this was open to further adjustment on receipt of the shift patterns worked for the weekdays about which it had spoken to the first respondent the previous day and had been notified that his case had been referred to its Finance and HR Department. The letter also stated that they had suggested a meeting to clarify the two key questions of (i) confirmation of the shift patterns worked for all weekdays in order that it could establish whether the correct rate had been paid and (ii) whether there was a local agreement on paid breaks as this was contrary to the NHS Terms and Conditions of Service handbook (AfC).

33. On or about 11 November 2016 Ms Hutfield sent to the second respondent the required information on the claimant's shift patterns by way of three years' worth of paper timesheets. Further on 16 November Mr Davies provided information as to the monies owed to the claimant in respect of his rest breaks, which he gave as being £1396.30.

34. Prior to this on 14 November 2016 the second respondent was supplied with a spreadsheet that the claimant had provided to ACAS, which was a copy of the one sent to him on 14 October 2016 with the exception of two additional tabs, by which he claimed that he was owed £42,986.15 for the period from December 2014 to August 2016. In arriving at this figure he subsequently clarified that he was comparing himself with a directly contracted engineer with whom he shared

the 24/7 shift pattern (Mr Yeo). It transpired however that the comparator had been in the position for 12 years and that whilst he was also on Band 5 he was paid at a different spine point due to his length of service.

35. On 22 November 2016 Ms Gray and Ms Davies spent a full day inputting the claimant's shift patterns into their spreadsheet, which resulted in their calculating that he was owed £12,702.74. This revised spreadsheet was then sent to ACAS on 25 November 2016 with an explanation as to how they had reached this figure. Arising from its provision some further queries were raised by the claimant around whether he had been paid the correct amount of overtime, which were forwarded by ACAS on 8 December 2016. Input was required from the first respondent on this issue, which saw Mr Davies advising on 9 December 2016 that all staff in pay bands 1 to 7 were eligible for overtime payments and that there was a single harmonised rate of time and a half with the exception of work on general public holidays which is paid at double time.

36. Upon revisiting the claimant's shifts armed with this information Ms Gray calculated that the claimant had worked a total of 1,597.22 hours of overtime. However, she needed further input from the first respondent as to which rate she should apply the overtime rate to. They subsequently confirmed that all hours in excess of 150 hours in a four week period should be treated as overtime. They also confirmed in a conference call on 13 December 2016 that the overtime highlighted on the paper timesheets had taken account of the 150 hours rule and it was agreed that Ms Gray would simply go back through these to identify the hours worked as overtime and apply the correct rate i.e. a bank holiday or otherwise. Having done so she calculated that the total amount owed to the claimant to take account of all overtime payments came to £17,450.70, which amount was jointly paid to the claimant by the first and second respondents on or around 13 January 2017. It was later agreed that the claimant was owed an additional £1,149.78 for work undertaken by him, which it is understood has since been paid.

37. In so far as the second respondent's calculations are concerned it was established that the claimant had no issue with their arithmetical accuracy and that his sole objection to them was based on his belief that his basic hourly rate upon which they were based was incorrect as the basic rate he had agreed with the first respondent of £14.28 an hour did not include holiday pay.

Law

38. The law relating to agency workers and their protection in their relationship with temporary work agencies and hirers is to be found in the Agency Workers Regulations 2010 (AWR). The core right given by them is the right to equal treatment in respect of 'basic working and employment conditions'. Regulations 5(1) and 7 provide that an agency worker who has completed a 12 week qualifying period must receive the same basis working and employment conditions as he or she would be entitled to for doing the same job had he or she been recruited directly by the hirer at the time the qualifying period commenced. Pursuant to Regulation 6(1) 'basic working and employment conditions' are restricted to terms and conditions relating to pay, working time and annual leave.

39. The statutory prohibitions on deductions from wages are contained in the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in section 13(1), which states that 'an employer shall not make a deduction

from wages of a worker employed by him' before going on to make it clear that this prohibition does not include deductions (a) which are required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

40. Section 27 gives the meaning of 'wages' as being any sums payable to the worker in connection with his employment, including inter alia 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise'.

Conclusions

41. Applying the law to the facts as found the Tribunal reached the following conclusions. The key question for us in order to determine whether the claimant's rights as an agency worker had been breached in respect of his basic working and employment conditions relating to his pay, was whether he had been paid less than if he had been recruited directly by the first respondent. In answering this question we unanimously considered that the evidence showed that the pay band for the post of Reactive Maintenance Engineer, which the claimant was undertaking was Band 5 and that had he have been appointed to this post as a direct employee he would have been offered it at spine point 16, the bottom of the band, as we accepted that the starting point within the advertised pay bands is where directly recruited persons are placed unless they already possess continuous service within the NHS, which the claimant accepted that he did not have.

42. Having concluded as such and being satisfied that the claimant had throughout his assignment received an hourly rate that was in excess of what he would have been paid as a directly recruited employee we further concluded that there had been no breach of Regulation 5(1) AWR and that the exercise undertaken by the second respondent in collaboration with the first respondent to address the shortfall in his pay over the period of his assignment was based on the correct hourly rate and had fully compensated him in respect of what he was owed.

43. Turning next to the claimant's complaint of having suffered unauthorised deductions from his wages in the form of the deductions made by the third respondent relating to Employer's National Insurance contributions and its margin we considered that the claimant was familiar with the pay process that the third respondent operated having worked under it previously and that it was clear from the pay slips provided to the claimant weekly throughout his assignment that the amounts retained by it in respect of these two items were deductions from its income received from the second respondent before it began to balance out what the claimant was owed by way of wages. As such we did not consider that their retention amounted to an unauthorised deduction for the purposes of section 13 ERA.

44. Dealing finally with the claimant's complaint that he had been underpaid in respect of holiday pay we were satisfied that the second respondent through Ms Gray had correctly uplifted his hourly rate to reflect the fact that the element in respect of holiday pay had from 8 December 2014 been undervalued by the oversight in respect of his entitlement from this point, which was 35 and not 28 days and that the balancing exercise that was subsequently undertaken to

address this, which the claimant accepted was arithmetically sound, meant that the claimant had suffered no underpayment in this regard.

21 March 2018

Employment Judge Wardle

JUDGMENT & REASONS SENT TO THE PARTIES ON

22 March 2018

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS