Case Number: 2301461/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Yasin**

Respondents: **Mitie Ltd (1)**
Butler Rose Recruitment Ltd (2)

Heard via Cloud Video Platform (London South) **On: 15 March 2021**

Before: **Employment Judge Davidson**

Representation

Claimant: Mr N Toms, Counsel
First Respondent: Mr H Zovidavi, Counsel

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

1. The tribunal does not have jurisdiction to hear the claimant's complaints of under the Equality Act 2010 and these are hereby dismissed.

2. The tribunal does have jurisdiction to hear the claimant's complaints of detriment following a protected disclosure.

Employment Judge **DAVIDSON**

22 March 2021

REASONS

The hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

2. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

3. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.

4. The participants were told that it was an offence to record the proceedings.

5. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

Issues

6. The issue for the hearing was whether the claimant had status to pursue his claims for discrimination and public interest disclosure. In particular:

    a. was the claimant an employee within the meaning of section 83 of the Equality Act 2020 (EA);
    b. was the claimant a worker within the meaning of section 43K of the Employment Rights Act 1996 (ERA)?

Evidence

7. The tribunal heard evidence from the claimant on his own behalf and from Emma Nekrews (Finance Director/Technical Services Finance Lead) on behalf of the first respondent. There was a bundle of documents running to 242 pages.

Facts

The tribunal found the following facts on the balance of probabilities:

8. The first respondent is a strategic outsourcing and energy services company. It provides infrastructure consultancy, facilities management, property management, energy and healthcare services. At the relevant time, it had a contract with the Ministry of Justice (MOJ).

9. The claimant is an accountant with experience in public and private sector businesses.

10. In August 2019, the first respondent was looking for a temporary Finance Business Partner (FBP) to work on the MOJ contract. At the time, the first respondent did not know whether the contract would be ongoing and therefore did not want to appoint a permanent member of staff to the role. Tom Parry interviewed the claimant on behalf of the first respondent and the claimant was subsequently offered the role.

11. The claimant offered his services as an independent contractor operating through a personal services company called Berk Executives Limited ("Berk"). Berk contracted with the second respondent to provide services to the first respondent under an agreement entered into on 7 August 2019. The first respondent was not a party to this Agreement.

12. The Agreement had a confirmed start date of 1 August 2019 and an end date of 31 March 2020. Berk was required to maintain various insurances in order to contract with the second respondent.

13. Terms of the contract were not negotiated with the claimant. They included:

    13.1. a provision confirming that this was not a contract of employment
    13.2. no mutuality of obligation
    13.3. services being provided by Berk as an independent contractor
    13.4. a qualified entitlement to assign or subcontract
    13.5. non-exclusivity
    13.6. qualified flexibility in how and when to provide the services.

14. The claimant was provided with the standard job description for the FBP role. Most FBP roles were filled by employees of the first respondent but there were a number of consultants, including the claimant. I find that the job description was generic for the FBP position and not tailored for, or aimed specifically at, the claimant.

15. The claimant was assigned to provide his services to the first respondent as part of a temporary assignment. Berk issued invoices to the second respondent in respect of the services of the claimant which had been provided to the first respondent, based on the timesheet information showing the number of hours worked. The consultant's daily rate was higher than an equivalent employee would receive by way of salary and this took into account the inability of consultants to take advantage of various benefits and entitlements only available to employees.

16. Following submission of the invoice, the second respondent paid the consultancy fees due to Berk. The first respondent had no responsibility to pay Berk and/or the claimant.

17. When the claimant started his assignment, he attended some training sessions to familiarise himself with the first respondent's systems. He was provided with a laptop and an email address. He did not have access to the first respondent's internal HR system.

18. He worked with a team of three individuals within the second respondent's organisation and directed some of their work but he was not their line manager.

He also worked with an offshore group of assistant accountants working in India through an offshore provider called Genpact.

19. The claimant worked with Emma Nekrews and Tom Parry as part of the team working on the MOJ contract. He was not appraised or line managed although he discussed his work with the rest of the team. He attended meetings with the external client (MOJ) and worked normal office hours. He followed their dress code and when unwell, he worked from home. He would not have been paid for days he did not attend, whether the absence was due to sickness, holiday or another reason.

20. The claimant did not attempt to send a substitute as the need did not arise. He believes that he would not have been able to do so in reality. The first respondent accepts that any substitute would have to be cleared by them but does not rule out the possibility.

21. The first respondent did not pay the claimant's travel expenses from his home to his assigned office in Bristol. The first respondent did pay expenses for travel to London.

22. The claimant attended a Finance Business Partner Conference, which was for all FBPs including consultants. The claimant said that all those attending (including consultants) were offered an incentive to reduce receivables although this is not in his witness statement and there is no mention of this in the lengthy slides of the presentation at that event. I find that no such incentive was offered although it is possible that encouragement was given to the FBPs to reduce receivables.

23. The claimant stated that he had high level access to the MOJ account settings, higher than Mr Parry and Ms Nekrews and he was able to amend the master commercial agreement document between the first respondent and the MOJ.

