



EMPLOYMENT TRIBUNALS

Claimant: Mr A Y Ali

Respondents:

1. Salix Homes Limited
2. Hayley Reed
3. Michael Page International Recruitment Limited

Heard at: Manchester **ON:** 3 August 2018

IN CHAMBERS: 8 August 2018

Before: Employment Judge Porter (sitting alone)

Representation

Claimant: In person

Respondents 1 and 2: Not in attendance

Respondent 3: Ms L Pearce of counsel

RESERVED JUDGMENT

1. The claimant was not an employee of Michael Page International Recruitment Limited.
2. The tribunal does not have jurisdiction to hear the claim of automatically unfair dismissal under s 103A Employment Rights Act 1996, which is hereby dismissed.
3. The tribunal does not have jurisdiction to hear the claim of breach of contract, which is hereby dismissed.

REASONS

Issues to be determined

1. At the outset it was confirmed that the issues to be determined were:
 - 1.1. whether the claimant was at the relevant time an employee of the third respondent;
 - 1.2. Whether the tribunal had jurisdiction to hear the claims of:-
 - 1.2.1. automatically unfair dismissal under s 103A Employment Rights Act 1996;
 - 1.2.2. breach of contract.

Concessions

2. The third respondent concedes that:
 - 2.1. the claimant was, at the relevant time, engaged by it as a worker within the meaning of the Employment Rights Act 1996;
 - 2.2. the tribunal has jurisdiction to hear the claim against it of detrimental treatment, including termination of the claimant's engagement as a worker, under s47B Employment Rights Act 1996;

Orders

3. At the outset of the hearing the claimant indicated that he had submitted, earlier in the day, a written application for strike out of the Response on the grounds that the respondent had engaged in scandalous and vexatious conduct and that the respondent had delayed in compliance with the orders of the tribunal.
4. It was noted that:
 - 4.1. The third respondent has not had sufficient notice of this application bearing in mind, in particular, that serious allegations are made about the conduct of counsel for the respondent (Mr W) at the previous preliminary hearing;
 - 4.2. Mr W is not in attendance today;

- 4.3. Counsel for the third respondent has been able to take instructions in a short break and it was confirmed that the claimant's allegations were strenuously denied.
5. EJ Porter explained that in determining any application to strike out the tribunal must consider:
 - 5.1. whether the respondent was guilty of the conduct and/or breach of orders;
and;
 - 5.2. if so, whether strike out was appropriate in all the circumstances and, in particular, whether any such conduct and/or breach in the performance of orders meant that a fair hearing was no longer possible.
6. EJ Porter also noted that:
 - 6.1. the application would involve hearing evidence from both the claimant and Mr W in relation to the alleged misconduct;
 - 6.2. that would involve a postponement of this hearing as Mr W was unavailable to give evidence today;
7. A short adjournment was granted to enable the claimant to seek legal advice and to confirm whether or not he wished to pursue his application.
8. After the break the claimant confirmed that he did not wish to pursue his application, and was ready to proceed.

Submissions

9. The claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that: -
 - 9.1. The third respondent has finally agreed that the claimant was never given the written terms and conditions upon which it relies;
 - 9.2. this is illustrative of how the respondent has refused to accept the truth, refused to accept the true nature of the relationship between them;
 - 9.3. Ms Collins cannot remember important matters but people do not forget the truth;
 - 9.4. Ms Collins guaranteed that this was a job for six months;

- 9.5. the third respondent exercised control over the claimant, agreed to pay him a wage provided that he did the work and submitted timesheets;
 - 9.6. The claimant was going to get a contract but was dismissed before the contract arrived;
 - 9.7. The respondent then insisted that the claimant sign a different contract before paying for work done, in an attempt to disguise the truth;
 - 9.8. The terms and conditions upon which the respondent seeks to rely are illegal and contrary to statute
10. Counsel for the third respondent made a number of detailed written and oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence, it was asserted that: -
- 10.1. in his claim form the claimant described himself as a worker. That is the true nature of the relationship. The claimant changed his mind and asserted that he was an employee when he realised what additional remedy would be available for him as an employee;
 - 10.2. the claimant did not receive a copy of the applicable terms and conditions but he did have access to the terms and conditions via correspondence from the respondent. He signed a document which indicated that the applicable terms and conditions were available and had the opportunity to ask for a copy but chose not to do so;
 - 10.3. There was no verbal contract of any type between Ms Collins and the claimant. Ms Collins never held herself out as having the legal power to vary or create a contract;
 - 10.4. Ms Collins and the claimant did discuss the possibility that the temporary contract could extend for six months. However, there was never a guarantee of six months' work;
 - 10.5. The claimant accepted in cross examination that there was no mutuality of obligation between him and the third respondent beyond the four days he worked for the first respondent. There was no expectation that the respondent would find alternative work for the remaining six months. The claimant agreed that he could leave the contract at any time;
 - 10.6. There was no mutuality of obligation;
 - 10.7. There was no control. The first respondent had day-to-day control over the claimant. The first respondent provided the training and supervision. The claimant merely had to tell the third respondent about

his lateness, sickness, time worked and holidays. This information was required for financial planning and not about exercising control over the claimant;

10.8. There was no employment relationship, express or implied

Evidence

11. The claimant gave evidence. He called no witnesses.

12. The third respondent (Michael Page International) called Ms Jess Collins, Business Manager.

13. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning from by the tribunal and, where appropriate, re-examination.

14. An agreed bundle of documents was presented. Additional documents were presented by the claimant during the course of the Hearing, with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

15. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

16. In 2017 the claimant was looking for a post in the Manchester area and had contact with Ms Collins of Michael Page International about vacancies advertised by her. The claimant understood that:

16.1. Michael Page International is a recruitment agency which advertises vacant posts for its clients;

16.2. to be successful in his application for any advertised vacancy the claimant would have to be able to demonstrate an ability to fulfil the requirements of the clients of Michael Page International;

16.3. if successful, he would be engaged in work in the advertised post in the business of the client, he would not be engaged in the business of Michael Page International;

16.4. The nature of the posts were temporary. Both he and the client could give notice to terminate the arrangement at any time;

16.5. If the client did wish to terminate the relationship with the claimant the third respondent was under no obligation to find the claimant other work.

[This claimant has demonstrated this understanding in giving his evidence. The claimant was at times inconsistent in giving his evidence but his understanding of the above points was clear.]

17. In or around June 2017 the claimant made an application for a Customer Service Adviser role with Michael Page International for a vacant post with one of the respondent's clients (not a party to these proceedings). The claimant did not sign any agreement with Michael Page International at that time. He did not sign any terms and conditions, he was not given a copy of any terms and conditions. The respondent did not bring to his attention any terms and conditions which would apply to the relationship between the claimant and the third respondent.

[On this the tribunal accepts the evidence of the claimant. There is no satisfactory documentary evidence of any terms and conditions agreed at the time. Michael Page International asserts that each time the claimant applied online for a role posted on its website, there was a link to the standard terms and conditions which would apply to that role. However, the tribunal has not been provided with any satisfactory documentary evidence relating to any such link or the nature of the terms and conditions to which the claimant would have been directed had he followed that link. The tribunal accepts the evidence of the claimant that he was unable to access any relevant terms and conditions on the respondent's website. Ms Collins' evidence is that the respondent changes its terms and conditions on a regular basis. She is unable to identify what terms and conditions would have been applicable when the claimant made his application in June 2017. She is unable to say that the terms and conditions used the third respondent in June 2017 were the terms and conditions contained at pages 40-42 of the bundle.]

18. In October 2017 the claimant attended Michael Page International's premises to register as a candidate. He was asked to sign the Candidate registration Schedule at pages 43 and 44 of the bundle. The declaration includes the following:

I have read and agree to the Michael Page International standard conditions recruitment services and the Michael Page privacy policy.

19. It is the normal practice of Michael Page International that when a candidate signs that Schedule they are provided with a copy of the Standard Conditions for Recruitment Services which appear at pages 40 – 42 of the bundle. The response form was completed on the understanding that the normal practice had been followed in this case. However, in evidence before the tribunal, Ms

Collins changed her witness statement to confirm her understanding that the claimant had not been provided with a copy of the Standard Conditions for Recruitment Services on 2 October 2017, and had not signed a copy of them.

20. The claimant obtained other work through a different recruitment agency, not a party to these proceedings. He understood the terms and conditions of that recruitment agency meant that it was a temporary role. The claimant was unhappy at that new work and started looking for alternative employment.
21. On 1 November 2017 the first respondent, Salix Homes Limited, contacted Ms Collins to request assistance in the recruitment of a temporary customer service adviser. Ms Collins posted an advert on Michael Page International's website.
22. On 16 November 2017 the claimant contacted Ms Collins by email and expressed an interest in the role, which he described as " a customer service role which is an immediate start in Manchester for six months"
23. Ms Collins replied by email the same day stating

What is your notice period?

I am interviewing for the job in Salford on six-month temporary assignment tomorrow between 10am and 4pm.

24. The claimant and Ms Collins then spent time on the telephone discussing the role in more depth, as well as the claimant's current circumstances. The claimant explained that his current role was guaranteed for six months and the claimant asked for assurances from Ms Collins that the advertised role with the first respondent was of the same length of time, as he had financial commitments which meant that he could not afford to be out of work. Ms Collins confirmed that the role was intended to be for a minimum of six months, was funded for that period, and would likely to be extended after the new financial year.

[On this the tribunal accepts in part the evidence of the claimant. The evidence of Ms Collins is not satisfactory. Her recollection of what was said at the time is poor.]

25. The claimant understood that Michael Page International was a recruitment agency and that work would be provided with Salix, that he had to meet the requirements of Salix, and that if either he or Salix were unhappy with the arrangement then either party could walk away – this was not a fixed term of six months.

[The claimant has been inconsistent in his evidence on this point. It is clear that he wanted to ensure that this was a genuine six month assignment, as advertised, that is, that the client was not going to terminate within the six

month period because of lack of resources. The tribunal does not accept the claimant's evidence that Ms Collins agreed that this was a fixed term contract of 6 months, which could not be terminated early]

26. Ms Collins arranged for the claimant to attend an interview with the first respondent (Salix) on 17 November 2017.

27. Later the same day in a telephone call with the claimant Ms Collins confirmed that the interviewers were impressed with the claimant, that a decision was made on the spot and he was offered the role. The claimant said that he could start the week commencing 27 November 2017 as he was required to give one weeks' notice.

28. By email dated 23 January 2017 the claimant wrote to Ms Collins in the following terms:

I haven't received anything about the role at Salix RE: start time confirmation of employment etc

I'm assuming you were going to make contact tomorrow but just wanted to clarify just in case.

29. Ms Collins replied by email of the same date in the following terms:

You're right I was going to touch basis afternoon.

Sorry I haven't call sooner. It has been a manic week. Are you still okay for the start on Monday

30. The claimant confirmed that he was available to start on the Monday.

31. By email dated 23 November 2017 at 15:18 Ms Collins wrote to the claimant in the following terms:

Congratulations on securing your new temporary job via Page Personnel.

The organisation is: Salix homes

Hourly rate is: £10 01p (basic pay) plus £1.26 (holiday pay) total per hour = £11.27p

To help you get yourself set up as a temporary employee via our payment processes we have included some important information to ensure you get paid on time every week

Following acceptance of your assignment, you will receive your contract details via email with log in details for a timesheet portal for you to be paid weekly. You must pay particular attention for the following:

- When you receive these, log in ASAP and accept the terms
- You will need to accept all the documents on the portal
- Add your bank details
- Set up SMS contact and alert
- All timesheets must be submitted by 10 am Monday morning for the previous week

(Any submitted after this time will not be guaranteed to be paid that week)

- Please use the feedback tab on the timesheets portal to log any queries with our payroll department directly

Temporary assignment guidelines

You must make sure you are in work on time every day and work to the hours initially given to you. If you are late, you must inform your line manager immediately and also inform ourselves.

If you are off sick, you must call your line manager first thing in the morning and inform Page Personnel immediately.

Any holidays must be authorised by your line manager and again inform Page Personnel

Page personnel will be in regular contact with you to check your progression in the role

Good Luck!

32. There followed an email exchange between the claimant and Ms Collins on 24 November 2017 relating to a query about holiday pay, whether it was included in the hourly rate. There was no further discussion about any other of the terms.
33. The claimant started work at Salix on 27 November 2017. Salix stated that the required hours of work were 35 hours per week. Salix provided him with training. Salix gave to the claimant instructions on his day-to-day working duties. The claimant's line manager, referred to in Ms Collins' email of 23 November 2017, was a Salix employee.
34. The claimant did not receive from Ms Collins or any other employee of Michael Page International the contract details referred to in Ms Collins' email dated 23 November 2017. The claimant was not asked to sign any terms and conditions of engagement. He was not provided with a copy of the Standard

Conditions for Recruitment Services which appears at pages 40 – 42 of the bundle.

35. On 30 November 2017 Salix informed Ms Collins of Michael Page International that it no longer wished to continue with the claimant's assignment.
36. The claimant did not receive any written terms and conditions from Michael Page International until after the termination of his engagement. He was not paid for the hours which he worked at Salix. When he asked for payment he was told it was a condition of payment that he sign the standard terms and conditions which appear at pages 40-42 of the bundle.
37. In every email that Jess Collins sends she adds a standard clause including her description as Managing Consultant, Housing Specialist, Page Personnel. In very small type at the end of each email is the following:

This email and any files transmitted with it are confidential and intended for the addressees only. If you have received this email in error please return it to the sender and destroy the message, its attachments and all copies in your possession.

