Case No: 1403114/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Gould**

Respondents: **(1) The Corsham School Academy Group**
(2) Protocol Education Ltd

PRELIMINARY HEARING

Heard at: **Southampton** **On: 30 July 2019**

Before: **Employment Judge Siddall**

Appearances:

Claimant: In person
First Respondent: Mr B Large, counsel
Second Respondent: Mrs C Greenway, solicitor

JUDGMENT

It is the decision of the tribunal that:

1. The claims for breach of contract against the second respondent in relation to a) pay for the period from 4 May 2018 to 25 July 2018 and b) pay for a parent's evening attended by the claimant on 29 March 2018 may proceed.
2. All other claims for breach of contract are dismissed upon withdrawal.
3. The claim for pay from 4 May 2018 to 31 August 2018 brought under regulation 6 of the Agency Worker Regulations is struck out as having no reasonable prospect of success
4. The claim against the first respondent that the claimant was refused access to collective facilities and amenities in breach of regulation 12 of the Agency Worker regulations can proceed.
5. The claims for failure to consult over redundancy and failure to consult over the financial arrangements between the first and second respondents are dismissed upon withdrawal.
6. The claim for breach of contract and/or breach of the Working Time Regulations in relation to holiday pay is dismissed upon withdrawal.
7. The claimant can proceed with his claims that he was subjected to detriments for making protected disclosures under section 47B of the Employment Rights Act 1996 in relation to the five disclosures identified below. Claims in relation to any other alleged protected disclosures are

dismissed upon withdrawal.

8. The claimant is given leave to amend his claim to include a claim that he suffered additional detriments following the termination of his assignment in that a) he was not offered the opportunity of any further work with the first respondent and b) he was not offered any further work by the second respondent save for one day's teaching.

SCHEDULE

a. An email sent to Mr Davis of the first respondent on 16 January 2018

b. An email sent to Rachel Coleman of the second respondent on 28 February 2018

c. An oral statement to Mr Davis on 28 February 2018

d. An email sent to Mr Davis on 25 April 2018

e. An oral statement to Mr Davis on 26 April 2018.

REASONS

Background and issues

2. By notice of 9 January 2019 this preliminary hearing was listed to consider the following:
    a. case management
    b. listing
    c. strike-out
    d. deposit order

3. By a claim form received at the employment tribunal on 28 August 2018 the claimant brought claims against the two respondents for:
    a. notice pay
    b. breach of contract
    c. outstanding holiday pay
    d. arrears of pay
    e. breaches of the Agency Workers Regulations
    f. whistleblowing detriment
4. Redundancy is mentioned. The claimant clarified today that he did not intend to bring a claim for a redundancy payment and nor does he pursue a claim for failure to consult over redundancy.

5. Within the body of the claim form the claimant explains that it was an express term of contract that his job was to last until the end of summer

term in July 2018. On 3 May 2018 he says he was told by the headmaster that his job was ending the following day. He is seeking loss of income until 25 July 2018.

6. In addition, the claimant says that in breach of day one rights pursuant to the Agency Worker Regulations the school failed to provide him with basic resources.

7. It also appears that the claimant alleged that he was subject to a detriment by way of a decision to observe him over a two-week period.

8. The body of the claim form also makes reference to qualifying protected disclosures pursuant to whistleblowing. He says he believes that his various qualifying disclosures annoyed the school and as a result the headmaster sought to bring the end of his employment forward. Within paragraph 11 of the claim form the claimant sets out what he says is a non-exhaustive list of qualifying protected disclosures.

9. The first respondent provided its response on 10 October 2018. Among other things, the first respondent says:

    a. the claimant was engaged from 2 January 2018 until 4 May 2018 as a temporary teacher of mathematics engaged through a supply agency, the second respondent

    b. the first respondent paid the second daily charge rate for the services provided by the claimant which was an all component payment including tax, national insurance, pension and holiday entitlement

    c. the first respondent is a secondary school with academy status

    d. the first respondent had previously engaged the services of the second respondent to provide agency workers and temporary teachers

    e. a vacancy for a maths teacher became available after one employee commenced appear maternity leave but then also a second employee resigning from their position

    f. the first respondent says it had always been its plan to proceed with a maths apprenticeship commencing in September 2018. The position which became available was therefore a temporary position

    g. the claimant attended an interview with the first respondent on 2 November 2017. It is denied that any discussions were held with the claimant either interview or thereafter to advise that the temporary assignment would last until 25 July 2018.

