



EMPLOYMENT TRIBUNALS

Claimant: Mr K Giannopoulos

Respondent: Athona Limited

Heard at: Cardiff **On:** 19 December 2019

Before: Employment Judge M R Havard (sitting alone)

Representation:
Claimant: In person
Respondent: Mr S Anthony, Managing Director

RESERVED JUDGMENT

The Claimant's claim under the Fixed Term Employees (Prevention etc) Regulations 2002 and his claim for notice pay are dismissed.

REASONS

Introduction and issues in dispute

1. On 9 March 2019, the Claimant, who is a doctor, commenced as a locum in the General Surgery department of the Cwm Taf University Health Board ("Cwm Taf UHB").
2. On 22 March 2019, on behalf of Cwm Taf UHB, Retinue health wrote to the Respondent confirming that the department at which the Claimant was working had made the decision that the placement should be terminated and the Respondent was requested to inform the Claimant that he was no longer required.
3. At a telephone preliminary hearing held on 1 November 2019, the issues between the parties which potentially fell to be determined by the Tribunal were identified as follows:

- (i) Was the Claimant a fixed term employee for the purposes of the Fixed Term Employees Regulations?
 - (ii) If so, was he subjected to less favourable treatment on the grounds of his fixed term status? The Claimant relies on being asked to be on call more than equivalent indefinite term employees;
 - (iii) Is the Claimant entitled to notice pay on termination of his contract? If so, what is the appropriate amount of notice pay?
4. The Claimant gave evidence on his own behalf.
 5. The Respondents called:
Mr Steven Anthony, Managing Director;
Mrs Tracie Spires, Head of Quality and Compliance;
Mr Anton La Ronde, Executive Recruitment Consultant.
 6. I was also provided with a main bundle (pages 1 to 73) and an additional bundle (pages 1 to 43).
 7. References to documents in the main bundle and additional bundle are marked MB/page and AB/page respectively.

Findings of Fact

8. In an email dated 1 March 2019, Mr La Ronde wrote to the Claimant confirming that the Claimant was to take up a locum position at the Prince Charles Hospital in Merthyr Tydfil which falls within the Cwm Taf UHB.
9. The locum position was in general surgery. It was due to commence on 9 March 2019 and finish on 14 April 2019. The hours and breaks were described as, "as per rota".
10. Later in the email it states:
"Agency Worker Regulations – PAYE Only – from 1 October 2011, after you have worked in the same job for 12 weeks, you will qualify for equal treatment in respect of pay and basic working conditions."
11. There is then reference to further documentation which are applicable when working with the Respondent to which the Claimant can gain access via various hyperlinks, to include terms and condition (MB35).

12. The Claimant worked via a company called Elite Management Consultancy Limited (MB61) and all payments would be made gross to Elite Management Consultancy Limited.
13. The Claimant and the Respondent operated to the terms of a document entitled "Terms of Engagement for Limited Company Contractors" (MB58 to 60). Within the context of the Claimant being placed as a locum at Prince Charles Hospital, the terms of engagement contain the following definitions:
 - **"Agency Worker"** means such of the intermediaries, employees, workers, officers or representatives supplied to provide the intermediary services;
 - **"Assignment"** means the intermediary services to be performed by the Agency Worker for a period of time during which the intermediary is supplied by the Employment Business to provide the intermediary services to the Hirer;
 - **"Engagement"** means the engagement, employment or use of the intermediary and/or any Agency Worker by the Hirer or by any third party to whom the intermediary and/or any Agency Worker had been introduced by the Hirer directly or indirectly on a permanent or temporary basis, whether under a contract of service or for services, an agency, licence, franchise or partnership arrangement or any other engagement;
 - **"Hirer"** means the person, firm or corporate body together with any subsidiary or associated person, firm or corporate body (as the case may be) to whom the intermediary is supplied or introduced requiring the intermediary services.
14. Under paragraph 9 entitled "Term and Termination", the agreement states:
 - 9.1 Assignment may be terminated by either the Employment Business or the intermediary by giving the other party in writing the period of notice specified in the relevant Assignment Details Form.
 - 9.2 Notwithstanding clauses 9.1 and 9.3 of this agreement, where required by the Hirer, the Employment Business may without notice and without liability instruct the intermediary to cease work on an assignment at any time where:
 - 9.2.1 the intermediary has acted in breach of the rules and regulations applicable to third parties providing services to the Hirer or to the Hirer's own staff; or
 - 9.2.2 the intermediary has committed any serious or persistent breach of any of its regulations under this agreement; or

