Case Number: 3328783/2017(V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs O Swieca	v	UPE Engineering Limited

Heard at: Watford, by CVP **On**: 12 January 2021

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant: Mr P Swieca, representative (the claimant's husband)
For the respondent: Mr Gregory Hine, solicitor

JUDGMENT

The claimant's claim of a breach of regulation 5 and/or regulation 16 and/or regulation 18 of the Agency Workers Regulations 2010, SI 2010/93, does not succeed and is dismissed.

REASONS

The claim as it stood at the start of the hearing

1 At the start of the hearing of 12 January 2021, there was before the tribunal only a claim of a breach of the Agency Worker Regulations 2010, SI 2010/93 ("the 2010 Regulations"). That was in these terms, which were set out in box 8.2 of the ET1 claim form, of which there was a copy at page 8, i.e. page 8 of the hearing bundle (any reference below to a page being, unless otherwise stated, to a page of that bundle):

> "UPE Precision Engineering Services Ltd acts in the capacity of the hirer and has not provided any information to me with regards to terms and conditions of my work. As a result, this constitutes a breach of the regulation

> 5 paragraphs (1) ? (6) of the Agency Workers Regulations 2010 and this type of conduct of UPE Precision Engineering Ltd exhausts the meaning of the regulation 16 (9a) and 16 (9b). As the hirer deliberately and without any reasonable excuse failed to provide relevant information under the regulation 5(1) ? 5(6), I have no option but to direct the matter to be resolved by the Employment Tribunal of proper venue as per the regulation 18(8b) aiming at imposing the compensation defined in regulation 18(14)."

2 The claimant's first language is Russian. The claimant was represented in this case by her husband, whose first language is also not English. I return below to the claim of a breach of the 2010 Regulations.

The claimant's application of 22 December 2020 to amend the claim

3 On 22 December 2020, the claimant made an application to amend the claim. The application to amend the claim made on that day was to add claims of precisely the same sort as claims for whose addition permission was refused by Employment Judge ("EJ") Smail, in a decision sent to the parties on 18 September 2019 of which there was a copy at pages 26-29. The application which EJ Smail refused was made on 19 April 2018. The main proposed additional claim was that the claimant was dismissed because she was pregnant: that her engagement with the respondent was terminated so that it ended on (at the latest) 6 August 2017 because the claimant was at that time pregnant. In addition, permission was sought to add a claim of sexual harassment on the part of a named person employed by the respondent. That application of 19 April 2018 to amend the claim was now repeated on the basis that the claimant had on 22 September 2020, learnt something new. That something new had emerged during a hearing to decide a claim made by the claimant against the temporary work agency (within the meaning of the 2010 Regulations) by which the claimant was employed (under a contract of employment, I was told by Mr Swieca) while she worked for the respondent to this claim. That agency was Unique Employment Services Limited ("Unique").

4 The reasons for making the renewed application to amend the claim were stated in the first three paragraphs of a document in which the proposed amendments (in the same terms as those for which EJ Smail refused permission) were then stated. Those first three paragraphs were in these terms:

> **New facts of the case**
>
> "1. On the 22nd September 2020, Mrs Lynn Fountain, the Head Office Manager at Unique Employment Services Ltd, under oath, before the Employment Tribunal at Watford, witness stated that Croner Group Limited had been instructed by Unique Employment Services Ltd to perform investigation that Mrs Olga Swieca was discriminated against or harassed because of her maternity, pregnancy or sex during the Claimant's assignment at UPE Engineering Ltd.

> 2. On the 22nd September 2020, Mrs Lynn Fountain, the Head Office Manager at Unique Employment Services Ltd, under oath, before the Employment Tribunal at Watford, witness stated that Mr Tufail Hussain performed the investigation that Mrs Olga Swieca was discriminated against or harassed because of her maternity, pregnancy or sex on behalf of Croner Group Limited during the Claimant's assignment at UPE Engineering Ltd.
>
> 3. The Claimant maintains that the dismissal date from UPE Engineering Ltd should not be valid as she had no opportunity to participate in the investigation as she was informed about the investigation on the 22nd September 2020. As a result, it was not practically reasonable to file a claim when she was pregnant as the Claimant did not know about the investigation before the 22nd September 2020."

5 When I pressed Mr Swieca about the new evidence on which the repeated application to amend was made, he told me that it was given by Ms Fountain to the tribunal which heard that claim. He then sent me a copy of the witness statement which Ms Fountain had put before that tribunal, and it contained nothing about the investigation which Mr Swieca submitted was such as to justify permitting the claimant now to amend her claim in the manner for which permission had been refused by EJ Smail.

6 I therefore pressed Mr Swieca to say what it was that Ms Fountain had said that justified the renewed amendment application, and he said that it was that Unique had hired Croner to carry out an investigation, and that Croner had engaged Mr Tufail to carry out that investigation. Mr Swieca said that he did not know what that investigation was about, or what its conclusion was, as he was not permitted by the judge who heard the claimant's claim against Unique to ask Ms Fountain questions about the investigation, and because Mr Tufail was not giving evidence as a witness in that case so he (Mr Swieca) was not able to ask Mr Tufail about the investigation.

7 When I asked Mr Swieca why he had not made the new application to amend before 22 December 2020, despite knowing precisely three months before then that he had (as he thought) good reason to make a new application to amend the claim, he said that it was because he did not have time to do so before 22 December 2020. That in turn was, said Mr Swieca, because it took him a total of five days to put the application together, and because he had only half a day per week to spend on it.

8 I said to Mr Swieca that as far as I could see, I was precluded from going behind the decision of EJ Smail to refuse permission to amend the claim in the manner for which permission was now again sought. I said that I was so precluded by the principle that where there is a judicial ruling on a particular issue between parties, then that ruling, unless it is subsequently overturned on appeal, is a final

determination of that issue. That principle is known as the *res judicata* principle. I referred also to the principle of issue estoppel, and I said that I would look into the law relating to the matter, to see what scope there might be for a revisiting of that decision of EJ Smail.

9 Mr Swieca said that the application for permission to amend the claim, as made originally on 19 April 2018, was not even now finally determined, as the claimant had appealed the decision of EJ Smail and that appeal was not yet finally determined. In fact, there had been a ruling under rule 3(7) of the Employment Appeal Tribunal Rules 1993, of which there was a copy at page 108-109, and Mr Swieca had, he said, asked for a hearing under rule 3(10) of those rules, but such a hearing had not been arranged yet. As I said at the hearing of 12 January 2021, as far as I was concerned, that meant that the ruling of EJ Smail on the application to amend the claim stood as a final determination of that application.

10 I adjourned the hearing to permit the claimant to look for anything relevant that he might find on the internet or otherwise come across, and so that I could review the leading textbook on the subject. That textbook is *Res Judicata* by Spencer Bower and Handley. I saw that in the first paragraph of that work (numbered 1.01; the current edition is the fifth edition, published in October 2019 and updated online) this was said:

> "A *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment."

11 I saw too that paragraph 1.02 of that work referred to a "party setting up a *res judicata* as an estoppel against his opponent's claim or defence, or as the foundation of his own".

12 I could see nothing material in that work, but when I resumed the hearing, Ms Swieca very helpfully referred me to the decision of the House of Lords in *Arnold v National Westminster Bank* [1991] 2 AC 93, and when I searched Spencer Bower and Handley, I found paragraphs 8.31 and 8.32, which so far as relevant were in these terms:

> '8.31 An exception for special circumstances was established in *Arnold*. The parties entered into a 32 year lease which provided for periodic rent reviews. On the first review the arbitrator assumed that the rent could be reviewed at the next review date. Walton J reversed this decision, holding that the hypothetical lease for the balance of the term contained no provision for any further review. A certificate under s 1(7)(b) of the Arbitration Act 1979 for an appeal [w]as refused and the Court of Appeal held that it had no power to grant leave to appeal. The tenant challenged this interpretation at the next review but was met with an issue estoppel. The estoppel failed in all courts because

of the special circumstances. These included the bizarre construction adopted by Walton J rejected in later cases, and the absence of any right of appeal. The refusal of a certificate had been wrong, if not perverse, having regard to the amounts involved, the continuing importance of the question in that and other cases, and the debatable nature of the decision. Lord Keith, who gave the principal speech, held that while the bar created by merger and cause of action estoppel was absolute, it was not for issue estoppel. He said:

> "there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result."

8.32 The issue estoppel stands if there was no newly discovered fact, if the party had only just realised its importance, where it was discoverable with reasonable diligence or the new fact was not sufficiently material. The discovery of fresh evidence is not sufficient. The remedy for that is an application for a new trial with an extension of time if that is necessary. The exception should be kept within narrow limits to avoid undermining the general rule and provoking increased litigation and uncertainty. Although the House relied upon several matters the absence of an effective right of appeal was critical'.

13 I myself could see nothing material in the discovery that Unique had commissioned an investigation, even if that investigation was into the question whether or not the claimant had been discriminated against in the manner claimed by the claimant in her proposed amended claim. That was not least because the fact that an investigation is carried out by a respondent into a matter which is subsequently the subject of a claim to an employment tribunal is irrelevant to the question whether or not the claim could have been made in time unless something was revealed in the investigation about which the claimant did not know and which could not have been discovered with reasonable diligence. In any event, the scope, subject matter and outcome of the investigation that was now said by Mr Swieca to have been said by Ms Fountain to have been commissioned by Unique were unknown to Mr Swieca, and therefore not before me. Furthermore, if the investigation was carried out at the request of Unique, then the investigation was at least possibly (if not probably) about the manner in which Unique had acted, and nothing to do with how the respondent to this claim had acted.

14 Mr Swieca referred to me several further authorities in support of the proposition that the fact that Ms Fountain, on behalf of Unique, had asked Croner to carry out an investigation meant that there was a material change in the circumstances which was such as to (a) justify me reconsidering the decision of EJ Smail, or (b) require me to do so. One was the decision in *Conquer v Boot* [1928] 2 KB 336. Another was *Farrar v Leongreen* [2017] EWCA Civ 2211; [2018] 1 P & CR 17. In addition, Mr Swieca relied on a decision of the European Court of Justice: *Asturcom Telecomunicaciones SL v Rodriguez Nogueira* (C-40/08). Furthermore, Mr Swieca said that the decision of an employment tribunal showed that a failure to carry out an investigation could be harassment. He relied in that regard on the decision of *Lewis v Network Rail* 3300540/2019. None of those cases appeared to me to assist the claimant here.

15 In those circumstances, having heard from Mr Swieca at length and having considered the proposition that the fact that Ms Fountain had said that Unique had commissioned an investigation, to be carried out by Croner, meant that the ruling of EJ Smail should be reconsidered, I concluded that there was no justification for such reconsideration. Even if the investigation had in fact been into the circumstances of the termination of the claimant's engagement with the respondent, I concluded that that investigation in itself would not have been material in any relevant way to the determination of EJ Smail that the application for permission to add a claim of pregnancy discrimination should refused. I came to that conclusion because I could not see how the fact that such an investigation was commissioned could have affected EJ Smail's decision to refuse such permission, given (I saw from paragraphs 13-18 of the reasons for that decision, at pages 28-29) that that decision was made principally on the basis that the application to add the claim was made long after the expiry of the limitation period for making a claim about the events to which the proposed amendments related.

16 That meant that the only claim before me was that of a breach of the 2010 Regulations. I therefore return to that claim.

The claim of a breach of the 2010 Regulations

17 After much discussion with Mr Swieca, I was able to discern that the claim of a breach of the 2010 Regulations was that the claimant had asked for a copy of a statement which complied with section 1 of the Employment Rights Act 1996 ("ERA 1996") relating to her employment with the respondent, and not received one.

18 That claim was advanced under regulations 5 and 16 of the 2010 Regulations, read together. Mr Swieca's submission was that regulation 5(2)(a) showed that after the claimant had been employed by Unique to provide services to the respondent for more than 12 weeks, she had the right to be treated as if she were an employee of the respondent, which meant, said Mr Swieca, that she was entitled to a statement complying with section 1 of the ERA 1996 as if she were an employee of the respondent.

19 That claim was in my view unsustainable. That is for the following reasons.

20 The claim was based on a failure by the respondent to comply with a request made by the claimant under regulation 16(3) of the 2010 Regulations. That request was for a statement of the claimant's terms and conditions. The request which was relied on in that regard was made in the letter dated 5 November 2017 at page 114, which was addressed to the respondent and was in these terms:

> "As per the regulation 16 paragraph 3 of the Agency Workers Regulations 2010 Act, I hereby request to provide me with the following information:
>
> - Basic pay per annum
> - Annual leave entitlement
> - Notice period
> - Benefits and rewards
> - Job description
>
> Please note that failure to provide the aforementioned information within 7 working days shall be treated as a deliberate action and subject to regulation 16 paragraph 9 of the Agency Workers Regulations 2010 Act.
>
> All information regarding this matter shall be made in writing or else null and void."

21 Regulation 5(2)(a) of the 2010 Regulations needs to be read with regulation 5(1). Together, they provide:

> "(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—
>
> (a) other than by using the services of a temporary work agency; and
>
> (b) at the time the qualifying period commenced.
>
> (2) For the purposes of paragraph (1), the basic working and employment conditions are —
>
> (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer".

22 Regulation 16 of the 2010 Regulations provides:

> "(1) An agency worker who considers that the hirer or a temporary work agency may have treated that agency worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

> (2) A temporary work agency that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—
>
> (a) relevant information relating to the basic working and employment conditions of the workers of the hirer,
>
> (b) the factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker at the time when the breach of regulation 5 is alleged to have taken place, and
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> (c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—
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> (i) explains the basis on which it is considered that an individual is a comparable employee, and
>
> (ii) describes the relevant terms and conditions, which apply to that employee.
>
> (3) If an agency worker has made a request under paragraph (1) and has not been provided with such a statement within 30 days of making that request, the agency worker may make a written request to the hirer for a written statement containing information relating to the relevant basic working and employment conditions of the workers of the hirer.
>
> ...
>
> (7) Paragraphs (1) and (3) apply only to an agency worker who at the time that worker makes such a request is entitled to the right conferred by regulation 5."

23 Mr Swieca accepted that at no time had the claimant made a request to Unique in writing, seeking the information referred to in regulation 16(1) of the 2010 Regulations. Accordingly, if only for that reason, given the opening words of regulation 16(3), there was no breach of regulation 16(3) by the respondent.

24 In addition, the claimant's purported request under regulation 16(3) was made long after the claimant's engagement with the respondent had ended. Thus, given regulation 16(7), for that reason too, no valid request had been made by the claimant under regulation 16(3).

25 Further, and finally, in my view the right to be given information under regulation 16(3) was not to a right to be given a statement complying with section 1 of the ERA 1996, not least because such a statement needs to be given only in relation to employment under a contract of employment, and the rights conferred by regulation 5(2)(a) of the 2010 Regulations are only to be treated comparably to a relevant employee of the hirer in question, in this case the respondent. In addition, and in any event, the right to a statement complying with section 1 of the ERA 1996 arises under that section, i.e. it is a statutory right, and not (as

required by regulation 5(2)(a)) a contractual right arising under the terms of an employee's contract of employment: regulation 5(2)(a) confers right only to the benefit of "the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer".

26 For all of the above reasons, in my judgment the claimant's claim of a breach of regulation 2010 was not well-founded and had to be dismissed.

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Employment Judge Hyams

Date: 13 January 2021

Sent to the parties on:

01/02/2021

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J Moossavi

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For Secretary of the Tribunals