EMPLOYMENT TRIBUNALS

Claimant: **Ms C Anderson**

Respondents: **Astellas Pharma Europe Limited (R1)**

Clinical Professionals Limited (R2)

Heard at: **via CVP** **On: 27/5/2021 – 28/5/2021**
In chambers on 10/6/2021 – 11/6/2021

Before: **Employment Judge Wright**

Representation:
Claimant: **Miss R Owusu-Agyei - counsel**

Respondents: **Mr G Baker – counsel R1**

Mr N Caiden – counsel R2

RESERVED PRELIMINARY JUDGMENT

It is the Judgment of the Tribunal that the claimant was not an employee or worker of either respondent and she was not a work seeker of R2.

REASONS

1. This preliminary hearing was listed at a case management discussion on 22/1/2020 to determine the preliminary issues:

   whether the claimant was an employee or worker under the meaning at s.230 (3) of the Employment Rights Act 1996 (ERA);

   whether the claimant was a contract worker, pursuant to s. 41 of the Equality Act 2010 (EQA);

   whether the claimant was a work seeker, pursuant to s. 55 EQA (this claim is only pursued against R2).

2. The Tribunal heard evidence from the claimant. Then from Jason Carter and Maurice Timmermans on behalf of R1 and Thomas Hancox on behalf of R2. Oral submissions were given and detailed written submissions were provided. There was a bundle of 1082-pages[1]. Hearing the evidence and submissions took the entire two days of the listing and so Judgment was reserved. The Tribunal thanks the representatives for their assistance during and after the hearing.

3. Who is who? The claimant is an individual who worked in the pharmaceutical industry from April 2013.

4. On 5/10/2015 the claimant incorporated JMNL Ltd (JMNL). She is the sole director and person with significant control. Explaining this, the claimant said: 'I knew to enhance my career especially within the pharmaceutical industry I had to take this role. In readiness to start with Roche[2], I formed JMNL'. It will be noted the formation of JMNL pre-dated the events of which the claimant now complains.

5. The second respondent (R2) is an employment business providing full time and temporary recruitment.

6. The first respondent (R1) is the European headquartered representative of a Japanese based pharmaceutical company.

Findings of fact

[1] As a note for those compiling the bundles, there were numerous email strings unnecessarily repeated in the bundle and seemingly irrelevant email strings were also included.

[2] Where the claimant's limited company contracted prior to the position with R1.

7. R2 entered into a contract with R1 on 2/1/2013 to provide staff. R2 has various methods of engagement. R2 places staff under temporary and fixed term contracts, in addition to permanent or fixed term and 'hosted' employment model.

8. In early March 2018 Mr Hancox of R2 became aware of a vacancy at R1 which he felt would suit the claimant and he contacted her to discuss the same.

9. On 7/3/2018 Mr Hancox emailed the claimant regarding the prospective role at R1 (page 275). In that email, he said: '6 month initial contract, ideally to start in April'. In response, the claimant expressed her interest and conversations (via email and telephone) ensued and the claimant informed Mr Hancox that her current contract was due to terminate at the end of that month.

10. Arrangements were then made for the claimant to meet relevant staff at R1 and she was sent R1's 'Culture - Our Guiding Principles Presentation' document. That document reads:

> 'Introduction
>
> We are proud that Astellas continues to be a truly successful company achieving substantial growth in an increasingly complex market.
>
> We support you, our employees, whilst you are with Astellas, from the moment you consider us as an employer through the recruitment process, to becoming part of our company, helping with your development to reach your potential, up to the time you decide to leave us, but still remaining as an Astellas alumnus.'
>
> [note the reference to 'our employees' in the first line of the second paragraph]

11. On 18/4/2018 Mr Hancox questioned R1's Internal Recruitment Coordinator what the reason was for the role being interim as opposed to being a permanent position? He also raised other queries which were relevant to the claimant, such as working from home (page 344).