- 9.2.3 the Hirer reasonably believes that the intermediary has not observed any condition of confidentiality from time to time; or
- 9.2.4 the Hirer is dissatisfied with the intermediary's provision of the intermediary services and has terminated the assignment.
15. The Claimant accepted that, on a number of occasions previously, Mr La Ronde, on behalf of the Respondent, had placed the Claimant with other trusts on the basis of exactly the same terms of engagement.
 16. The Claimant commenced locum work at Prince Charles Hospital.
 17. The Claimant accepted, and I found, that the duration of the locum would be determined by Cwm Taf UHB, as opposed to the Respondent as would the rota with regard to the amount of occasions on which the Claimant would be required to be "on call".
 18. The Claimant was living in temporary accommodation through Airbnb and experienced considerable difficulty with the owner of the accommodation as shown in the exchange of texts between the Claimant and Mr La Ronde. Mr La Ronde provided much support to the Claimant in attempting to resolve the Claimant's accommodation arrangements but this clearly had caused substantial disruption to the Claimant.
 19. On 20 March 2019, Mr Williamson wrote on behalf Cwm Taf UHB to Mr La Ronde (MB37-38). He stated that there had been reports from clinicians that the Claimant had turned up late to work on 19 March 2019 and again on the morning of 20 March 2019 and when Mr Williamson spoke with him, the Claimant did not apologise but indicated that he had been up late talking to his landlord. The email also stated that the Claimant explained to Mr Williamson that he was, "breaking the law as I had been giving him on calls and giving our substantive staff clinics/theatres".
 20. Mr La Ronde was asked to provide feedback to the Claimant about "this inappropriate behaviour" and stated that the Claimant was due to work on the Saturday and Sunday.
 21. However, in his reply of 20 March 2019, Mr La Ronde asked whether the Claimant could have Saturday and Sunday off before he started nights on the following Monday as the Claimant was going through a lot of stress at the moment and needs time to "get himself sorted" (MB37).
 22. On 22 March 2019, Mr Williamson sent to Mr La Ronde some feedback forms in respect of the Claimant (MB41 to 47). There were two feedback forms. Each of them were dated 21 March 2019 and had been completed by different consultants. They referred to concerns with regard to the attitude of the Claimant towards certain staff, the fact that he had turned up late for handover, and references to the Claimant's role as a doctor and his failure to

consult with the Registrar or Consultant prior to making a decision with regard to a patient's care.

23. On 22 March 2019 at 14.31 pm, Cwm Taf UHB sent an email to Mr La Ronde (MB49) stating:

"Hi Anton

In regards to the above Dr the department had made the decision to no longer continue with the placement.

Can you inform the Dr they are no longer required".

24. Later that evening on 22 March 2019, Mr La Ronde sent a text to the Claimant telling him that the locum appointment had been terminated.

The Law

25. Regulation 4(1) of the Agency Workers Regulation 2010 ("AWR") defines a "temporary work agency" as a person engaged in the economic activity of either:

- Supplying individuals to work temporarily for and under the supervision and direction of Hirers (Reg 4(1)(a)), or
- Paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of Hirers (Reg 4(1)(b)).

26. Under AWR Regulation 2, the Hirer is the end user of an agency worker's services. For the purposes of the AWR, a Hirer is "a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person".

