EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr F Hussain	**v**	**Government Legal Department**

OPEN PRELIMINARY HEARING

Heard at: **Central London Employment Tribunal** **On:** **13 December 2019**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **In person**
For the Respondents: **Mr S Margo, Counsel**

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. The Claimant's claims are not struck out.

2. The true nature of the Claimant's engagement by the Respondent was as an agency worker supplied to the Respondent by an agency, not an employee.

This Hearing

1. By a claim form presented on 16 June 2019, the Claimant brought complaints of direct disability discrimination, discrimination arising from disability, disability-related harassment, failure to make reasonable adjustments, victimization, failure to pay holiday pay and less favourable treatment of an agency worker against the Respondent.

2. The Claimant relies on depression and asthma in his disability discrimination complaints.

3. The Claimant contended that he was required to attend a city farm team building exercise, despite his concerns that it was exacerbate his asthma. He also

contended that the Respondent subjected him to direct disability discrimination / discrimination arising from disability / harassment by:

3.1. Requiring the Claimant to accept all the cases he was being offered;

3.2. Ms Ramzan-Ashgar telling the Claimant to "shush" twice on 25 March 2019;

3.3. Ms Ramzan-Ashgar rejecting a brief prepared by the Claimant when a senior solicitor approved it.

4. The Claimant contended that the Respondent failed to make reasonable adjustments for him when it:

4.1. Required him to attend the city farm;

4.2. Gave him too much work;

4.3. Failed to permit the Claimant to work from home 1 - 2 days each week;

4.4. Failed, through Occupational Health, to ask how the Claimant's depression would impact on his work.

5. The Claimant said that the termination of his employment by the Respondent was an act of victimisation after the Claimant told Ms Ramzan-Ashgar that he would take the Respondent to the Tribunal for disability discrimination, amongst other things.

6. The Claimant contended that he was employed by the Respondent, but wrongly classified as self-employed.

7. Respondent defended the claims. It said that it had never been the Claimant's employer, but that the Claimant was an agency worker supplied on a temporary basis by an agency. It said that the Claimant had been engaged to work at the Respondent from 7 January 2019 until the Respondent requested that the agency terminated his assignment, which the agency did on 18 April 2019. The Respondent contended that it had terminated the Claimant's assignment because it had discovered that the Claimant had forwarded work related emails to his private account, contrary to the Respondent's policies and potentially in breach of data protection legislation.

8. The Respondent also contended that the Claimant had been engaged on the basis that he had significant employment law experience, but that his line manager, Mr Ackroyd, had spent much time reviewing the Claimant's work and making substantial changes to it. It said that these performance concerns were raised with the Claimant on 8 March 2019, when the Clamant agreed to move to be line managed by Ms Ramzan-Ashgar. It further contended that, despite her support and help to improve, the Claimant's performance did not improve and Ms Ramzan-Ashgar did not feel confident of his ability to manage employment litigation.

9. The Respondent also stated that the Claimant had told 2 Respondent employees that he "was going to do [the Respondent] for disability discrimination" and that he had decided to bring the claim before he joined the Respondent.

10. The Respondent did not admit the Claimant was a disabled person at the relevant times. It said that the Claimant did not tell Mr Ackroyd that he had depression, but rather, that he had OCD and asthma. It said that Mr Ackroyd suggested referring the Claimant to Occupational Health for a report on how to support the Claimant, but that the Claimant did not pursue this. It contended that the Claimant told Ms Ramzan-Ashgar that he suffered from depression and asthma and that she referred him to Occupational Health and requested a desk assessment that day. The Respondent denied that Ms Ramzan-Ashgar refused to make reasonable adjustments for the Claimant; it contends that she was awaiting the Occupational Health report before making a decision. The Claimant was seen in OH on 1 April 2019 and the OH report was issued on 5 April 2019 but, from 3 April 2019, the Claimant was off work, sick.

11. The Respondent denied that the Claimant was treated less favourably than comparable permanent employees; it said that occupational sick pay and pension contributions are outside the scope of the Agency Worker Regulations.

12. The Respondent applied for the Claimant's claim to be struck out on the grounds that it had no reasonable prospects of success, or for a deposit order on the grounds that the Claimant's allegations or arguments had little prospects of success.

13. It applied for the claims to be struck out on the basis that they were premeditated and vexatiously brought. It also applied for the claims for rolled up holiday pay, and breach of Agency Worker Regulations 2010 to be struck out because they had no reasonable prospects of success. It asked the Tribunal to determine the Claimant's employment status in this regard.

14. On 20 November 2019 the Tribunal wrote to the parties, saying that there would be an Open Preliminary Hearing on 13 December at which the Tribunal would decide whether to strike out the claim because it had no reasonable prospects of success, or to make a deposit order.

15. At this Hearing, the Claimant and Ms Ramzan-Ashgar gave evidence.

16. The Claimant confirmed that he was not pursuing an application to amend his claim to bring a claim of automatically unfair dismissal. He confirmed that his agency worker claim related only to holiday pay and not to pension and sick pay.

17. The Respondent had drafted a List of Issues in the claim and the Claimant said that these were agreed for the purposes of this Hearing. Some details needed to be added to them.

18. The Respondent clarified that it was seeking strike out of the Claimant's claims on the basis that they were vexatious and premeditated and that their purpose was to extract money from the Respondent. It asked that the Tribunal determine the Claimant's employment status – that he was an agency worker. If he was not an agency worker, the Tribunal should strike out his Agency Worker Regulations claims. If he was an agency worker, the Tribunal should strike out his holiday pay claims because the Respondent could not have been responsible for any breach of the Agency Worker Regulations 2010 under Regulation 10, because the Respondent was

not responsible for paying the Claimant's wages, the agency or the company employing the Claimant was.

19. Alternatively, the Respondent contended that the Tribunal should make a deposit order in relation to the Claimant's claims on the same basis. It also contended that the Claimant's disability discrimination claims had little reasonable prospects of success on the basis of the contemporaneous documentation.

20. The Claimant resisted the applications. He said that the employment relationship was a sham arrangement; the true nature of which was that of employer/employee.

21. The Claimant said that the documentation produced by the Respondent for the purposes of this Hearing was clearly not complete and he relied on oral exchanges between the Respondent's employees and him which had not been documented.

22. He also said that, through justice, a Claimant will obtain money, but that did not mean that he had any intention to extort funds from the Respondent.

23. The Claimant contended that the Respondent had not submitted a Regulation 14(3) defence under the Agency Worker Regulations 2010.

Findings of Fact

24. The Claimant worked at the Respondent as a solicitor specializing in employment law pursuant to an agency arrangement. The Claimant had engaged with an umbrella company, Parasol Limited, which itself had a contract with the agency, Netforte Limited. Netforte was the agency which supplied the Claimant to the Respondent.

25. The only contract which was available to the Tribunal was the contract between the umbrella company, Parasol Limited and the agency, Netforte Limited. I did not have the contract between the Claimant and the umbrella company, nor the contract between the agency and the Respondent.

26. The contract between the umbrella company and the agency included the following terms:

    26.1. Definitions. "The Company" was Parasol Limited; "The Supplier" was Netforte Limited; "The Contractor" was Farrukh Hussian; the "Contracting Authority" was the Government Legal Department.

    26.2. The "Charge Rate" was £237.98 per day (plus VAT if applicable).

    26.3. "Fee" was defined as ".. in relation to any particular period, the amount payable by the Supplier to the Company in respect of on in connection with the provision by the Company of the Services.

    26.4. "Services" were defined as "..the services to be supplied by the Company as notified by the Contracting Body to the Company".

    26.5. "Supply of the Services. 1.1.1 In consideration for the payment of the Fee by the Supplier, the Company shall make available to the Contracting Body the individual to supply the Services.

26.6. "1.3.1 The Company shall carry out, and shall ensure that the individual carries out, the Services in accordance with all and any policies and procedures of the Contracting Body.."

26.7. "Fee..2.7 The Company shall be solely responsible for all tax liabilities, national insurance contributions and any other taxes and deductions payable in respect of the Individual ..".

26.8.8 "Status of the Parties 8.1 At all times during the Assignment Period, the Company shall be an independent contractor and nothing in the Assignment Terms nor any Direct Agreement ….shall create a contract of employment, a relationship of agency or partnership or a joint venture between the Company or Individual on the one part and the Contracting Body on the other part….".

26.9. "8.3 Neither the Supplier nor the Contracting Body is under any obligation to offer work to the Company and the Company is under no obligation to accept any work that may be offered. No party wishes to create or imply any mutuality of obligation between themselves. The Supplier is under no obligation to pay the Company at any time when no work is available during this agreement."

26.10. "8.4 The Company shall not be obliged to accept or perform any work outside the scope of the Services…".

27. It was not in dispute that, when the Claimant worked at the Respondent pursuant to these arrangements, the Respondent's managers directed his work and supervised him closely.

28. The Claimant was paid pursuant to Netforte Limited submitting "Work Orders" for hours worked in a particular period. The Word Orders described the "Worker Pay Type" as "Agency UMBRELLA".

29. The Claimant is an employment lawyer. He considered, before he entered into his engagement with the Respondent, that the agency contract arrangements infringed his right to holiday pay. The Claimant told the Tribunal that he received "rolled up" holiday pay from the agency, but that he was taxed and paid as an employee by the umbrella company. He did not produce his payslips.

30. The Claimant did not challenge the contractual arrangements when he worked for the Respondent.

31. On 25 March 2019 Melissa Powys-Rodrigues, a lawyer in the Respondent's Employment Team, overheard the Claimant telling two other employees in the Respondent's canteen that, he would "do them for disability discrimination" and that he had decided to being a claim before he joined. She heard the Claimant say that rolled up holiday was not the equivalent of permanent staff pay and that after 12 weeks, based on the Agency Worker Regulations, temporary/agency staff should have the same benefits as permanent staff. The Claimant said "I am going to do them for disability discrimination. It's all about the money. I would like more money". Ms Powys-Rodrigues reported this conversation to Ms Ramzan-Asghar. She interviewed the two employees and the Claimant. The two employees confirmed that this is what the Claimant had said. The Claimant agreed that he

had used the words, but said that the conversation was not about disability discrimination but about rolled up holiday pay.

32. In evidence to the Tribunal, the Claimant said that he had intended to bring a claim about rolled up holiday pay before he started to work for the Respondent, but that he had not intended to bring a disability discrimination claim because he could not have known the facts of such a claim before they actually happened.

Documents – Discrimination claims

33. Some documents were produced to the Employment Tribunal. Full disclosure had not taken place between the parties. The documents showed that, on 11 January 2019, the Claimant emailed Victoria Johnson, who was organising a team building trip to a farm, copied to his manager Angus Ackroyd, saying that he was looking forward to the farm visit but was a chronic asthmatic and that animals and animal fur exacerbated his asthma. He said that he would therefore need to exercise caution about what he was asked to do at the farm. Ms Johnson relied that day, saying that she would contact the farm and find out more about what was planned.

34. Mr Ackroyd also replied on 11 January suggesting that he discuss the farm trip with the Claimant and saying, “It may also be helpful to discuss more generally if there are any workplace adjustments you need”. Mr Ackroyd requested a keyboard and mouse for the Claimant on 11 January.

35. On 15 January Ms Johnson forwarded an email from the farm describing the proposed activities there, to all proposed participants, including the Claimant and Mr Ackroyd. She said, “I understand that some people are pregnant, may have allergies or other health conditions that mean they are unable to attend the farm. Please make sure you read the below carefully and decide whether you can attend. If you would like to attend but you need adjustments in some of the activities then we can speak to the farm and arrange this.”

