



EMPLOYMENT TRIBUNALS

Claimant

Ms H Anderson-Daley

v

Respondent

- 1. Kartikeya Solutions Limited**
- 2. Social Work Focus Limited**

PRELIMINARY HEARING

Heard at: Watford

On: 29 November 2018

Before: Employment Judge Lang

Appearances:

For the Claimant:	In person
For the First Respondent:	H Patel
For the Second Respondent:	K Doe

JUDGMENT

1. The claimant's complaints against the Second Respondent are dismissed on withdrawal by the claimant. The First Respondent was her employer at the termination date.
2. The claimant's complaints against the First Respondent of unfair dismissal, breach of contract and unpaid holiday pay continue to a full merits hearing

REASONS

The issues

1. The matter was listed for a preliminary hearing, to determine the following issues:
 - 1.1 Whether the claim was presented within time as extended by ACAS Early Conciliation and if not, whether it was reasonably practicable for the claim to have been presented in time;

- 1.2 Whether the claimant has complied with ACAS Early Conciliation with respect to the Second Respondent;
 - 1.3 Whether the First or Second Respondent employed the claimant at the time of termination of employment on 22 September 2016;
 - 1.4 And, whether the claimant had two years continuous employment with the employer as at 22 September 2016.
2. I was able to resolve the first two issues without hearing from the parties. It was clear to me that the claim was presented in time having regard to the effects of early conciliation. The Early Conciliation process has the effect of stopping the clock. The claimant's employment terminated on 22 September 2016 and her primary limitation period would have expired on 21 December 2016. Because the clock stopped for one month during the Early Conciliation period, being 7 November 2016 to 7 December 2016, once restarted the claimant had until 21 January 2017 to submit her claim. She did so on 12 January 2017 and was in time.
 3. I was also able to resolve the second issue as to whether or not the claimant had complied with ACAS Early Conciliation with respect to the Second Respondent as the claimant had been able to provide a copy of the Early Conciliation Certificate in relation to the Second Respondent. The Early Conciliation Certificate number was R196951-16/28 and Early Conciliation in relation to the Second Respondent was also from 7 November 2016 to 7 December 2016.
 4. That therefore left only the final two issues to be determined by me today.
 5. I heard evidence from the claimant on her own behalf and I heard evidence from Mr Patel, who is a Director of the First Respondent and evidence from Mr Doe, who is a Director of the Second Respondent.
 6. The parties had put together a bundle of documents which ran to 110 pages.

The facts

7. The claimant was recruited by the First Respondent as a Residential Support Worker at the First Respondent's Children's Home. She says that this was in September 2008. The First Respondent treated her as a freelance worker and paid her gross. No holiday pay was paid. She signed in and out and submitted monthly timesheets provided by the First Respondent.
8. By October 2010 she was receiving regular monthly payments and working for the First Respondent on a regular basis.
9. From November 2012 payments were received from the Second Respondent rather than from the First Respondent. The Second Respondent was provided consultancy services to the First Respondent and they took over responsibility for payment of four or five freelance workers including the claimant.

10. In May 2015, Mr Patel provided the claimant with a letter saying that he had employed her since April 2008 on a full-time contract at a salary of £1,500 per month. He says that the contents of the letter were untrue and that this was provided as a goodwill gesture to help the claimant's son find accommodation.
11. In September 2016, the Second Respondent issued a contract of employment to the claimant which states: "You are employed by Social Work Focus Limited are being assigned to provide services to Kartikeya Solutions Limited from time-to-time". It provided for payment of rolled up holiday pay. The claimant received the contract but did not sign it. Payslips were received from the Second Respondent from that time. The payslips did not include any element of rolled up holiday pay.
12. The Second Respondent accepts that it only placed staff with the First Respondent and that it had no other clients in relation to these staff. The First Respondent was the only end user of the staff. Since that time, it has taken on up to 12 or 13 workers from time-to-time on this basis.
13. The claimant worked in the same way at the home throughout. She took instructions from the home manager initially and then later from Mr Patel.
14. Following the termination of her employment a P45 was issued, dated 27 October 2016, by the Second Respondent and this recorded a leaving date of 24 September 2016. No attempt was made by the Second Respondent to contact the claimant to ascertain if she wanted to be considered for further assignments. The Second Respondent had been informed by the First Respondent that the claimant had obtained further employment.

The law

15. The case of Ready Mixed Concrete (SE) Limited v The Minister of Pensions (1968) 2 QB 497 established that the key tests for the existence of a contract of employment are that: (a) an agreement exists to provide the servant's own work or skill in the performance of service for the master in return for a wage or remuneration; (b) in the performance of that service, the master has a sufficient degree of control over the servant; and (c) the other provisions are consistent with a contract of service.

Conclusion

16. I consider that there was an employment relationship between the First Respondent and the claimant certainly from October 2010 onwards. From that date the claimant was working regular hours. I am satisfied there was an obligation on her to work hours that were offered to her and that the First Respondent was obliged to pay her for the work done. She was subject to the First Respondent's control and she was obliged to work personally.
17. Nothing changed in 2012 save that the payments were then made by the Second Respondent and I consider that the Second Respondent was effectively acting as an agent for the First Respondent in this regard. It was not her employer. It did not have a sufficient degree of , or indeed, any control over her at any stage.

18. The letter of May 2015 accurately reflects the position at that time. The claimant, at that time, was an employee of the First Respondent.
19. In September 2015, the agency arrangements began and payslips were issued by the Second Respondent. I have considered whether this a genuine agency arrangement and I have come to the conclusion that I do not think that it was. The Second Respondent only had one client and the arrangements were being superimposed on to the existing contractual relationship between the First Respondent and the claimant.
20. The Second Respondent's role was in effect limited to acting as an agent for the First Respondent end user in obtaining personnel for it and administering the payroll. The true position was that the existing employment contractual relationship between the First Respondent and the claimant, which began in October 2010, continued until termination.
21. The answers that I have arrived at in relation to the two remaining issues are that the First Respondent employed the claimant as at the date of termination of employment on 22 September 2016, and that the claimant had over two years continuous employment with the First Respondent as at 22 September 2016.
22. The claimant indicated that she wished to withdraw her complaints against the Second Respondent in the light of my findings and, accordingly, those complaints against the Second Respondent are dismissed on withdrawal. The claimant confirmed that she wished to continue against the First Respondent with her complaints of unfair dismissal, breach of contract and unpaid holiday pay. She did not pursue a claim in relation to failure to provide employment particulars.
23. The outstanding issues to be determined at a full merits hearing are as follows:

Unfair dismissal

24. Did the First Respondent dismiss the claimant on 22 September 2016? If so, what was the reason for dismissal and was it a potentially fair reason?
25. If it was a potentially fair reason, was dismissal fair or unfair in accordance with Employment Rights Act s.98(4).

Breach of contract

26. How much notice was the claimant entitled to? Did the claimant fundamentally breach the contract by an act of gross misconduct?

Holiday pay

27. What is the claimant's entitlement to unpaid holiday pay? Is she entitled to pursue a claim for unlawful deductions in relation to the two years prior to the complaint, ie from 12 January 2015?

28. What holiday pay was the claimant entitled to under the Working Time Regulations on termination?

Employment Judge Lang

8 January 2019

Sent to the parties on:

8 January 2019

For the Tribunal:

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