



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr M Holt

v (1) ETEC Contract Services Limited
(4) Interaction Recruitment plc

Heard at: Bury St Edmunds

On: 14 October 2019

Before: Employment Judge S Moore

Appearances

For the Claimant: Mr D Jones, Counsel.

For the 1st Respondent: Ms L Pearce, Solicitor.

For the 4th Respondent: Mr G Holder, Recruitment Director.

JUDGMENT ON PRELIMINARY ISSUES

- (1) At the time of the termination of his engagement of site manager for the first respondent the claimant had a disability within the meaning of section 6 of the Equality Act 2010.
- (2) The claimant was not in employment with either the first or fourth respondent within the meaning of s.83(2)(a) of the Equality Act 2010 and was not a “worker” of either the first or fourth respondent for the purposes of s.230(3) of the Employment Rights Act 1996.

REASONS

Introduction

1. This was a preliminary hearing to determine two issues which had previously been identified as follows:
 - 1.1 Whether the Tribunal has jurisdiction to hear the claimant’s claims given the assertions of the first and fourth respondents that he was

a self-employed contractor providing services through a limited company.

- 1.2 Whether the claimant at the material times was a disabled person within the meaning of s.6 of the Equality Act 2010.
2. I heard evidence from the claimant and Mr David Shaw, business manager for first respondent. I was also provided with statements from the claimant's partner, Miss Clare Benton, Mr Andy Callow, Managing Consultant for the fourth respondent and Mr Calum Burke, a senior consultant of the fourth respondent, and I was referred to a bundle of documents.

Evidence

3. In 2018 the first respondent won a contract with South Norfolk Council to construct a leisure centre at Long Stratton and contacted the fourth respondent to engage a temporary site manager.
4. The fourth respondent identified the claimant as being suitable for the position. An email from the fourth respondent to the claimant of 25 February 2018 states that the role is "freelance", that it starts on 12 March 2018 and is for 45 weeks.
5. Subsequently the first respondent negotiated the fourth respondent's fees for supplying the claimant including the fourth respondent's commission.
6. There was no written contract between the first respondent and the claimant.
7. As between the fourth respondent and the claimant, there is an email from the fourth respondent to the claimant dated 8 March 2018 attaching a contract headed: "Contract for services for the engagement of an agency worker" ("the Agency Worker contract"). The Agency Worker Contract states that during an assignment the agency worker will be engaged by the fourth respondent under a contract for services.
8. The Agency Worker Contract sets out a number of obligations on the part of the agency worker and a number of rights on the part of the agency worker, such as the right to holiday pay. It further provides that the parties acknowledge the agency worker's pay will be subject to deductions in respect of PAYE pursuant to s.44-47 of the Income Tax Earnings and Pensions Act 2003 and class 1 National Insurance contributions.
9. There is no signed copy of the Agency Worker Contract in the bundle and the claimant accepted in cross-examination that he could not be sure he

had ever signed it. Nevertheless he maintained that this was the relevant contract that governed his relationship with the fourth respondent.

10. The fourth respondent maintained it never entered into the Agency Worker Contract with claimant but had contracted instead with a company called Turtlemoon Limited (“Turtlemoon”), a company the claimant had set up approximately thirty years ago and of which he is the sole shareholder and director.
11. In this respect the claimant accepted in cross examination that he agreed with Laura Skipworth of the fourth respondent it would be tax efficient for him to provide his services in respect of the role at the first respondent through Turtlemoon and further that this type of arrangement was common place in the industry. Consistently with this, the evidence in the bundle shows that Turtlemoon submitted invoices to the fourth respondent for the work done by the claimant as site manager for the first respondent, the fourth respondent invoiced the first respondent, the first respondent paid the fourth respondent, and the fourth respondent paid Turtlemoon. When the fourth respondent paid Turtlemoon no deductions were made in respect of PAYE or class 1 National Insurance Contributions.
12. The claimant further stated that prior to the role for the first respondent (which commenced in March 2018) he had taken on a role for just over a year, again through the agency of the fourth respondent, at a company called LA Construction and before the role at LA Construction he had worked in a succession of several less lengthy roles in which he had been engaged directly rather than through an agency. Prior to the role at LA Construction the claimant said he had not used an agency for about 6 years, but had done so on that occasion because he had come back from an extended holiday and needed work quickly. The claimant accepted he had not been paid holiday pay by the fourth respondent while engaged in his role at the first respondent or at LA Construction.
13. The claimant agreed that he submitted the accounts of Turtlemoon annually to HMRC and paid tax accordingly. In the bundle is a copy of Turtlemoon’s trading, profit and loss account for the period of 8 June 2017 to 30 June 2018 and those figures include the income and expenditure relevant to the claimant’s role as site manager for the first respondent and, prior to that, his role at LA Construction.
14. As regards the claimant’s role as site manager for the first respondent, the first respondent accepts that it had some day-to-day control of the claimant because it was necessary to instruct the claimant on matters to do with the construction project as they cropped up on a daily basis. However, the claimant was responsible for making decisions and giving orders on site. Mr Wells, who has since left the company, monitored commercial

performance mainly from a distance through twice daily telephone conversations with the claimant as well, as weekly and monthly meetings.

15. The claimant was required to work to the first respondent's policies such as in respect of health and safety, and waste management. He was also given a copy of the site rules and information regarding welfare facilities, position of the offices, canteens, toilets and where clothes could be dried etc. However, he was not given a copy of the company's grievance procedure, as a staff member would have been. As regards equipment, the claimant was responsible for procuring the major surveying tools required for the role. However he was given the first respondent's hard hat and safety high-visibility jacket in order to comply with health and safety policy. He was also issued with a laptop computer and mobile phone to ensure the speed and capacity of both were sufficient for the claimant to do his job. However, he only had access to those parts of the first respondent's website that were available to freelance services providers and which allowed him to access the first respondent's policies etc.
16. On 27 July 2018 the claimant suffered a heart attack whilst he was travelling home from work. He was admitted to hospital and had surgery on 29 July 2018. During the operation he had an angioplasty to his coronary artery to widen the artery as a result of plaque blockages causing the heart attack. He was advised that other plaques were identified but were inoperable. He was prescribed with drugs and aids following the heart attack to help with these symptoms, these were:
 - 16.1 Ticagrelor, which thins the blood and helps prevent blood clots.
 - 16.2 Perindopril, which is a drug for high blood pressure and heart failure.
 - 16.3 Atorvastatin, to reduce cholesterol.
 - 16.4 Two inhalers to help with his lung function and the reduced capacity of his heart and blood flow, and a GTN Spray to help with chest pain.
17. He was advised he would be required to take the medication to help with the heart condition for the rest of his life.
18. The claimant was discharged from hospital at the end of July 2018.
19. The claimant's partner Miss Benton informed the first and fourth respondents of what had happened and suggested to Mr Wells of the first respondent that the claimant's brother replace the claimant while the claimant recovered. However, Mr Wells told Miss Benton that the claimant was not able to replace himself on the contract and that he would contact

the fourth respondent to arrange cover. As is apparent from an email from Mr Wells to Mr Burke of the fourth respondent, a new site manager had been appointed by 16 August 2018.

20. The claimant attempted to return to work on 28 August 2018 but did not have a fit to work certificate. He returned with such a certificate on 3 September 2018. However, at a meeting on 6 September 2018 South Norfolk Council informed Mr Wells that they wished to retain the claimant's replacement in order to ensure continuity of project delivery and because of concerns for the claimant's health and wellbeing. The claimant's role of site manager was therefore terminated on, or shortly after, 6 September 2018.
21. In March 2019 the claimant suffered a further episode of suspected acute coronary syndrome.
22. The claimant says that as a result of his heart attack and the damage caused to his heart from blocked veins he experiences ongoing issues with normal day-to-day activities and that he has been advised by his GP and hospital that they are likely to continue for the rest of his life. These include:
 - 22.1 Difficulties of walking any distance without becoming out of breath and suffering chest pains and becoming fatigued. He says this includes the difficulties walking up and down stairs in particular.
 - 22.2 Carrying and lifting items such as carrying the shopping in from the car at home and lifting and carrying weights weighing 5-10 kilograms. He says that at work he would be required to carry items that would weigh 5-10 kilograms and he very much struggles to carry items beyond 10-15 metres.
23. He states that his medication assists him with his day-to-day activities. Once he ran out of medication and within 24 hours began to feel the effects of struggling to walk or climb stairs without becoming extremely breathless and fatigued.
24. The claimant further states that as a result of the heart attack he has now started to suffer from a mental impairment of stress and anxiety. This can happen in numerous different situations such as once when he was driving to a hospital appointment and started to have extreme stress and anxiety and needed to pull over as he had broken out in hot and cold sweats.
25. A medical report has been provided from Dr Sarev dated 30 July 2019. Dr Sarev states that a non-fatal myocardial infarct (heart attack) leaves an area of scarring of the myocardium impairing its contractility and a

predisposition to heart failure. The heart failure manifests itself with breathlessness restricting the claimant's activities. Dr Sarev states that at the time of the claimant's dismissal the extent of the damage was mild in terms of reduction of his left ventricular pumping capacity. However, at the date of the report the claimant was suffering from effort related shortness of breath and a recurrence of angina. The doctor was of the opinion that arterial hypertension was contributing to symptoms of shortness of breath. The claimant's resting peak expiratory flow was about 60% of normal for a man in his age, which limited his physical capacity.

