Case No: 2504281/2019(V)

EMPLOYMENT TRIBUNALS

Claimant: **Mr S P Spokes**

Respondents: **Beaver Management Services Limited [R1]**
Charles Contract Services Limited [R2]
Barrier Limited [R3]

Heard: **Remotely (by video link)** **On:** **21, 22 and 23 October 2020**

Before: **Employment Judge S Shore**
Non-legal Member Mrs C Hunter
Non-legal Member Mrs S Mee

Representation:

Claimant: **In Person**
Respondents: **Ms A Farah [R1 and R2]**
Mr A Walton [R3]

WRITTEN REASONS

Background

1. Following a hearing conducted remotely by video on 21, 22 and 23 October 2020, the unanimous decision of the Tribunal was that all the claimant's claims against all three respondents failed. It was decided that:

    1.1. There was no contract between the claimant and the first respondent that qualified the claimant as a worker or employee of that company. His claims of automatic unfair dismissal and/or detriment for the reason that he had made a protected disclosure failed.

    1.2. There was no contract between the claimant and the second respondent that qualified the claimant as a worker or employee of that company. His claims of

automatic unfair dismissal and/or detriment for the reason that he had made a protected disclosure failed.

1.3. There was no contract of employment between the claimant and the third respondent that qualified the claimant as an employee of that company. His claims of automatic unfair dismissal for the reason that he had made a protected disclosure failed.

1.4. The claimant was a worker of the third respondent, but did not make a protected disclosure to it on 18 November 2019, so his claim to have suffered a detriment because he made such a disclosure failed.

2. The Tribunal's decision was sent to the parties on 16 November 2020 and the first and second respondents requested written reasons on 26 November 2020. I asked them to clarify why they made the request, given that they had been entirely successful in defending the claims made by the respondent and given the overriding objective requires the Tribunal to deal with matters proportionately. I anticipated that the request may be have been driven by a desire to use our decision as authority for asserting that none of the people with whom the first and second respondents had contractual relationships as a recruitment agency or umbrella company and pointed out that a finding of fact made by an Employment Tribunal at first instance is not binding on any subsequent Tribunal. By an email dated 4 January 2021, the first and second respondents asserted the provisions of Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 give no discretion to a Tribunal that is asked to produce written reasons. That assertion is, of course, correct.

3. I should, perhaps, correct one misconception held by Ms Farah, the representative of the first and second respondents; Employment Tribunal proceedings on the CVP have not been recorded for some time. Employment Judges working remotely are not issued with dictation machines and it is, of course, a criminal offence for anyone to record the proceedings themselves.

4. I therefore offer my sincere apologies for the time it has taken me to produce these written reasons and for the fact that the written reasons may well be materially different from the oral reasons taken by the parties at the hearing itself.

Claims and Issues

5. The factual basis of the claimant's claims is relatively straightforward. He is an experienced and qualified scaffolder. His claims arise from the events of a single day: 18 November 2019 at approximately 4:20pm. The claimant says at that time on that day, he was told that he was no longer required at the site of the third respondent, Barrier Ltd. The claimant claims that he and his colleagues had refused to work on because it was too dark to work at height without adequate lighting.

6. The major complicating factor in this case is the complex nature of the legal and contractual relationships between the claimant and the three respondents. The first respondent, Beaver Management Services Limited ('Beaver') is an employment agency that contracts directly with the third

respondent, Barrier Limited ('Barrier') for the provision of individuals to work on Barrier's sites.

7. The second respondent, Charles Contract Services Limited ('Charles') is an intermediary service provider (usually called an 'umbrella company') that contracted with the claimant.

8. We are indebted for the work done by Employment Judge Sweeney in a preliminary hearing heard on 27 April 2020, the orders from which were sent to the parties on 5 May 2020. He had obviously spent considerable time and effort clarifying the claimant's claims with him and putting them into a clear and understandable format.

9. He did this by setting out the claimant's case against all three respondents when looked at holistically and then had identified the issues for each claim against each respondent individually.