On the basis that you are the intended recipient then your receipt of this email represents your agreement to be bound by, or your continuing agreement to, our standard terms and conditions applicable to the transaction to which this email relates. If you require a copy (of a replacement copy) of the applicable terms and conditions please email your request by return

The Law

38. The Employment Rights Act 1996 s230(1) defines an employee as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.'
39. 'Contract of employment' is defined, at s230(2) as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.'
40. Case-law, and in particular the cases of **Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497** (as endorsed by the Supreme Court in **Autoclenz v Belcher [2011] UKSC 41, [2011] ICR 1157**) has established that the necessary components of a contract of service are as follows:
 - There must be a contract between the employee and the employer.
 - There must be mutuality of obligation within that contract.
 - The employee must be subject to the control of the employer.

- The employee must be obliged to perform her work personally for the employer.
- Finally, the contract must not contain terms which are inconsistent with it being a contract of employment.

41. Whether someone is an employee involves consideration of all the relevant factors of which the control and organisational tests form part. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole (**Hall (Inspector of Taxes) –v- Lorimer [1994] ICR 218**). The Tribunal 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 such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account. **Kelly & others –v- Trusthouse Forte plc [1983] ICR 728**. In considering the factors the Tribunal should take into account the “irreducible minimum” without which no contract of employment can exist – control, mutuality of obligation and personal performance before going on to consider other relevant factors. One additional factor is financial consideration. A person in business on his or her own account will carry the financial risk of that business. Payment of a regular wage or salary is a strong indicator of employment. The label given to and the amount of any payment is not necessarily important. The incidence of income tax and National Insurance contributions is another relevant factor. Payment under the PAYE system suggests employment. Intentions of the parties may be a relevant factor but the Tribunal must look at the substance of the matter not at any label attached to it by the parties.

42. In deciding whether there was a sufficient degree of control it is noted that there are many forms of control - for example, practical and legal, direct and indirect. It is not necessary for the work be carried out under the employer's actual supervision or control. Lord Phillips in **Catholic Child Welfare Society and ors v Various Claimants and ors 2013 IRLR 219, SC** (a case concerning vicarious liability for acts of sexual abuse), noted that:

“Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.”

43. If a contract has been created, it is then necessary to consider the terms of that contract to ascertain whether the other four necessary constituents of a contract of service are present. In analysing the terms of the contract the question in every case is ‘what was the true agreement between the parties?’: **Autoclenz Ltd v Belcher [2011] UKSC 41**.

44. In deciding whether there is mutuality of obligation the critical question here is whether there was a contractual obligation on the respondent to provide work for the claimant to do and a contractual obligation on the part of the claimant to do the work, indeed to provide any services at all to the respondent.
45. In **Montgomery v Johnson Underwood Ltd ICR 819 CA** the Court of Appeal considered the employment status of agency workers, that is, workers who are engaged by an employment business under some form of contract, but carry out work for clients of the employment business. In that case the Court of Appeal stated that “an offer of work by an employment agency, even at another’s workplace, accepted by the individual for remuneration to be paid by the agency, could satisfy the requirement of mutuality of obligation”, although clearly each case will turn on its own facts.
46. A key issue in this type of relationship is whether there is a sufficient degree of control between the worker and employment business. In **Dacas v Brook Street Bureau (UK) Ltd 2004 ICR 1437, CA**, the Court of Appeal agreed with an employment tribunal that a worker was not an employee of an employment business where the employment business was under no obligation to provide the worker with work, the was under no obligation to accept any work offered, the employment business did not exercise day-to-day control over the worker or her work — that control had been exercised by the client, the end user. The Court stated that the fact that the employment business had agreed to do some things that an employer would normally do (for example, paying wages) did not make it the employer.
47. In **Secretary of State for Business, Innovation and Skills v Studders and ors EAT 0571/10** the EAT held that agency workers were not employees of the agency through which they obtained assignments. While the agency exercised a modest degree of control over holidays, it had no day-to-day control over the claimants’ work. The EAT concluded that the contract showed no intention to create an employment relationship and that the requirements of mutuality of obligation and control were absent. Although the agency paid tax and national insurance contributions on the basis that the workers were employees, this was a neutral factor because it was a statutory requirement.
48. The tribunal has considered the law and authorities referred to in submissions.

Determination of the Issues

(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

49. The respondent concedes that the claimant was a worker within the meaning of the Employment Rights Act.
50. This is clearly an agency arrangement. Michael Page International entered in to a contract with the claimant whereby Michael Page International agreed to pay the claimant for work carried out by the claimant in the business of Salix.
51. The question is what was the nature of that contract. The claimant asserts that this was an employment contract, that he was employed by Michael Page International on a fixed term contract, carrying out duties for and under the direction of Salix, for a period of 6 months.
52. The terms of the agreement between the claimant and the third respondent in relation to the work for Salix are not clearly set out in writing.
53. The claimant and third respondent did not agree written terms and conditions for the work with Salix. The claimant signed up as a candidate as evidenced by the Candidate Registration Schedule (p43 and 44). This did not set out the terms upon which any subsequent assignment would be conducted. Neither party asserts that the signing as a candidate created a binding legal agreement between the parties for the supply of work. The Candidate Registration Schedule states "I have read and agree to the Michael Page International Standard Conditions for Recruitment Services." However, the claimant was not given any copy of any such agreement to read before signing the Registration Schedule. The claimant had never previously been requested to sign and acknowledge acceptance of any terms and conditions which were available on the internet. The wording of the Candidate Registration Schedule does not make it clear that the stated Standard Conditions relate to any subsequent assignment. The respondent has failed to provide any satisfactory evidence as to what were the terms and conditions of any assignment at the time the claimant signed that registration document. Ms Collins cannot say that the document which appears at pages 40 - 42 is the same document which the claimant would have seen had he looked on the website either when he signed the Registration Schedule or when he applied for a job in June 2017, because, on her understanding, the terms change on a regular basis.
54. The suggestion that the claimant agreed to be bound by the terms and conditions referred to at the bottom of Ms Collins' e-mails is without merit. This brief standard note does not clearly identify the terms and conditions to which it refers.
55. It is clear that there was an agreement between the claimant and Michael Page International, as evidenced by the email exchange between the claimant and Ms Collins.

56. Ms Collins' email dated 23 November 2017 (paragraph 31 above) sets out some key terms but clearly indicates that the contract details would be sent after the claimant accepted the assignment. They were never sent before the claimant started work with Salix. The claimant was provided with the written terms and conditions only after the assignment with Salix came to an end.
57. The document at pages 42 and 43 forms no part of the agreement between the claimant and the third respondent.
58. Looking to the terms agreed between the claimant and Ms Collins, it was clear that the respondent agreed to pay to the claimant an agreed hourly rate of pay and holiday pay. He was required to work the hours initially agreed with Salix (35 hours per week), to submit time sheets, and to notify Michael Page International of sickness and holiday leave. Although it was both parties understanding that the assignment with Salix was likely to last a minimum of 6 months, the advertised period, there was no agreement between the claimant and the third respondent for a fixed term of six months. The claimant well understood that this was an agency agreement and that either the client or himself could terminate the agreement at any time. The assurance given by Ms Collins was to the effect that funding was in place for at least six months work and that, if all went well, if both Salix and the claimant were happy to continue, the assignment would continue for at least 6 months.
59. The claimant accepts that there was no continuing mutuality of obligation between himself and Michael Page International after his role with Salix came to an end. He accepts that there was no obligation on Michael Page International to provide him with a different role, or to continue to pay him for work not done. He asserts that there was mutuality of obligation for that role only, that is, that he was guaranteed to work for Salix for 6 months.
60. There was, during the continuation of the assignment with Salix, some degree of mutuality of obligation between the claimant and Michael Page International. The claimant agreed to work the hours set by Salix and Michael Page International agreed to pay him for the hours worked.
61. However, there was an insufficient degree of control exercised by Michael Page International over the claimant to make this a contract of employment. Salix decided on the hours of work, the duties, gave training and instruction on day to day duties, approved holidays. Michael Page International's control over the claimant was very limited and restricted, in essence, to ensure that the claimant provided an adequate record of his working hours so that he was paid in accordance with the agreement for payment of wages.

RESERVED JUDGMENT

Case Number: 2404288/18

62. The fact that Michael Page International paid the wages, referred to the claimant as a “temporary employee” in the email dated 23 November 2017 (paragraph 31 above), is insufficient to make this a contract of employment.

Employment Judge Porter

Date: 5 September 2018

RESERVED JUDGMENT and REASONS SENT TO THE PARTIES ON

26 September 2018

FOR THE TRIBUNAL OFFICE

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