26. The doctor's summary was that the claimant has effects that arise from a physical impairment, i.e. shortness of breath, limited physical capacity and recurrent angina and that these effects have an impact on his ability to carry out normal day-to-day activities. In the doctor's opinion the claimant was, at that date, disabled due to his recurrent angina and mental anxiety and stress related to his heart attack.
27. The claimant was cross examined on the basis of notes from the cardiac rehabilitation clinic of 19 September 2018 where it was pointed out that prior to his heart attack he was recorded as undertaking less than 30 minutes of moderate intensity activity 5 times a week, whereas his activity level as at September 2018 was approximately 30 minutes of moderate intensity 5 times a week and that he was walking and jogging.
28. The claimant was also taken to a report of the Department of Cardiology at the Norfolk and Norwich Hospital dated 3 October 2018 where it was recorded the claimant had made a good recovery from his heart attack, that he was looking after himself very well, that he was walking 4-5 miles every day vigorously and has had no symptoms on exertion. The claimant agreed the notes were accurate but said he depended on his medication and further that he had to do the walk of 4-5 miles in separate outings not exceeding 2000 paces and making sure his heart rate did not exceed 135 beats per minute.
29. The claimant was also taken to his GP notes dated 28 November 2018 where it was noted that his bloods were normal, that his pulmonary function showed some minor problems, but that he had had a good outcome "from the diving medical" and he was off to work in a hotel in Thailand soon and was looking and feeling really well.
30. The claimant said he had been to see a specialist diving doctor and had been told he was fit to dive up to 6 metres, although the doctor had also said it was not a sensible thing to do. In the end the claimant had not gone diving although for reasons that were not related to his heart attack.

31. It was also put to the claimant that when he had sought to return to work he had not requested any reasonable adjustments and that his fitness for work certificate did not make any mention of any reasonable adjustments. The claimant replied that it was not for the GP to say what he could and could not do.
32. The claimant was also taken to a report of Norfolk and Norwich University Hospital Cardiology Department dated 12 December 2018 which states “I am pleased to say that your recent echo-cardiogram shows that there has been a good recovery in the function of your heart. It is not completely normal but it has improved quite a lot.” The claimant said that might be the case but if he stopped taking his medication everything would stop working.
33. It was also put to the claimant that there is no mention of stress or anxiety in his GP records and the claimant said he had never discussed that with his doctor; he accepted that the first mention of stress and anxiety was in his impact statement following his second episode in 2019.

Conclusions

Disability

34. The physical impairment relied upon by the claimant is coronary artery disease, myocardial infarction and arterial hypertension.
35. In determining whether a person’s impairment has a substantial adverse effect on his ability to carry out normal day-to-day activities, the effects of medical treatment must be ignored. If the impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat it, it is to be treated as having that effect. This is so even where the measures taken result in the effects of the impairment being completely under control or not apparent; (see paragraph 5(1) of schedule 1 of the Equality Act 2010).
36. When the claimant was discharged from hospital on 31 July 2018 following his heart attack he was prescribed a list of medication (set out above). The report of Dr Sarev dated 12 July 2019 confirms that the claimant is still taking the same medication, albeit the volumes of the medication have in some respects changed by a small amount. I also note that Dr Sarev’s states in his report that management of Mr Holt’s coronary disease is intended to minimise the risk of reoccurrence and by “management of”, I understand Dr Sarev’s to be referring (at least in part) to the medication that the claimant takes for his heart disease. Further, at paragraph 9.1.8 of his report Dr Sarev states that “continuous cardiovascular medication is essential” and records without comment that in March 2019 when the claimant ran out of medicines due to a misunderstanding with his pharmacy he started to feel unwell and within 24 hours he started

struggling to walk or climb stairs without becoming extremely breathless, fatigued and needing to sit down.

37. Accordingly, while the medical evidence could address more directly and in more detail the substantial adverse effect the claimant's physical impairments would have on his ability to carry out normal day-to-day activities in the absence of medication, I am satisfied that the evidence set out in paragraph 36 above is sufficient to show that, that adverse effect would be substantial. Further I am satisfied that this was the position on or about 6 September 2018 when the claimant's position as site manager for the first respondent was terminated and that as at 6 September 2018 that adverse effect was also long-term. In that latter respect long-term includes "likely to last for at least 12 months" or "likely to last for the rest of the life of the person affected" (paragraphs 2(1)(b) and 2(1)(c) of schedule 1 to the Equality Act 2010). When he was discharged from hospital on 31 July 2018, the claimant was advised that he would have to be on medication for the rest of his life, he still remains on that medication and, it is to be noted, suffered a further episode of suspected acute coronary syndrome in March 2019.
38. I therefore find that as from 27 July 2018 the claimant has suffered from a physical impairment, i.e. coronary artery disease, myocardial infarction and arterial hypertension which continues to have a substantial and longterm adverse effect on his ability to carry out normal day-to-day activities, and therefore that from this date the claimant has had a disability within the meaning of section 6 of the Equality Act 2010.