27. However, the Claimant has claimed to be a fixed term employee of the Respondent.

28. Regulation 1 of the Fixed Term Employees (Protection etc) Regulations 2002 ("FTE Regulations") defines a "fixed term contract" as a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate:

- a) On the expiry of a specific term
- b) On the completion of a particular task, or

- c) On the occurrence or non-occurrence of any specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him;

And any reference to "fixed term" shall be construed accordingly.

"Fixed term employee" means an employee who is employed under a fixed term contract.

29. Regulation 3(1) of the FTE Regulations states:

"A fixed term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee:

- a) *As regards the terms of his contract; or*
- b) *By being subject to any other detriment by any act, or deliberate failure to act, of his employer.*

30. Regulation 3(3) states:

"The right conferred by paragraph (1) applies only if:

- a) *The treatment is on the ground that the employee is a fixed term employee; and*
- b) *The treatment is not justified on objective grounds".*

31. With regard to the Claimant's claim for one week's notice pay, Section 86(1) of the Employment Rights Act 1996 states:

"The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more:

- (a) Is not less than one week's notice if his period of continuous employment is less than two years*

32. Section 86(6) states:

"This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party".

Conclusions

33. The Claimant had accepted quite properly that the length of the locum appointment at Prince Charles Hospital and the terms of the appointment,

particularly with regard to the on call rota and the work expected of him on a day-to-day basis, would be set by the hospital and not the Respondent. Furthermore, he was clearly under the supervision and direction of the hospital and thereby Cwm Taf UHB and not the Respondent.

34. The terms of engagement into which the Claimant had entered on this, and previous, occasions made specific reference to the AWR as opposed to the FTE Regulations.
35. The arrangement reached between the Respondent, the Claimant via Elite Management and Consultancy Limited, and Cwm Taf UHB were consistent with the provisions of the AWR and, in particular, Regulations 3 and 4 of those regulations.
36. I do not consider that, on the facts, a fixed term contract (meaning a contract of employment) existed between the Claimant and the Respondent.
37. Even if it did, the Claimant accepted that he was comparing the terms of his arrangement with those of the permanent employees of Cwm Taf UHB. However, to be entitled to a remedy under the FTE Regulations, the Claimant would have to establish that he had suffered less favourable treatment compared with permanent employees of the Respondent in accordance with Regulation 2.
38. For this reason, even had I found that he was a fixed term employee, he is unable to succeed in any claim.
39. As for the entitlement to notice pay of one week, the Claimant would have to establish that he enjoyed a statutory right under Section 86 of the Employment Rights Act 1996. However, to be able to do so, he would have to establish that not only did he have a contract of employment but also that he had been working for a continuous period of one month. I have found that the Claimant did not have a contract of employment with the Respondent. Even if he had, the Claimant commenced work at Prince Charles Hospital on 9 March 2019 and his locum was terminated on 22 March 2019. He therefore had not worked the requisite period of one month.
40. Furthermore, in accordance with paragraph 9.2.4 of the Terms of Agreement, it stipulates that the Respondent may, without notice, instruct the Claimant to cease work on an assignment where the Hirer, in this case Cwm Taf UHB, is dissatisfied with the Claimant's provision of the services he was required to undertake and has terminated the assignment.
41. This was precisely what happened on this occasion.
42. I accept the Claimant's assertion that the role of a doctor is an enormously responsible one and that the job that he fulfils is of huge importance. Furthermore, I have noted that he has included in the documentation

references from other hospitals and trusts who have spoken highly of his performance. Nevertheless, the feedback forms from Cwm Taf UHB refer to concerns as to his performance and it was on the basis of these concerns that they terminated the assignment. It was not necessary for me to consider whether those concerns were well-founded. However, Cwm Taf UHB were entitled to express those findings and rely upon them as reasons for terminating the assignment. In turn, the Respondent was entitled to terminate the agreement without notice.

43. For all these reasons, the Claimant's claims are dismissed.

Employment Judge M R Havard
Dated: 16 January 2020

JUDGMENT SENT TO THE PARTIES ON 17 January 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS