



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs R Mudamburi

**Respondent:** Jayco Recruitment Ltd

**Heard at:** North Shields Hearing Centre

**On:** 14<sup>th</sup> October 2019

**Before:** Employment Judge Sweeney

***Appearances:***

**Claimant:** In person

**Respondent:** Mr Jonathan Coates, Director of the Respondent

**JUDGMENT** having been given to the parties on 14 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## REASONS

### **The Claimant's claim**

- 1 This is a complaint under section 23 of the employment rights act 1996 for unauthorised deduction of wages contrary to section 13 of that act.
- 2 Mrs Mudambari is claiming arrears of pay in respect of three shifts: one on 6 April 2019 for work which she expected to undertake her from 8 PM to 8 AM but in the event and did not going to a breakdown in communications, for a care home called Abbey Court. She claims payment of £225.50 in respect of what would have been an 11 hour shift at the rate of £20 an hour.
- 3 She also claims for a payment in respect of a shift on 18 April 2019 for work which she did undertake at Briardene care home from 8 AM to 8 PM. She claims £214.50 in respect of that shift at the rate of £19.50 per hour.
- 4 Finally she claims payment for work undertaken on 21 April 2019 at Rushyfield care home from 7:30 AM to 7:30 PM. She seeks payment of £258.50 at a rate of £23.50 per hour.

- 5 The respondent and denies that they are liable for these payments in this jurisdiction. Its position is that the claimant was not an employee or a worker of the respondent and the tribunal has no jurisdiction to adjudicate on the claimant's claim of unauthorised deduction of wages.

### **The Hearing**

- 6 Mrs Mudambari represented herself and Mr Jonathan Coates, director, represented the Respondent.
- 7 At the start of the hearing Mr Coates handed up some documents:
- A contract between Emerald4Freight Ltd and the respondent dated 22, October 2018,
  - Invoices submitted by E4F Ltd,
  - An assignment schedule for 06 April 2019,
  - A document called 'working with us',
  - Extracts from companies house for E4F Ltd,
  - A screenshot with some details of E4F Ltd,
- 8 The claimant had previously sent to the tribunal copies of timesheets, the 'working with us' document and invoices.

### **The facts**

- 9 The claimant is a registered nurse. Some time ago her husband formed a limited company called Emerald4Freight ('E4F'). As the name suggests, he intended to operate a freight business. However, sadly he passed away before it could take off. The Claimant took over the running of the company and retained the name in memory of her husband. She contacted companies house and she is the sole director and shareholder.
- 10 The company has its own bank account. Mrs Mudambari has an accountant. Her accountant advised and set up for her to receive a wage from the limited company. She intended the company to grow into a company which provided agency workers to hospitals, care homes etc. Indeed at one point the company engaged the services of 6 agency workers. These workers were provided to end users through the limited company. There was one particular contract with Darlington and Durham University Hospital NHS Trust referred to in evidence. That was the last contract under which E4F, managed by the Claimant, provided agency workers to the NHS Trust. The contract came to an end around November 2018. Some change in the regulations regarding taxation resulted in Mrs Mudambari deciding to terminate the contract with the Trust.
- 11 The Respondent is an employment business and a temporary work agency and provides workers to end user clients such as, in this instance, care homes. It is a 'temporary work agency' under the Agency Workers Regulations 2010 (regulation 4).