10. The claimant's 'generic' complaint was that:

    10.1. On 18 November 2019, he had been automatically unfairly dismissed contrary to sections 94 and 103A of the Employment Rights Act 1996 because he had made a qualifying disclosure within the meaning of section 43B(1)(d) of the Employment Rights Act 1996, or alternatively;

    10.2. On 18 November 2019, he was subjected to detriment contrary to section 47B of the Employment Rights Act 1996 because he made a qualifying disclosure within the meaning of section 43B(1)(d) of the Employment Rights Act 1996.

11. The issues in the case were agreed as being:

Beaver [R1]

12. In respect of Beaver:

    12.1. Was there a contract of any sort (express or implied) between it and the claimant?

    12.2. If so, was the contract between it and the claimant:

        12.2.1. A contract for services;
        12.2.2. A contract of employment, or;
        12.2.3. A contract whereby the claimant undertook to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the

individual (referred to as a 'worker contract' in section 230(3) of the Employment Rights Act 1996?

12.3. On 18 November 2019, did the claimant make a qualifying disclosure under section 43B(1)(d) Employment Rights Act 1996?

12.4. If so, was it made in accordance with section 43C(1)(a) or (b) of the Employment Rights Act 1966?

12.5. If there was a contract of employment between Beaver and the claimant, was the claimant dismissed by Beaver?

12.6. If so, was the reason or principal reason that the claimant made a qualifying disclosure?

12.7. If there was a 'worker contract' was the claimant subjected to a detriment by Beaver, or an agent of Beaver?

12.8. If so, was he subjected to the detriment on the ground that he made the qualifying disclosure?

Charles [R2]

13. In respect of Charles:

13.1. Was the contract between it and the claimant:

13.1.1. A contract for services;
13.1.2. A contract of employment;
13.1.3. A 'worker contract', or;
13.1.4. Was the claimant a worker within the extended meaning of section 43K(1)(a) or (b) of the Employment Rights Act 1996 (an 'extended worker')?

13.2. On 18 November 2019, did the claimant make a qualifying disclosure under section 43B(1)(d) Employment Rights Act 1996?

13.3. If so, was it made in accordance with section 43C(1)(a) or (b) of the Employment Rights Act 1966?

13.4. If there was a contract of employment between Charles and the claimant, was the claimant dismissed by Charles?

13.5. If so, was the reason or principal reason that the claimant made a qualifying disclosure?

13.6. If there was a 'worker contract', or if the claimant was an 'extended worker' was the claimant subjected to a detriment by Beaver, or an agent of Beaver?

13.7. If so, was he subjected to the detriment on the ground that he made the qualifying disclosure?

Barrier [R3]

14. In respect of Barrier:

14.1. Was the contract between it and the claimant:

14.1.1. A contract for services;
14.1.2. A contract of employment;
14.1.3. A 'worker contract', or;
14.1.4. Was the claimant a worker within the extended meaning of section 43K(1)(a) or (b) of the Employment Rights Act 1996 (an 'extended worker')?

14.2. On 18 November 2019, did the claimant make a qualifying disclosure under section 43B(1)(d) Employment Rights Act 1996?

14.3. If so, was it made in accordance with section 43C(1)(a) or (b) of the Employment Rights Act 1966?

14.4. If there was a contract of employment between Barrier and the claimant, was the claimant dismissed by Barrier?

14.5. If so, was the reason or principal reason that the claimant made a qualifying disclosure?

14.6. If there was a 'worker contract', or if the claimant was an 'extended worker' was the claimant subjected to a detriment by Beaver, or an agent of Beaver?

14.7. If so, was he subjected to the detriment on the ground that he made the qualifying disclosure?

15. If the claimant was employed under a contract of employment by any of the respondents:

15.1. Was he dismissed on 18 November 2019?

15.2. If he was dismissed, was the reason or the principal reason for his dismissal that he made a protected disclosure?

16. If the claimant was a worker of any the respondents (either within section 230(3) or section 43K of the Employment Rights Act 1996), was he subjected to a detriment by an act dine by:

    16.1. His employer, or;

    16.2. By another worker of his employer in the course of that other worker's employment (section 47B(1A)(a) Employment Rights Act 1996), or;

    16.3. By an agent of his employer with the employer's authority (section 47B(1A)(b) Employment Rights Act 1996)

    on the ground that the claimant had made a protected disclosure?