12. They had also discussed the daily rate. Mr Hancox suggested £475 and the claimant overruled that and said to offer £550. Mr Hancox negotiated with R1 and the rate of £525 was eventually agreed. The claimant, then understandably said that she wanted to sign JMNL's contract with R2 before giving her notice in her current role. After reaching agreement in principle, on 26/4/2018 Mr Hancox congratulated the claimant and sent

her the draft contract and said her company name and start date (etc) would need inserting (page 350). Subject to adding in the claimant's company's name, the contact was between that entity (JMNL) and R2.

13. The claimant clearly carefully read the contract (she agreed she did in cross-examination) and queried some clauses. Mr Hancox took the queries to his legal team. In one email, Mr Hancox said: 'she's essential a contracts manager by the way, so she's standing firm on a lot of these'. It is obvious that Mr Hancox started to feel he was becoming a 'middle man' and he suggested that the claimant may wish to speak directly to his colleague(s) (presumably 'legal') in order to answer her queries. At one stage, the claimant said she would only agree to a proposed term if R2 would guarantee her a placement with a new client once this contact ended (page 358).

14. There were also queries over the start and termination date. The start date was hampered by the fact R1 has set start dates.

15. On 30/4/2018 the claimant sent to Mr Hancox proof of JMNL's insurance coverage (page 367). The claimant did not query this request.

16. On 1/5/2018 the claimant was asked for information and documentation, including her limited company's VAT certificate, although this request seemed to generate further emails to be exchanged.

17. The claimant declined to sign the 48-hour working week opt out.

18. On 3/5/2018 the claimant, on behalf of JMNL, signed a document to say that IR35 did not apply to her limited company (page 101).

19. By the 4/5/2018 the outstanding issue was responsibility for getting the claimant's time-sheet signed. The claimant commented to Mr Hancox (although the sentence does not make sense, however it is the claimant's description of herself which is relevant): 'The only point I do not agree with is the fact that I am held responsible for having [Mr Timmermans] approving my timesheet within a day. But please inform [Mr Carter] and* sure it won't come across well if it is the first time they hear this from the contractor.' (page 421)

    [*Perhaps this should read 'am'?]

20. This followed a query from the claimant about a background check which R1 required. She said: 'As a contractor I have never had to do two background checks.' (page 422)

21. The fact there was no contract in place, was causing the claimant anxiety. The agreement between JMNL was dated 4/5/2018 and signed on behalf

of R2 on the same date, was signed by the claimant on behalf of JMNL on 18/5/2018 (page 103).

22. On 13/6/2018 R1 contacted Mr Hancox and confirmed the claimant's security clearance had been satisfactorily receive and she was due to start on the 18/6/2018 (page 438).

23. On 18/6/2018 a Trainee Solicitor emailed the claimant on behalf of R2 and set out timesheet and invoicing requirements (page 440). A manual was attached which gave details of how to use an online time recording and approval system for *all temp and contract workers* (page 443).

24. The claimant participated in an induction attended by contractors and employees. The Tribunal finds the employees attended a further induction session which dealt with issues such as pensions, which did not apply to contractors. It was sensible of R1 to have a general induction and to deal with matters such as fire drill procedures, which applied to all staff working on site. R1 however had a demarcation between contractors and employees.

25. On 1/8/2018 the claimant raised a query with R2 saying her previous payment did not include VAT (page 469).

26. A further query arose regarding approving the claimant's timesheet in August. On 2/8/2018 the claimant said (page 471): 'I am on site, but I do not know any one in HR or* have I met anyone within that team.'

    [* Perhaps this should read 'nor' rather than 'or'?]

27. The Tribunal finds that an employee would have, some six weeks into an engagement, have met 'someone' from HR and would have been introduced to HR.

28. There is a dispute over when the claimant informed R1 of her pregnancy. The claimant said she informed R1 on 12/7/2018 (page 28). Her son was born on 31/1/2019 and so she would have been approximately 10-weeks pregnant at that time. In an email to Mr Hancox of 25/9/2018, the claimant said (page 497): 'I am quite happy with my position in the team and told everyone the good news while they were all very happy and excited for me they all wanted to know when I will be back which is a great sign.'

29. The Tribunal finds that the claimant did not inform R1 of her pregnancy until much later than she said in her evidence. The claimant's email to Mr Hancox also indicates that she only told her team during September 2018 when she would have been around four months pregnant.