- 12 In October 2017 the claimant approached and met with Mr Coates and Laura Gibson. The purpose of this was for the Claimant to see if E4F to do business with Jayco (or its predecessor, R Care). The claimant explained to Mr Coates that her company was expanding. As far as both she and Mr Coates saw it, this was with a view to the two companies doing business with each other, whereby the Respondent would engage E4F to provide workers, which may have included the Claimant herself to work for end-users.
- 13 The respondent engages with other limited companies on a similar basis, essentially sub-contracting with those companies for the provision of staff on to the end user.
- 14 Mrs Mudambari, on behalf of E4F signed a contract with the Respondent on 22 October 2018. She understood that this was a contract between the two limited companies. She understood that there was a difference in the legal sense between Rosemary Mudambari and the limited company. She understood that a limited company is a legal entity. That agreement does not require Mrs Mudambari to personally perform work or services for either the respondent or the end user. She could have provided anyone (provided they were clearly suitably qualified) to carry out the work. At the time she signed the contract on behalf of E4F, her company had been providing staff to the Darlington & Durham Trust and she mentioned this to Mr Coates.
- 15 There was no reason for the Respondent to believe anything other than that E4F was a genuine company with wider ambitions, and not just a personal service company whereby Mrs Mudambari was looking for work as an individual through the vehicle of a limited company. E4F was a genuine company. It had its own bank account. Once money was transferred from the Respondent to E4F's bank account, that money was then transferred from its account to the Claimant's personal account by way of wages. She engaged an accountant to advise her and the company.
- 16 Mrs Mudambari did of course undertake work personally but the Respondent was indifferent to whether it was her or someone else. The company, E4F submitted invoices to the Respondent for her services. She worked shifts, completed timesheets and submitted an invoice for payment on behalf of the limited company.
- 17 The timesheets bore the name of Jayco. They were obtained from the respondent's office. Each worker would sign the timesheet in triple carbon and leave a copy at the care home. The Claimant had a name badge identifying her, giving her RGH PIN and with the name 'Jayco' at the top. The Claimant would be notified by text indicating which shifts she was on as this was the number she provided on behalf of E4F.
- 18 The invoices were submitted by E4F, which stated on the invoice that it was a member of the Recruitment and Employment Confederation ('REC') an industry standard membership for employment businesses.

**April 2019 ('the April shifts')**

- 19 The Claimant had been asked to work a shift at Abbey Court care home on 04 April 2019. When she turned up, she was told by the end user that she was not needed. She submitted an invoice in the name of the limited company for £225.50. She also worked two shifts on 18 and 21 April 2019 at Briardene and Rushyfield care homes respectively. Again, she submitted invoices for £214.50 and £258.50 respectively. The Claimant submitted the invoices as director of E4F.
- 20 In the course of the hearing, Mrs Mudambari referred on a number of occasions to her being a worker of E4F. Whilst by no means a significant factor in my conclusions, nevertheless it demonstrated that she understood the concept and relationship with the limited company of which she was a director and shareholder. She also maintained that she must be a worker of the Respondent because ultimately they have to pay E4F before she can obtain any money from E4F.
- 21 Neither she nor E4F has been paid in respect of the April shifts. Mr Coates said that E4F was not paid because it owed the Respondent money in respect of training costs and penalties for late cancellation of shifts. He was unable to provide any evidence or details of this.

### **Relevant law**

- 22 The provisions which deal with protection of wages are found in Part II ERA 1996. These provisions apply to the wider category of 'worker' and are not limited to 'employees'. Therefore, to qualify for protection in the employment tribunal, the claimant must establish that she was a 'worker' within the meaning of s.230(3) ERA.
- 23 There are two key components (albeit not the only ones) to this definition:
- (1) The claimant must have entered into a contract with the respondent;  
and
  - (2) She must have undertaken to perform personally work or services for another party to that contract
- 24 A contract need not be in writing or be express. It is also possible for there to be an 'implied' contract. However, there must be 'a' contract and the claimant must have agreed to perform personally work or services for a party to that contract.

### **The parties' submissions**

- 25 Mr Coates submitted that the claimant was not an employee nor was she a worker. There was a contract between two genuine companies. He said that the Respondent was not liable to the Claimant because she did not work under a contract with it. When asked whether he accepted that the claimant was an agency worker, he submitted that the claimant was not an agency worker. He maintained that E4F was not an intermediary under the Agency Worker

Regulations 2010. He referred to clause 3.4 and clause 4 of the written agreement.

26 Mrs Mudambari submitted that she was a worker of Jayco Recruitment Ltd because:

- (a) she had a name badge with Jayco on it;
- (b) she received texts telling her when shifts were scheduled;
- (c) she received a document called 'Working for Us';
- (d) She completed time sheets with Jayco's name on them.