17. The parties produced an agreed bundle of 157 pages.

18. We heard evidence from the claimant and his former colleague, Michael Dorward, who both produced witness statements as their evidence in chief. Both were cross-examined by the respondent's representatives.

19. Evidence was given for the respondents by:

    19.1. Scott Gilmore, Business Development Manager for the first respondent;

    19.2. Stephen Williams, Director of the second respondent;

    19.3. Paul Harriman, Managing Director of the third respondent;

    19.4. Jamie Burgess, Site Foreman for the third respondent;

    19.5. Darren Shepherd, Access Development Business Manager for the third respondent, and;

    19.6. Gladys Bell, Health & Safety Manager for the third respondent.

20. All the respondents' witnesses gave evidence from witness statements and were cross-examined by the claimant.

21. The parties had agreed a timetable for the hearing which we able to stick to, with a couple of amendments to take into account the availability of witnesses and issues with connectivity.

22. Written submissions were prepared for all the parties and were considered by the panel.

Findings of Fact

23. All our findings of fact were made unanimously. All were made on the balance of probabilities. These reasons only record the findings that we found to be relevant to the issues we had to determine. Where the facts were not in dispute, we will either indicate as such in these reasons or make no comment. Where the facts were in dispute, we will explain why we preferred the evidence of one party over that of another.

Status

24. The claimant is an experienced and qualified scaffolder. No evidence was presented to cast any doubt on his qualifications and experience produced in the bundle.

25. The claimant entered into a contract for services with Charles [143-144]. The contract states it is a contract for services. A number of terms within the contract emphasise that the relationship between the claimant and Charles is not that of employee/employer and that he is not a worker. The claimant never disputed the terms of the contract or his status as described within it.

26. We find that there was no element of direction or control between Charles and the claimant that is consistent with him being either an employee or worker of Charles. That finding it is based on applying the factual evidence to the law, particularly the lack of any evidence of Charles directing the claimant's work. Applying a multi-factual test, we find that there was no relationship consistent with that of employer and employee. We find Ms Farah's expression of the law in her skeleton argument to be correct.

27. We note paragraphs 23 to 26 of the case management summary in EJ Sweeney's case management order of 5 May 2020 in which he recorded the discussion he had with the claimant about the nature of his claims against Charles. He had said his complaint was against Barrier and he was only proceeding against Beaver and Charles because he did not know which entity to proceed against.

28. We find that the claimant was not a worker or employee of Beaver. There was no contractual or other legal relationship between the claimant and Beaver. It merely sourced the assignments and advised the claimant of them.

29. We find that the claimant was not an employee of Barrier because there was a lack of control over his actions and the relationship did not meet the multi-faceted test of the employer/employee relationship.

30. We find that the claimant meets the definition of worker in respect of his relationship with Barrier.

Claimant's Working Hours and Other Terms

31. The claimant only worked at the Triton Knoll site at the Smulders yard at Wallsend for a few days between 11 November 2019 and 18 November 2019. He missed one day of work because his flat was flooded.

32. Barrier produced a sheet of clock in and out times for the claimant that he said was unreliable. We find that there is no reason why the sheet (produced by Smulders) would be deliberately falsified, although we find that it may be incorrect in some aspects. However, on balance, we find that the claimant generally attended work before 7am and generally left sometime before 5pm.

33. The claimant and Barrier said that he and colleagues would be released early if Jamie Burgess thought they had done enough for the day. Mr Burgess said that if the scaffolders had finished at his request before 5pm, they were paid for 10 hours. If they worked beyond 5pm, they would be paid for 12 hours (which we assume was an additional hour at double time).

34. The time sheets produced corroborate our finding above. We find no inconsistency between the time sheet and the evidence of Jamie Burgess.