24. When the claimant raised a grievance, the first respondent explained that they did not need to investigate it as he was not an employee, although they did carry out an investigation.

<u>The Law</u>

25. The relevant statutory provisions are as follows:

25.1. Section 83(2)(a) EA provides

(2)"Employment" means—

a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

25.2. Section 230(3) ERA provides

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes 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;

25.3. Section 43K ERA (protected disclosure detriment) provides

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)".

Conclusions

Employment relationship

26. The claimant's representative confirmed that, notwithstanding the content of the claim form and the claimant's witness statement, he was not seeking to imply an employment contract between the claimant and the first respondent. The authority relied on by the respondent of *James v London Borough of Greenwich [2008] EWCA Civ 35* would make this difficult on these facts as there is no contractual relationship between the claimant and the respondent and there are other explanations other than employment for the connection which exists between the claimant and the first respondent. I therefore find that the claimant did not work under a contract of employment.

Employment under a contract personally to do work

27. I must consider whether the claimant was 'employed under a contract personally to do work'. One issue is whether the claimant was required to perform the services himself or whether he could substitute himself with another person. The contract is explicit that this is permitted, with some qualifications. This was never tested because the claimant never attempted to use a substitute.

28. In looking at the terms of the contract, I must have regard also to what happened in practice, following *Autoclenz v Belcher (2011) ICR 1157*. Given that this issue never arose in practice, I must form a view as to whether the first respondent would have allowed the claimant to subcontract the services.

29. In considering this, I note that, although the claimant had relevant experience and skills, these were by no means unique. He replaced a previous FBP (who was a consultant) and was, in turn, replaced by another FBP, also a consultant. Any substitute would have to be made familiar with the operating models of the first respondent and the first respondent would expect to be consulted about the substitution but I do not agree with the claimant's conclusion that he would be 'kicked out' if he attempted to supply a substitute.

30. If I am wrong and a substitution would not have been permitted, I must also consider the other aspect of the definition, which is that the claimant must be 'employed under' such a contract.

31. This requires consideration of the issue of 'subordination'. In *Allonby v Accrington and Rossendale College [2004] ICR 1328*, the ECJ drew a distinction between people performing services for and the direction of another person in return for which they receive remuneration and independent providers of services who are not in a relationship of subordination with the person who receives the services.

32. The claimant gave contradictory evidence regarding subordination. He explained how he had specific skills and experience which gave him high level access to the first respondent's information and contract settings. He also said that he was effectively doing the job of a Director of Finance and that he had was the only one wo was privy to the commercial contract with the MOJ, including Mr Parry and Ms Nekrews. These factors suggest that the role was not a subordinate role.

33. On the other hand, the claimant said he kept office hours and reported to Ms Nekrews on a monthly basis. I accept the respondent's evidence that the claimant worked as part of the team and liaised with the first respondent's Finance team, as would be expected. He was also expected to adopt the first respondent's operating procedures but I do not find that these factors amount to a relationship of 'subordination'. The fact that the claimant reported to Ms Nekrews on a monthly basis does not indicate subordination which, in my view, would require reporting on a daily or, at most, a weekly basis.

34. There may not be an obvious distinction in the way the claimant interacted with those he was working with compared to an employee performing his role. However, I find that the concept of 'subordination' covers a much wider range of control than assigning tasks or reporting outcomes. Subordination covers the relationship where the individual has to request holiday, is subject to performance reviews, appraisals, disciplinary procedures and can be reassigned at the employer's will. These elements were lacking from the relationship between the claimant and the first respondent.

35. I have taken into account the importance of protection against discrimination in the workplace and I have focussed on the nature of the relationship in practice, rather than the written contractual terms. However, I must follow the wording of the statute and, in my view, the claimant does not fall within the relevant definition. I find, therefore, that the tribunal does not have jurisdiction to hear his complaints under the Equality Act.

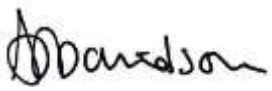
Extended definition of 'worker' under section 43K ERA

36. I now turn to consider whether the claimant falls within the extended definition of worker for the purposes of the whistleblowing legislation.

37. The extended definition of worker in section 43K applies to agency workers and individuals supplied via an intermediary provided that the terms are not set by the worker themselves. I find that, in this case, the claimant's services were supplied via more than one intermediary and the claimant was unable to influence the terms on which he contracted. These were given to him to accept or reject and there was no opportunity for negotiation.

38. Following the authority of *Croke v Hydro Aluminium Worcester Ltd UKEAT/0238/05* and *Keppel Seghers UK Ltd v Hinds [2014] IRLR 754*, I find that a person can be a worker for these purposes even if they contract with the intermediary through a personal service company, as the claimant did in this case.

39. I find that the claimant does fall within the definition of worker for whistleblowing claims and the tribunal does have jurisdiction to hear this claim.



Employment Judge **DAVIDSON**

23 March 2021