36. The Claimant brings direct disability/discrimination arising from disability/harassment complaints in relation to the farm visit. In his claim form he said that he had met Mr Ackroyd twice to discuss his concerns about the farm visit. He said, “Angus Ackroyd showed a blatant disregard to my health and well being as a disabled person on account of my asthma. Angus stated that the venue was outside as opposed to inside so I should be fine.”

37. The Claimant told the Tribunal that Mr Ackroyd had said orally to the Claimant that he should be fine attending the farm.

38. The contemporaneous documents show that, on 14 March 2019, the Claimant asked Ms Ramdan-Asghar to be permitted to work from home one to two days a week, to help his depression and anxiety and increase his efficiency. Later, on 27 March 2019, when the Claimant complained that Ms Ramdan-Asghar had refused home working, Ms Ramdan-Asghar replied saying that she had not refused home working, but had organized a desk station assessment and OH referral on the same day as she and the Claimant had discussed the matter. She said that she would be, “..happy to consider the adjustments they advise.” The Claimant was off work, sick, from 3 April 2019. He had been seen in OH on 1 April 2019 and the Consultant OH Physician produced a report on 5 April 2019.

39. The Claimant brings direct disability/discrimination arising from disability complaints in relation to Ms Ramzan-Asghar's alleged refusal of his request to work from home one to two days per week "even though non-disabled people in the team were taking one to two days home working per week."

40. The Claimant also brings direct disability/discrimination arising from disability complaints in relation to Ms Ramzan-Ashgar telling the Claimant at 11am that he had to produce a brief for counsel before noon and then rejecting the brief. The contemporaneous documents show that the Claimant sent a draft brief to Ms Ramzan-Ashgar, saying that the CMD Agenda would follow. Ms Ramzan-Ashgar replied, saying that it would be best for the Claimant to permit a colleague to draft the instructions as the Claimant's brief had provide no details of the directions sought or the issues to be addressed.

41. The Claimant then sent the brief to a different Senior Lawyer at 14.51, this time attaching the CMD Agenda. The Senior Lawyer said that the brief was fine.

42. The Claimant further relies on allegations that

    42.1. Mr Ackroyd insisted that he take on a case, despite telling him that he should not accept all cases he was being offered.

    42.2. Mr Ackroyd told the Claimant to "shush" twice and said that he was not civilized.

43. These are relied on as allegations of direct disability/discrimination arising from disability/harssment.

The Law

Strike Out

44. By *r37(1)(a)&(b) ET Rules of Procedure 2013* the Tribunal has power to strike out all or part of a claim on the grounds that it is scandalous or vexatious or that the manner in which the proceedings have been conducted by or on behalf of the Claimant has been scandalous, unreasonable or vexatious.

45. A vexatious claim is one which is not pursued with the expectation of success, but to harass the other side or out of some other improper motive, *E.T. Marler Limited v Robertson* [1974] ICR 72.

46. In *Bennett v London Borough of Southwark* [2002] IRLR 407, the Court of Appeal held that, if the conduct of a party's case is shown to have been scandalous, it must also be such that striking out is a proportionate response to it. Not every instance of misuse of the judicial process, albeit properly falling within the description of scandalous, frivolous or vexatious, will be sufficient to justify the premature determination of a claim. In that case, although the conduct of the applicant's representative had been improper, this was reversible and did not have, as its implicit consequence, the aborting of the entire proceedings.

47. An Employment Judge also has power to strike out a claim on the ground that it has no reasonable prospect of success under Employment Tribunal Rules of

Procedure 2013, Rule 37(1). 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, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said:

> "The 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 recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

48. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B [2011]* EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [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. Only in an exceptional case will it will be appropriate to strike out a claim for having no reasonable prospect of success where the issue to be decided is dependent on conflicting evidence. Such an exceptional case might arise where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472*,* or, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation', *Ezsias* para 29, per Maurice Kay LJ.