35. There was some discussion about the provision of lighting on site. This was the subject of a complaint by the claimant to the HSE. We find that unless HSE were satisfied as to the safety of Barrier's operation on site, it would not have shut its investigation down, as it was agreed it did. We therefore find the fact that it did shut the investigation down to be corroborative of Barrier's case that there were 39 telescopic lights on the Triton Knoll site.

36. We cannot imagine that HSE would have been fobbed off if it thought that the number of lights on site meant the whole of the site, as the claimant suggested.

37. The photographs taken by the claimant and produced from his LinkedIn account were of limited use. The photograph produced by Barrier, as taken by Jamie Burgess a few days after the incident on 18 November was of more evidential value. There was some dispute about this, but we find that the photograph supplied by Barrier [153] was of the Triton Knoll site. We make this finding because the evidence of Mr Burgess was not really challenged.

38. The photograph showed the Triton Knoll site illuminated. We find it inconceivable that the site would not have been illuminated at all. We find that claimant's evidence that the lights were only at ground level and shone up in the eyes of the scaffolders working at height did not meet the standard of proof required, as he had not mentioned it until his witness statement was sent to respondents in September 2020.

18 November 2019

39. On 18 November, the claimant was working at the Smulders yard. He was working at ground level with another scaffolder, Mick Dorward, whilst a squad of scaffolders worked about 60ft above them. There was an incident at about 16:20pm. The earliest contemporaneous evidence is the claimant's text to Scott Gilmore of Beaver [96]. This is very important, as it was sent within minutes of the incident. He wrote:

> *JB wanted lads to work in the dark with no lights on the job*
> *Me and Mick had refused to work unsafe in the dark*
> *JB told them not to bother coming back*

40. We find that if Mr Burgess had told them to “fuck off”, as alleged, it is highly unlikely that C would not have repeated those words verbatim, or used an alternative.

41. We note that Mr Burgess’ witness statement recounted what was said and he did provide a report of the incident to Gladys Bell on 21 November [111]. His statement says he said he needed scaffolders who were willing to work in the dark and if they were not prepared to do that, they should not bother coming back the following day.

42. Mr Dorward’s written evidence on the exchange between him, the claimant and Mr Burgess was that he explained to Mr Burgess that the lighting was no good for the scaffolders working at height. He said that Mr Burgess replied that he needed lads who were going to work in the dark. Mr Burgess then addressed the claimant and asked what he would do if asked to work in the blast shed at that time of day, to which he replied that if it was too dark, he’d stop work there too. Mr Burgess then responded by telling them both to fuck off and not to bother coming back.

43. Firstly, Mr Dorward’s statement is not corroborative of the claimant’s assertion that he made a protected disclosure.

44. Secondly, his evidence was generally supportive of Mr Burgess’s evidence that he had said that he needed lads who would work in the dark.

45. Thirdly, if Mr Burgess was “dismissing’ them, why say not to bother coming back?

46. Fourthly, the claimant’s account in his ET1 was very similar to Mr Burgess’ account. In his ET1, he said he had “refused to work unsafe”.

47. Under cross-examination, Mr Dorward said that it had been him who had called the scaffolders working at height down. That contradicts the claimant’s evidence.

48. On balance, therefore, we prefer Mr Burgess’ evidence to that of the claimant. We also find Mr Dorward’s evidence to be corroborative of Mr Burgess’ evidence on a key point.

49. We find that the claimant has not shown on the balance of probabilities that he made a protected disclosure to Mr Burgess on 18 November 2019. We find the most that he said about health and safety was that if he had been required to work in the blast shed at a similar time, he would stop if the light was inadequate. We note that precedent shows us that a hypothetical example cannot be a protected disclosure.

50. We do not find that C was ‘dismissed’.

51. At that point, the claim fails entirely because we have found that there was no qualifying relationship between the claimant and the first and second respondents that enabled him to bring any claim before an Employment Tribunal. We find he was not an employee of the third respondent, but was a worker, but that he had made no protected disclosure.

52. All the claimant's claims therefore fail.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore

Date 11 January 2021