### **Conclusions**

27 The Claimant's company, E4F, was at all material times a genuine company and at times engaged up to 6 workers for supply to end users. The Claimant submitted invoices through E4F for those workers just as she did through E4F to the Respondent in respect of shifts she completed herself. The contract between E4F and the Respondent was entered into before the invoices were submitted. The agreement was between E4F and the Respondent that she would be supplied to work for the end user.

28 There was no written or oral contract between the Claimant and the Respondent, nor was there an implied contract. It was not necessary to imply a contract in this case. Two bona fide companies entered into a contractual relationship, the terms of which were set out in writing.

29 Even if there had been a contract between the Claimant and the Respondent, the Claimant did not undertake personally to perform services for Jayco Recruitment Ltd. The work she undertook was for the care homes. The difficulty the Claimant had in seeking to enforce payment against the Respondent is that she had no contract with the Respondent. She contracted with E4F which she, as a director and shareholder ran as a genuine and legitimate company. The Claimant was in fact in business on her own account and was the director and shareholder of a company and had been for many years.

30 I considered whether the claimant might be an agency worker within the meaning of the Agency Worker Regulations 2010. This was a less straightforward issue – and not one which in any event Mrs Mudambari had raised. At no point did she maintain that she was an agency worker. She did not raise any question of whether she should be regarded as such even for the purposes, for example, of the national minimum wage provisions. Even if she was an agency worker, that would not of itself mean that she was a worker and enable to enforce payment for the unpaid shifts through Part II of the ERA.

31 The Claimant could not bring herself under section 34 of the National Minimum Wage Act 1998. She was supplied by E4F to do work for the principal (the end user care home). It just so happened that the Respondent had sub-contracted to E4F. The latter company submitted invoices to the Respondent and upon payment, E4F paid the Claimant – just as E4F had paid the other agency

workers which it provided to the Durham & Darlington NHS Trust. I concluded that the Claimant was not supplied by the Respondent but by E4F.

- 32 I considered regulation 3 of the Agency Worker Regulations 2010. If a person is supplied by the temporary work agency (the Respondent) through an intermediary (E4F), this does not prevent the Claimant being an agency worker. However, these provisions are complex provisions and I was acutely conscious that the Claimant was not pursuing any claim as an agency worker, no claim in respect of payment of national minimum wage and that Mr Coates was wholly unprepared for any such arguments.
- 33 Therefore, on the evidence before me and absent any claim by the Claimant that she was an agency worker and/or that she was bringing a claim in respect of payment of the national minimum wage, I approached the claim as it had been presented, namely a claim of unauthorised deduction of wages under section 23 ERA 1996 for payment of the specific amounts of money for the April shifts.
- 34 The claim must fail as the Claimant was not a worker of the Respondent for the reasons given above. She cannot bring herself within the two key components referred to in paragraph 23 above. She was the director and shareholder of a company which contracted with the Respondent. The Respondent had genuinely entered into a commercial arrangement with E4F which the Claimant promoted as being a temporary work agency with ambitions to expand. The fact that it did not expand as planned was a matter of choice; that the Claimant had stopped supplying other workers was not communicated to the Respondent and does not alter the relationship between the two companies in any event. Further, she had no contract with the Respondent under which she undertook personally to provide work or services for the Respondent. She could have provided any suitably qualified person on behalf of E4F. In any event, the work she performed was for the end user.
- 35 It may be that there is a genuine claim to payment of the shifts in question but if there is it must be a matter for the civil courts and most likely between the two companies. Mr Coates said that an action had been presented in the courts but rejected. Mrs Mudambari did not agree that that was the case. Whatever the position, it is not a matter for me to express any view on.
- 36 She did not work under any contract with the Respondent and did not perform any services for them as they were provided to the end user. Therefore, she does not fall within the extended definition of 'worker' under section 230 ERA which would enable her to claim arrears of pay under s23 ERA.