49. In *QDOS Consulting Ltd v Swanson* UKEAT/0495/11 *(12 April 2012, unreported)*, Judge Serota QC, reiterating that applications to strike out discrimination cases on the basis that they are misconceived should only be made 'in the most obvious and plain cases' in which the applicant 'can clearly cross the high threshold of showing that there are no reasonable prospects of success', stated that applications 'that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses', should not be brought under the strike out provisions, but ' must be determined at a full hearing'. Strike out applications 'should rarely, if ever, involve oral evidence and should be measured in hours rather than days' (para 49).

50. Discrimination cases should only be struck out in the very clearest circumstances, *Anyanwu v Southbank Student's Union* [2001] IRLR 305 House of Lords.

Deposit Order

51. If, at a Preliminary Hearing, an Employment Judge considers that and specific allegation or argument in a claim or response has little reasonable prospect of success, he or she may make an order requiring that party to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation or argument, *r39(1) ET Rules of Procedure 2013.*

52. The Tribunal is required to make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to such information into account in deciding the amount of the deposit, *r39(2).*

53. When determining whether to make a deposit order, 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 UKEAT/0095/07, [2007] All ER (D) 187 (Nov)*. Although, as Elias J pointed out in that case, the less rigorous test for making a deposit order allows a tribunal greater leeway to take such a course than would be permissible under the test of no reasonable prospect of success, the tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).

54. In *Madarassy v Nomura International Plc* [2007] IRLR 246 Lord Justice Mummery said that, in discrimination cases, the burden of proof does not shift from the Claimant to the Respondent where the Claimant proved only the bare facts of a difference in status and a difference in treatment. He said that a difference in protected status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities a Respondent had committed an unlawful act of discrimination, paragraph 56 of that Judgment.

Employee / Sham

55. *S230(1) Employment Rights Act 1996* provides, "In this Act "employee" means the individual who had entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

56. The following elements must be fulfilled for a contract of employment to exist. That a contract exists between the worker and the alleged employer; that an obligation exists on the worker to provide work personally (*Express & Echo Publications Ltd v Tanton* ("*Tanton")* [1999] ICR 693), that there is mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623), and there is an element of control over the work by the employer consistent with the contract being one of employment.

57. With regard to mutuality of obligation, this does not require the employer to provide work on all occasions, *Wilson v Circular Distributors Limited* [2006] IRLR 38. In that case, the EAT said that mutuality of obligation exists on behalf of an employer, if when work was available it must be offered and also, on behalf of the employee, where an employee was required to undertake work when it was offered, unless he had a very good reason not to, such as being ill.

58. Even if all those requirements are fulfilled, the contract may be one of employment, rather than must be one of employment. The Courts have stated the Court of Tribunal will weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment, *Ready Mixed Concrete* (*South East) Limited v Minister of Pensions and National Insurance* [1968], QBD 497, *Carmichael and Another v National Power Plc* [1999]

ICR 1226 HL, *Express and Echo Publications Limited v Tanton* 1999 IRLR 367 and *Hewitt Packard Limited v O'Murphy* [2002] IRLR 4.

59. The factors that can be taken into account have included, whether the person doing the work provides his or her own equipment, the degree of financial risk taken by the individual doing the work, the intentions of the parties, a prohibition on working for other companies and individuals, remuneration by way of wages or salary, payment during absence for illness, paid holidays and membership of a company pension scheme. Those are not exhaustive factors, but are an indication of the relevant factors which can be taken into account.

60. Where one party alleges that the written terms of an employment contract do not reflect the true agreement between the parties, and thus are a sham, "the question the court has to answer is: what contractual terms did the parties actually agree?" Lord Clarke in *Autoclenz v Belcher* [2011] UKSC 41, at paras 21 and 29.

61. When deciding what was the true agreement between the parties, a Tribunal should recognise," "that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract… the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed… frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept…so the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part," Lord Clarke, at paras 33 -35.

Agency Workers

62. In *James v Greenwich BC* [2008] EWCA Civ 35, [2008] IRLR 302 the Claimant had a contract with an agency, and the agency had a contract with the Council, as end user, but there was no express contract directly between Ms James and the end user Council.

63. The Court of Appeal said that the relevant question in such cases is whether it is necessary, in the tripartite setting, to imply mutual contractual obligations between the end user to provide the worker with work and the worker to perform the work for the end user. In the agency worker cases the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker's provision of work to the end user or the fact of the end user's payment of the worker via the agency. Whether an agency worker is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. The mere passage of time did not generate a legal obligation on the part of the council to provide her with work any more that it generated a legal obligation on her to do the work.

64. The Court of Appeal said that the provision of work by the local authority, its

payments to the employment agency and the performance of work by Ms James were all explained by their respective express contracts with the employment agency, so that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.

Agency Worker Regulations 2010

65. By *Reg 5(1) Agency Worker Regulations 2010* a qualifying agency worker (one who has worked in the same role for 12 or more weeks) is entitled to the same basic working and employment conditions as he or she would have been entitled to for doing the same job, had they been recruited (at the time that they were) by the hirer *other* than through an agency. The relevant terms and conditions include those relating to pay and holidays, *Reg 6.*

66. 'Pay' is defined in *Reg 6(2)* as 'any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under the contract or otherwise'.

67. *Reg 3* defines “agency worker”. By *Reg 3(3),* an individual will be treated as an agency worker if the temporary work agency initiates or is involved as an intermediary in the making of arrangements that lead to the individual being supplied to work temporarily for and under the supervision of the hirer and the individual is supplied by an intermediary, or one of a number of intermediaries, to work termporarily for and under the supervision of the hirer.

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71. Both agency and hirer can be liable for a breach of Reg 5 to the extent that each is 'responsible for that breach', Reg 14, *London Underground Ltd v Amissah* [2019] EWCA Civ 125, [2019] IRLR 545.

72. Reg 14 provides,

> **"14 Liability of temporary work agency and hirer**
>
> (1) [Subject to paragraph (3),] a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.
> (2) . . . The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.
> (3) A temporary work agency shall not be liable for a breach of regulation 5 where it is established that the temporary work agency—
> [(a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer—
> (i) about the basic working and employment conditions in force in the hirer;
> (ii) if needed to assess compliance with regulation 5, about the relevant terms and conditions under which an employee of the hirer is working where—
> (aa) that employee is considered to be a comparable employee in relation to that agency worker for the purposes of regulation 5(4), and
> (bb) those terms and conditions are ordinarily included in the contract of such a comparable employee;
> and
> (iii) which explains the basis on which it is considered that the employee referred to in sub-paragraph (ii)(aa) is a comparable employee;]
> (b) where it has received such information, has acted reasonably in determining what the agency worker's basic working and employment conditions should be at the end of the qualifying period and during the period after that until, in accordance with regulation 8, the agency worker ceases to be entitled to the rights conferred by regulation 5; and
> (c) ensured that where it has responsibility for applying those basic working and employment conditions to the agency worker, that agency worker has been treated in accordance with the determination described in sub-paragraph (b),
> and to the extent that the temporary work agency is not liable under this provision, the hirer shall be liable.
> (4) . . .
> (5) Where more than one temporary work agency is a party to the proceedings, when deciding whether or not each temporary work agency is responsible in full or in part, the employment tribunal shall have regard to the extent to which each agency was responsible for the determination, or application, of any of the agency worker's basic working and employment conditions."

Discussion and Decision

The Employment Relationship

73. In this case, the Claimant was an employment solicitor. He was fully aware of the contractual arrangements into which he was entering. He knew that he was entering into an agency worker contractual relationship, through which he would be supplied, first through the umbrella company to the agency, and then through the agency to the Respondent, as an agency worker.

74. The Claimant worked, as intended, as an agency worker. Work orders were generated to obtain payment from the Respondent for his work.

75. The contractual arrangements in this case were standard, agency worker contracts. There was nothing to suggest that this was a case of a sham contractual arrangement. The fact that the Claimant was working under the supervision of the Respondent was entirely consistent with an agency arrangement. Indeed, the definition of agency worker in the *Agency Worker Regulations 2010* envisages that an agency worker will work under the supervision of the hirer.

76. I decided that the provision of work by the Respondent, payment to the employment agency and the performance of work by the Claimant, were all explained by the express contractual arrangements, between the Claimant and the umbrella company, the umbrella company and the employment agency, and the agency and the Respondent. It was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.

77. The Claimant was supplied to the Respondent, the end user, as an agency worker. His contract was with the umbrella company, not with the Respondent.

Strike Out Application – Vexatious Claim

78. The Respondent contended that the Claimant was engaged as an agency worker. It accepted that the *Agency Worker Regulations 2010* applied to the arrangements in this case, as the Claimant was to be treated as an agency worker under *Reg 3(3) AWR 2010.*

79. On the facts, Claimant intended, from the outset of his employment, to bring a claim against the Respondent under the *Agency Worker Regulations,* relying on a failure to pay him holiday pay because he had been paid “rolled up” holiday pay, which he contended was impermissible and different to permanent staff at the Respondent.

80. I was concerned that the Claimant had not produced his relevant payslips. I had to proceed on the basis that the Claimant was correct in his assertion that he was paid “rolled up” holiday pay.

81. There was no evidence whether the “rolled up” element of the Claimant’s pay was specified and whether it was the equivalent of holiday pay for permanent employees of the Respondent. In *Kocur v Angard Staffing Solutions Ltd* [2018] IRLR 388*, EAT*, the EAT said that the 'rolling up' of holiday pay is permitted under the *Working Time Regs 1998*. In the light of that, once the overall entitlement to holidays is equal, it may be possible to pay the agency worker in a different way from ordinary employees (eg at the end of a short engagement). However, in the case of rolled up holiday pay, the method of calculation needed to be being transparent and comprehensible.

82. I accepted the Claimant’s contention that it is not vexatious to bring a claim to recover compensation for a legal wrong. If he was paid “rolled up” holiday pay and the calculation of it was not transparent and comprehensible, the Claimant could have a valid claim in this regard.

83. The Respondent contended that, in any event, the Respondent was clearly not responsible for any breach of the *Agency Worker Regulations 2010;* pursuant to *Reg 14,* the agency or umbrella company, and not the Respondent, as hirer, was responsible for paying the Claimant's holiday pay.

84. It did not agree that it was possible for me to take any view about the apportionment of liability in respect of holiday pay, at this Hearing. If the Respondent's payments to the agency were not sufficient to pay the same hourly rate to the Claimant as a permanent member of staff, plus holiday pay in respect of his holiday entitlement, then the Respondent could be liable for breach of the *Agency Worker Regulations 2010*.

85. I did not strike out the Claimant's claim for breach of the *Agency Worker Regulations 2010* in respect of holiday pay. It was not necessarily vexatious, even if it was premeditated.

86. Furthermore, I was not satisfied, on the evidence, that the Claimant had intended to bring a claim for disability discrimination before he commenced his engagement with the Respondent. The Claimant contended that he had intended only to bring a holiday pay claim. I considered that his words to his fellow workers were ambiguous in this regard. The fellow workers did emphasise, in their subsequent interview, that the Claimant had talked about intending to bring a claim under the Agency Worker regulations.

87. I did not strike out any of the claims on the basis that they had no reasonable prospects of success. As explained, if the Claimant was paid rolled up holiday pay and there was no transparent calculation of it, his claim could be meritorious. Apportionment of liability could only be decided having heard evidence.

88. The Claimant's remaining claims are discrimination claims. He relies on verbal statements made by the Respondent's managers. There are disputes of fact between the parties. It is impossible for me to say, at this stage of the proceedings, that the claims have no reasonable prospects of success.

Dated: 13/12/2019

Employment Judge Brown

SENT TO THE PARTIES ON
18/12/2019

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FOR THE TRIBUNAL OFFICE