Employment status

39. Considering first the claimant's relationship with the fourth respondent I am not satisfied that the claimant and the fourth respondent ever signed the Agency Worker Contract that was emailed to the claimant. If it was signed it is strange that neither party can locate a signed copy of it. Further, such a written contract would be inconsistent with the reality of the relationship between the fourth respondent and the claimant.
40. In this respect the evidence indicates that the intention of the parties was for the claimant to provide his services on self-employed basis through his own limited company, Turtlemoon, and that this is in fact what happened. The email from the fourth respondent to the claimant of 25 February 2018 describes the role as "freelance", the claimant agreed with Laura Skipworth of the fourth respondent that it would be tax efficient for him to provide his services through his own company, and invoices and corresponding payments were subsequently submitted by, and paid, to Turtlemoon. Further the payments from the fourth respondent to Turtlemoon were not subject to deductions for PAYE or class 1 National Insurance Contributions (as would have been the case under the Agency Worker Contract).

41. Moreover, the wider picture is entirely consistent with the claimant as being somebody in business on his own account. His working history is that he undertakes specific projects for a limited duration either through an agency, such as the fourth respondent, or directly, and arranges his working life to suit his own convenience and needs. He operates through his own company, Turtlemoon, and has done so for approximately thirty years, submitting annual trading accounts. Notably the accounts of Turtlemoon for the period 8 June 2017 to 30 June 2018 included the income received from the claimant's role as site manager for the first respondent and his prior role for LA Construction. It is also notable that although the claimant's role at LA Construction was also for a limited duration and through the agency of the fourth respondent, the claimant did not claim holiday pay, as he would have been entitled to do had his relationship with the fourth respondent been that of an agency worker pursuant to the Agency Worker Contract.
42. I therefore find that the claimant was self employed and supplied his services through his own limited company. To this purpose I find there was a contract between the fourth respondent and Turtlemoon that the claimant would be supplied to the first respondent to undertake the role of site manager on the Long Sutton Leisure Centre construction project.
43. As between the claimant and the first respondent, I find that there was no contract at all. There is no written contract between those parties, and there is no necessity to imply a contractual relationship between them because the agency arrangement vis-à-vis the fourth respondent was a genuine one. Further, the evidence is consistent with the claimant providing his services (via Turtlemoon and the fourth respondent) as a person operating a business on his own account. In addition to the factors set out above at paragraph 39 the claimant had a high degree of autonomy in carrying out his role as site manager, and for the purposes of access to the first respondent's website and information he was treated as self-employed. He was responsible for procuring the site equipment / tools necessary for the job and although he was issued with the first respondent's hard-hat and safety high-visibility jacket this was in order to ensure compliance with health and safety policy. Similarly he was issued with a laptop computer and mobile phone in order to ensure the speed and capacity of both were sufficient for the job. When the claimant was off-sick following his heart attack the first respondent simply replaced him with someone else through the fourth respondent; the fact the first respondent rejected Ms Benton's suggestion that the claimant's brother stand in for him and chose instead their own replacement is consistent with there being no contractual obligation between the claimant and the fourth respondent.
44. It follows from the above that I find the claimant was not in employment with either the first or fourth respondent within the meaning of s.83(2)(a) of the Equality Act 2010 and was not a "worker" of the first or fourth

respondent for the purposes of s.230(3) of the Employment Rights Act 1996.

- 45. I note, however, that the first respondent has accepted that the Tribunal has jurisdiction to hear the disability claim against it. In particular, in its Response the first respondent states that it accepts that it was a principle and the claimant was a contract worker within the meaning of s.41 of the Equality Act 2010. The basis of this concession needs to be clarified.
- 46. It appears to be a requirement of s.41(5) that the contract worker in question is employed by one person and supplied to another, and I have found that the claimant was not employed by the fourth respondent but was self-employed. It may be that in the first respondent has in mind MHC Consulting Services Ltd v Tansell [2000] ICR 789 where the claimant was not an employee of the agency that supplied his services to the end user but had chosen to provide his services through the establishment of his own company, which employed him. However, in this case there is no evidence currently before me that the claimant was an employee of Turtlemoon, only that he was the sole shareholder and director of that company.
- 47. In the light of all the above the matter needs to be listed for a two-hour Preliminary Hearing to identify the/any remaining issues in the case and make appropriate orders for its future conduct.

Employment Judge S Moore

Date: 30/12/2019

Sent to the parties on:

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For the Tribunal Office