h. in the event, a decision was made to appoint the teaching assistant who was already employed by the first respondent and who had been interviewed for the position of maths apprentice to take over the position of maths teacher to which the claimant had been temporally appointed. Claimant was advised of this on 3 May 2018.

i. Breach of agency worker regulations is denied. The claimant had full access to all the facilities and amenities at the first respondent's premises.

j. It is denied the claimant made various protected disclosures.

k. It is accepted that after the qualifying period specified within the Agency Worker Regulations 2010, the claimant acquired the right to the same pay and other basic working conditions as equivalent to permanent members of staff of the first respondent. However, pay does not include notice pay. The claimant therefore had no entitlement to notice pay as alleged or at all.

l. It is denied that the assignment was brought to an end as a consequence of any redundancy or as a detriment.

10. The second respondent provided its response to the tribunal on 11 October 2018. Among other things, the second respondent says:

a. as a temporary agency worker, the claimant was not entitled to notice pay

b. the claimant registered with protocol Education on 6 June 2017. Upon registering he signed a contract of services which states he is registering as a temporary worker. The terms provides that a temporary worker is engaged on a contract of services and is not an employee of the second respondent.

c. The first respondent the claimant both received written confirmation of the placement with the first respondent on 3 November 2017

d. the dates on the written confirmation indicated that the start date of the placement was the first date of the spring school term, 2 January 2018, and the end date of the placement was the last day of the summer school term, 25 July 2018.

e. In accordance with the guidance provided by the Department for Education day one rights pursuant to the Agency Workers Regulations relate only to access to collective facilities and amenities, such as canteen, childcare facilities and transport services together with access to information about the hirers job vacancies. Any claim relating to the provision of resources fall

outside the second respondent's requirements.

f. The Department for Education guidance on AWR for supply teachers is clear on holiday pay which confirms that the claimant has no legitimate claim for additional holiday pay. The claimant does not have any entitlement to pay for school holiday closures from 26 July 2018 until 31 August 2018.

g. The claimant was not an employee either of the first or second respondent.

11. The tribunal wrote to the claimant on 5 November 2018 asking him to provide further information in relation to the alleged qualifying disclosures. The claimant replied on 19 November 2018 setting out a list of qualifying disclosures.

12. Application for strikeout/deposit:

13. The first respondent wrote on 5 November 2018. According to the first respondent the following have little or no prospects of success:

a. Breach of contract: the claimant did not have a contract with the first respondent. The claimant was aware that the assignment could be terminated at any time and there was no mutuality of obligation.

b. Non-payment of national insurance contributions and holiday pay: the claimant was paid an upper pay scale spine grade 3 which not only incorporated the full components of the role but also included for national insurance contributions, tax and holiday pay.

c. Claim for redundancy: the claimant was not an employee of the first respondent and in any event does not have sufficient continuity of service.

d. Agency worker regulations: the claimant had full access to all facilities and amenities at the first respondent's premises.

e. Whistleblowing/detriment: the matters set out in the claimant further and better particulars simply sought to report details about student activity during the course of a normal student day. The claimant failed to particularise which type of malpractice the statements tended to show.

14. The second respondent made the following further observations on 21 December 2018:

a. breach of contract: the claimant's claim that there was a collateral contract is rejected. The contract between the claimant and the second respondent contained an 'entire agreement' clause.

b. Additional hours: there was no agreement by the second respondent to pay the claimant additional amounts of work that fell outside the normal school day

c. agency worker regulations claims: claims for day one rights pursuant to regulations 12 and 13 of the Agency Work Regulations can only be brought against the hirer, i.e. the first respondent.

d. Notice pay: there was a clear written contract between the parties that permitted the second respondent to terminate the claimant assignment at the first respondent without notice or any liability other than that for payment of days worked to the date of termination.

e. Whistleblowing claims: none of the matters pleaded as any reasonable prospect of success.

f. National insurance: the second respondent cannot see how this can be a valid claim against either respondent holiday pay: this is referenced in the daily rate

15. Amendment application: by email sent on 25 February 2019 the claimant sought permission to amend saying, in colloquial terms, he was blacklisted for work by both the first and second respondent. In particular, the claimant says the first respondent did not offer him further opportunities for work and that the second respondent has given no work (apart from one day) since his assignment with the first respondent ended on 4 May 2018.

16. Some issues:

17. The protection afforded to individuals who make protected disclosures are contained in: Section 47B ERA — which confers a right on workers not to be subjected to any detriment on the ground that they have made a protected disclosure, and Section 103A ERA — which stipulates that an employee will be regarded as having been unfairly dismissed if the principal reason for his or her dismissal is that he or she made a protected disclosure.

