



EMPLOYMENT TRIBUNALS

Claimant: Mrs Donkor-Baah

First, Second and Third Respondents: University Hospitals Birmingham NHS Foundation Trust and others

Fourth Respondent: 4 Recruitment Limited

UPON APPLICATION made by letter dated **15 November 2020** to reconsider the judgment dated **28 October 2020** under rule 71 of the Employment Tribunals Rules of Procedure 2013 and after considering written representations of the parties in accordance with Rule 72

JUDGMENT

1. The removal of the fourth respondent, 4 Recruitment Services Limited, as a party to these proceedings is revoked.
2. I have made further case management orders in relation to the claimant's claims which are set out in a separate order.

REASONS

1. At a preliminary hearing on 1 October 2020 I considered a number of applications including one from the fourth respondent to be removed as a party to the proceedings. That application was made on the basis that the claimant's discursive grounds of claim which run to some 15 pages, fails to identify any particular claim against the fourth respondent.
2. The claimant objected to the application and said that she wanted to amend her claim to make a claim against the fourth respondent. This was in essence an amendment to her claim against the first respondent under Regulation 17 of the Agency Worker Regulations.

3. Having considered what the claimant said about that claim and how she said it was made out against the Fourth Respondent I determined that she should not be allowed to amend her claim because I was not satisfied that she explained any legal basis for the new claim and the claim she outlined would have no reasonable prospect of success. In those circumstances it was in the interests of justice to allow the claimant to amend her claim and it was proper to remove the fourth respondent as a respondent because there was no claim pleaded against it.
4. My decision is recorded in my summary of that case management hearing and I issued a separate judgment.
5. On 15 November 2020 the claimant applied for a reconsideration of this decision. After considering the application under Rule 72 I determined that I should accept the application and asked for the parties' views on whether the application could be considered without a hearing.
6. I received further representations from the parties and both confirmed that they were content to proceed without a hearing. On that basis I asked both parties to provide me with any further representations under Rule 72(2) by 22 January 2021. No further representations having been received I have determined this application on the basis of the parties written submissions.

The claimant's grounds

7. The claimant's application for reconsideration is made on the following grounds:
 - (1) My claim form contains a claim against the Fourth Respondent for which it has a case to answer; and
 - (2) My application to amend my claim has not been heard in full. I intend to bring new claims against the Fourth Respondent as part of this application. The Tribunal has not yet considered the merits of this claim."

The first ground

8. The claimant says this in her application for reconsideration:

"The Fourth Respondent's application for strike out was made on the basis that my claim form raised no complaint against them. Judge Cookson agreed with this, and at Paragraph 24 of the Record she writes: "it is correct that the narrative attached to the claim form appears to raise no specific complaint against the Fourth Respondent". However, I respectfully contend that this is not correct; paragraph 4 on page 11 of my grounds of claim – under the heading Claims/Damages. Although I was unable to adequately particularise this claim in the Preliminary Hearing, I can now particularise it and show why the Fourth Respondent has a case to answer:

 - (1) *Whilst I was suspended from working for the First Respondent pending their investigation into the events of 08 and 09 February 2019, I was*

entitled to equal treatment rights relating to the basic working and employment conditions (including pay) to those of a worker directly recruited by the First Respondent (Regulation 5(1) AWR).

- (2) I contend that if I had been directly recruited as a worker by the First Respondent, then I would have been entitled to be paid my average weekly earnings whilst I was suspended from working for them pending their investigation (Rice Shack Ltd v Obi UKEAT/0240/17/DM).*
- (3) Pending the investigation, I was suspended from working for the First Respondent without pay. I contend that my suspension without pay therefore constitutes a breach of Regulation 5(1) AWR for which I bring a claim under Regulation 18(2) AWR. 4. Should the Tribunal find in my favour with regards to this claim, then pursuant to Regulation 14(1) and 14(2) AWR, liability would be apportioned between the First Respondent (the hirer) and the Fourth Respondent (the temporary work agency) to the extent that the Tribunal determines each was responsible for the breach.*
- (4) The above claim is being brought against both the First and the Fourth Respondent; it is not a new claim for which I am seeking to be added as part of an application to amend my claim, rather it is an existing claim already brought under my claim form, only now better particularised. Judge Cookson did not consider whether the Fourth Respondent had a case to answer in respect of this claim. To uphold Order 1.2 and thus allow for the Fourth Respondent to be removed from these proceedings, would be to allow a named Respondent to be removed without considering whether they may be liable for a legitimate claim that was brought in-time against them. I contend that this would not be in the interests of justice, and that the Fourth Respondent should therefore remain listed as a party to these proceedings until the Tribunal determines, having heard evidence, whether they have a case to answer in regard to this claim.”*

9. Turning to the claim form, under the heading “Claims/Damages” the claimant sets out in paragraphs 4 to 24 a number of claims referring to the First, Second and Third Respondents. Nowhere in those 20 paragraphs, which run to approximately 4 and half pages, does she refer to the Fourth Respondent. In the whole of the 15 pages of the particulars of claim, the claimant makes only brief passing reference to the Fourth Respondent only twice, once to identify one and one to say she made them aware of her concerns about the respondents. The particulars claim does not refer to any claim or complaint against the Fourth Respondent.

10. The Fourth Respondent, in its submissions, objects to the further particularisation that the claimant provides. They point to the fact that the claimant had not been suspended and point out that the claimant’s case can be distinguished from the circumstances which arose in the Rice Shack case. That however is a matter of evidence. In essence the Fourth Respondent appears to accept the principle that there could be claim

against them, albeit that it was not expressed in terms in the claim form and it may be misconceived.

11. For the reasons set out above I do not accept that I was incorrect to find that the claim form contains no claim against the Fourth Respondent. However, I recognise that the claimant is a litigant in person and in the circumstances I accept that she has now explained her claim. Bearing in mind the overriding principle of ensuring the cases are dealt with fairly and justly I consider the claim which the Fourth Respondent in its submissions appears to accept but dispute, should receive judicial consideration. It would not be proper for the removal of the fourth respondent to prevent that. On that basis the fourth respondent should remain a party to the proceedings and accordingly my order to remove the fourth respondent is revoked.
12. However, I am concerned that the claim set out by the claimant in her reconsideration application has little reasonable prospect of success. The fourth respondent's grounds for objection rather confusingly refer to the claimant's "contract of employment", but they attach the claimant's contract of services which is, expressly, not a contract of employment. It is a contract which provides that the fourth respondent will seek to secure assignments from time to time for the claimant with a range of employers. The first and third respondents say that the claimant's assignment was not suspended, it was terminated. In paragraph 15 and 22 of the particulars of claim under the heading Claims/Damages the claimant refers to the termination of her assignment. Accordingly that appears to be common ground between the parties.
13. If it is correct that as matter of fact the claimant's assignment was terminated rather than suspended, her complaint under Regulation 5 must be dependent on her being able to show that she had a right to be suspended rather than her assignment being terminated when the concerns about her actions were raised. Regulation 5 AWR relates to relevant terms and conditions, that is the terms set out in Regulation 6. These include rights in relation to pay but not to rights to the application of disciplinary procedures or rights in relation to termination. It appears to me that a claim the claimant should have been suspended rather than having her assignment terminated may be a claim which falls beyond the scope of regulation 5 and therefore there may be grounds which make it appropriate for me to consider striking out the claimant's claim under Regulation 5 of the AWR or making its continuation subject to a deposit order under Rule 39 because the claim may have little reasonable prospect of success. I have made case management orders in the separate order to enable this matter to be considered.

The second ground

14. Having determined above that the order removing the fourth respondent should be revoked, it is unnecessary for me to consider the second ground of the claimant's application. I will record however that I consider that ground to be misconceived. The claimant's application to amend her claim against the fourth respondent was considered at the hearing and refused. My reasons for that are set out in paragraph 26. The orders I made relating to the following preliminary hearing and to the particularisation of the amendment application related to the claims against the first respondent. I made clear in my order that I simply referred to "respondents" in my subsequent orders in light of the removal of the fourth respondent.

Employment Judge Cookson

10 February 2021