18. The Agency Workers Regulations apply to:

a. individuals who work as temporary agency workers;

b. individuals or companies (private, public and third sector eg charities, social enterprises) involved in the supply of temporary agency workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a hirer;

c. and hirers (private, public and third sector)

19. Day 1 rights for all agency workers: If you hire agency workers, you must ensure that they have they can access your facilities (such as canteen, childcare facilities, etc) and can access information on your job vacancies from the first day of their assignment.

20. The guidance provides that if you are an employer and hire temporary agency workers through a temporary work agency, you should provide your agency with up to date information on your terms and conditions so that they can ensure that an agency worker receives the correct equal treatment as if they had been recruited directly, after 12 weeks in the same job. You are responsible for ensuring that all agency workers can access your facilities and are able to view information on your job vacancies from the first day of their assignment with you.

(i) Deposit Orders

21. If, at a preliminary hearing, an employment judge (or, as the case may be, a tribunal) considers that any specific allegation or argument put forward by a party in relation to any matter to be determined by a tribunal has little reasonable prospect of success, he may order that party to pay a deposit of an amount not exceeding £1,000 as a condition of being permitted to continue to advance that allegation or argument (Employment Tribunal Rules 2013 Rule 39(1)). However, before making an order, the judge must make reasonable enquiries into the paying party's ability to pay the deposit, and have regard to any such information when determining the amount of the deposit (r 39(2)).

22. The tribunal's reasons for making the order must be provided with the order and the paying party must be notified about the potential consequences of the order (r 39(3)). The order will specify the date by which the deposit must be paid.

23. If the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the order relates will be struck out (r 39(4)).

24. Where the paying party pays the deposit, and the tribunal ultimately decides the specific allegation or argument against him for substantially the same reasons given in the order, the consequences are two-fold. First, he will, unless the contrary is shown, be treated as having acted unreasonably in pursuing the specific allegation or argument for the purpose of having an award of costs made against him under r 76 (r 39(5)(a)). Second, the paying party will forfeit the deposit, which will be paid to the other party (r 39(5)(b)); however, if a costs (or preparation time) order is made against him, the amount of the deposit will count towards settlement of the order (r 39(6)). In all other circumstances, the deposit will be refunded to him (r 39(5)).

25. When determining whether to make a deposit order under Rule 39, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a

provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames EAT/95/07, 16 October 2007*).

26. At para 23 of *Van Rensburg* Elias J noted that he could see "no reason to limit "a matter required to be determined" to legal matters only. If that had been the draughtsman's intention, the rule would surely have been differently formulated so as to render the intention clear".

27. He continued at para 24 that "under the "more draconian rule" of 18(7)(b) [the old rule] which empowers a tribunal to strike out a claim, or any part of it, on the grounds that it is "scandalous or vexatious, or has no reasonable prospect of success" strike out would be it would be possible for a claim to be struck out pursuant to this rule, even where the facts were in dispute."

28. At para 27 he concluded that: "Moreover, the test of little prospect of success in rule 20(1) [the old rule] is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7) [strike out]. It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response".

(ii) Strike Out

29. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the grounds that it has no reasonable prospect of success (rule 37(1)(a)).

30. Before making a striking out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (rule 37(2).

31. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances (*Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46 at para 30*). In *Balls v Downham Market High School & College [2011] IRLR 217, EAT*, Lady Smith explained the nature of the test to be applied as follows (at para 6): "[T]he tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

32. In addition to considering the material specifically relied on by the parties, the tribunal should, according to Lady Smith, have regard to the

employment tribunal file, as this may reveal correspondence or other documentation which contains material relevant to the issue of whether the claim has no reasonable prospects of success. If there is such material, which is not referred to by the parties, the employment judge should draw attention to it and give the parties the opportunity to make submissions on it.

33. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute (see *North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330*, *[2007] IRLR 603*, *[2007] ICR 1126*; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46*). On a striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence (see *E D & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, at para 10* per Potter LJ, in the context of the striking out provisions in the CPR; *Ezsias* at para 29; *Lockey v East North East Homes Leeds* (*UKEAT/0511/10*, *[2011] All ER (D) 76 (Aug) at para 20*). Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents (*Patel*), or, as it was put in *Ezsias*, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ).

Decisions made at the preliminary hearing

34. Following a discussion at the start of the hearing, the claimant undertook to review his various claims and decide those which he wished to proceed with. When we re-convened, he withdrew a number of his claims for breach of contract and his claim for holiday pay.

35. The claimant made it clear that he wished to pursue his claim for breach of contract in relation to pay for attending a parent's evening, which he had previously classified as a whistleblowing claim as well. He wished to pursue his contract claim for pay to the 25 July, and his claims under the Agency Worker regulations and under the whistleblowing provisions.

36. I heard submissions from Mr Large and from Mrs Greenway in support of their applications to strike all the remaining claims out, or in the alternative for me to make a deposit order. I will deal with each of the claims in turn.

37. In relation to the claim to be paid from the date of termination (4 May 2018) to 25 July 2018, Mrs Greenway argued that the claimant had little or no prospect of success, because the second respondent's standard terms and conditions allowed for the termination of an assignment by the agency at any time, without notice. She conceded that the assignment sheet indicated that the placement at the school would continue until 25 July

2018 but said that this was indicative only. In reply the claimant stated that he had been assured both by the first and second respondents that the assignment would continue until the end of the summer term and that he would not have taken the job otherwise. Although I advised that there are issues with the claimant's position in light of the express written terms, on balance I concluded that in light of the factual scenario put forward it would not be appropriate to strike out this claim or make it subject to a deposit order at this time.

38. I viewed the claimant's application to amend his claim for pay for attending the parent's evening on 29 March as a re-labelling exercise. The claim is clearly set out on the ET1 and the application is granted in the interests of justice.

39. The claim for pay for the period from 4 May 2018 to 31 August 2018 brought under the Agency Worker regulations is problematic. The claimant's case was that he had taken the job on the understanding that it would continue until the end of the summer term – 25 July 2018. This is the date stated on the assignment sheet issued by the second respondent. The assignment was ended on 4 May 2018 with immediate effect. The claimant argues that the effect of regulations 5 and 6 of the Agency Worker regulations is that he should have been entitled to the same period of notice as a permanent member of the teaching staff at the first respondent. In such a case, under a standard teaching contract, notice could not have expired until the end of the summer holidays.

40. Regulation 5 of the Agency Worker regulations states that an agency worker shall be entitled to the same 'basic working and employment conditions' as he would be entitled to if recruited by the hirer. Regulation 5(2) states that the basic working and employment conditions are 'the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer'. However under regulation 6(1), these 'relevant terms and conditions' means those terms that relate to: pay, the duration of working time, night work, rest periods and annual leave. Mr Large points out that regulation 6 does not cover a right to equivalent notice of termination of employment, but the claimant argues that there is nothing in regulation 6(3) that excludes a claim for notice pay.

41. I have noted that the claimant asserts that he was offered work until the 25 July 2019. His claim for breach of contract, as opposed to his claim for additional pay under the Agency Worker regulations, relates to pay for the period between the date of termination on 4 July 2018 and the end of the summer term. His regulation 6 claim is that he was entitled to be paid for the whole of the school summer holidays down to the end of August. This claim therefore goes beyond his claim for breach of contract as the claimant is seeking pay for a period of time even after the anticipated end of his agency work assignment.

42. Mr Large refers me to the recent EAT decision of *Kocur v Royal Mail UKEAT 0181/17* which makes it clear that the Agency Worker regulations do not confer a right for an agency worker to be given the same number of working hours per week as a permanent member of staff. In my view, this case is similar save that the claimant's claim is not for equivalent hours per week but relates to the duration of the claimant's assignment and the right to notice. He asserts that after twelve weeks, the contract of a teacher employed on an agency basis could only be terminated with one full term's notice and that in his case, the Agency Worker regulations would give rise to a right to pay for the whole of the school summer holidays. It seems to me that if the claimant's submission was correct, there would be no advantage in engaging an agency worker, the whole purpose of which is to have access to a flexible workforce to cover gaps in staffing provision. The claimant is effectively asserting that he had a right either for his assignment to be extended until the end of the school holidays or to be paid for the same period. This is despite the fact that he says that the agreement he reached with the second respondent was that he would be engaged until 25 July 2018.

43. In effect the claimant is arguing that after twelve weeks he would be entitled to the same period of notice as a comparable member of permanent staff. I do not believe that can be correct. Whilst the claimant pins his claim to the terms of regulation 6(3) and the fact that notice pay is not specifically excluded, it is more important to focus on regulation 6(1) and the scope of the 'relevant terms and conditions' in relation to which an agency worker is entitled to equal treatment. Just as *Kocur* found that this did not give rise to a right to a particular number of *hours* each week, I find that regulation 6(1) does not give rise to a right to any particular *duration* of an agency worker assignment, nor does it confer a right to a specific period of notice. All the matters referred to in 6(1) appear to relate to how an agency worker should be treated during an assignment, but provide no right for such assignment to be extended by operation of law or for an agency worker to be entitled to equivalent notice of termination. The claimant cannot assert a right to notice *pay* if he is not able to establish a right to a specific period of notice.

44. In any case the claimant is not disadvantaged by the removal of this claim as he brings a similar claim in two other ways: first he alleges that the early termination of his assignment was a breach of contract and he claims pay against the second respondent until 25 July 2018. Second he claims that the termination of his assignment amounted to a detriment because he made protected disclosures. If successful he will no doubt be claiming his lost earnings over a similar period.

45. Since preparing these written reasons I have had the benefit of reading the claimant's request for reconsideration dated 13 September 2019. I

have considered this carefully but remain of the view that the claim under regulations 5 and 6 cannot succed. The claimant asserts that after twelve weeks an agency worker would be entitled to the same period of notice as a permanent member of staff. There is nothing in the Agency Worker regulations nor the Employment Rights Act 1996 which gives agency workers the right to an equivalent period of notice, nor any minimum period of notice. Again, whereas the claimant pins his argument to regulation 6(3), and the fact that notice pay is not excluded, that regulation simply qualifies the rights that arise out or regulation 6(1). Regulation 6(1) gives agency workers the right to comparable treatment in relation to certain aspects of the contract of employment but not in relation to notice. Therefore the fact that regulation 6(3) does not exclude notice *pay* is not relevant as a right to equivalent *notice* to that of a permanent member of staff has not arisen.

46. In all the circumstances I have concluded that this particular claim under the Agency Worker regulations has no reasonable prospect of success and it is struck out. I have considered the application for reconsideration, but I find that there is no reasonable prospect of my original decision being varied or revoked, and it is therefore refused.

47. I turn to the whistleblowing claims. The claimant had produced further particulars which contained a long list of alleged protected disclosures. This included complaints about the behavior of students, an allegation of cheating and a request for resources. I referred the claimant to the definition of qualifying disclosures contained in section 43B of the Employment Rights Act. He stated that some of his disclosures contained an assertion that his health and safety had been endangered. There was one assertion that he had not been paid (but he agreed that this was a claim that related to him alone and there was no public interest in the disclosure). We identified a number of occasions where he had complained that what was happening at the school had caused him significant stress and put his health at risk. These disclosures were:

    a. An email sent to Mr Davis of the first respondent on 16 January 2018

    b. An email sent to Rachel Coleman of the second respondent on 28 February 2018

    c. An oral statement to Mr Davis on 28 February 2018

    d. An email sent to Mr Davis on 25 April 2018

    e. An oral statement to Mr Davis on 26 April 2018.

48. Mr Large argued forcefully that the claims for detriment because of making protected disclosures should not proceed because the claimant

was only referring to his own health and cannot point to any wider affected group, thus not satisfying the 'public interest' test. I am not able to accept that at this stage. The communications sent by the claimant refer to a number of allegations of poor behavior by pupils, the significant effect on other children, requests for intervention by the school as well as the stress that was being caused to himself. There is certainly an argument here as to whether the public interest test has been met but taking the totality of the circumstances into account it would not be appropriate to strike the claims out at this stage or make a deposit order on that basis.

49. Therefore the claim that the claimant was subjected to a detriment for making the disclosures set out at paragraph 42 above may proceed. The claims in relation to any other alleged protected disclosures are dismissed upon withdrawal. It will be for the tribunal at the full merits hearing to determine whether the disclosures set out above amounted to qualifying disclosures and whether they were made in the public interest.

50. Finally I deal with the claimant's application to amend his claim to include claims of post-termination detriment. He says that following the termination of his assignment, not only was he not given the opportunity to do any more work at the school, but that the second respondent did not offer him any further assignments save for one day's teaching. The first and second respondents dispute that there was work to offer him and resist the application. I have applied he principles set out in the *Selkent* case and have decided that it would be in the interests of justice to grant the application for amendment. These assertions follow on from the termination of the assignment and the lodging of the tribunal proceedings. The merits cannot be determined at this stage but it does not seem to be in dispute that the claimant did no further work at the school and very little for the second respondent. The application was made in a timely manner prior to the preliminary hearing. Regulation 17 of the Agency Worker Regulations protect a worker from detriment on the grounds that he has brought proceedings under the regulations (17(3)(a)(i). This claim can proceed.

_____

Employment Judge Siddall

_____

Date 12 October 2019.