30. On 31/8/2018 Mr Timmermans emailed a colleague and said (page 491):

> 'Regarding the upcoming leave of [the claimant] in January, I've explored with the team and HR on coverage.
>
> The 'normal' time of maternity leave for employees in the U.K. is a year, but [the claimant] being self-employed sees herself only taking 6 months (January-July).
>
> Asking you for approval for 1 contractor, fixed term of 8 months, starting December 1st 2018.
>
> With notice periods, recruiting time and interviews, we would need to start this process early September.
>
> If you are ok, I will initiate request with successfactors and work with HR.
>
> This will go in parallel with the 18month extension request in successfactors of [the claimant's] contract we agreed upon couple of weeks ago. ([The claimant] is performing better than expected and definitely a talent we want to retain in the future).'

31. On 19/9/2018 the claimant was invited to R1's Christmas party. The invitation noted that contractors and agency staff will be asked to pay a nominal fee of £20 to attend in line with HMRC guidance. It also stated that employees and agency staff will not be asked to contribute (page 496). The claimant replied and said she would like to attend. She also said that she was never asked to make the £20 contribution (witness statement paragraph 40).

32. At some point, the claimant raised the question with R2 of using the substitution clause in the contract between JMNL and R2 (clause 3.4 page 106). The claimant said in evidence that her main motivation was to in essence, keep her option of returning to R1 open, when she chose to return to work. She had also stated that the replacement would be charged out at a lower daily rate than herself and therefore, JMNL would make a small profit. By this point, it had been discussed and agreed that her contract would be extended to June 2020 and so would be a two year engagement (less the time off she planned to take).

33. This resulted in Mr Hancox making enquiries. On 21/9/2018 Mr Hancox apologised for taking so long to get back to the claimant. He then reported that it was possible for JMNL to exercise the right to use a substitute, subject to; R1's agreement and that the replacement had the same

capabilities as the claimant (page 499). Ultimately R1 did not agree to this proposal.

34. The claimant was subsequently involved in interviewing the contractor who was going to cover her absence. It seems that she became aware of the daily rate the candidates were seeking. She queried this with Mr Hancox and said that she would raise it directly with R1 and she subsequently did so (page 522 and 531).

35. On 22/11/2018 Mr Hancox drafted an email for the claimant to comment upon requesting an increase in the daily rate to £600 per day (page 546). The claimant made some additions and the text was subsequently sent from R2 to R1 (page 554). The email was copied to Mr Timmermans and he responded with some negative observations from his point of view (page 556). R1 then made a counter offer to R2 of £550 per day effective on the first anniversary (page 579). Mr Hancox discussed this with the claimant and then asked R1 why she was not offered £600.

36. The issue was then back with R1 and internal emails were exchanged. The line manager (Amber Meriwether who had replaced Mr Timmermans) stated the offer was final and referred to the claimant's contract potentially ending the following week on 11/12/2018 (page 582). There then followed discussions between Mr Hancox and the claimant. There was also a concern that if there was no formal contract extension in place, that the claimant would not be able to return to work at R1 in January 2019 until she went on leave (page 589). An extension of the contract to 18/6/2020 was also confirmed between R2 and R1 (page 606).

37. At some point, the claimant's line manager took the decision to terminate the engagement and confirmed this on 15/4/2019 (page 660). R1 accordingly gave four weeks' notice to R2 and this was recorded in writing on 23/4/2019 (page 666).

38. R2 sent the claimant details of a role (Senior Clinical Outsourcing Manager) on 31/7/2019 (page 669). It is not clear what type of contract was on offer, but ultimately, the claimant said she did not want to pursue it.

39. On 5/8/2019 Mr Hancox contacted the claimant to discuss a role (Outsourcing lead). She queried the role as it appeared to be a 'permanent role; and said that she 'normally [found] them herself'.

40. On 8/8/2019 a query arose over the invoice for the four weeks' notice. Mr Hancox said to R1 (page 671):

> '…the attached email is the last I heard of it I should have followed up when I came back. Surprised [the claimant] hasn't even mentioned it as it's a serious bit of money.
>
> FYI – she did say she's going to charge [R1] for a late fee, I told her I would imagine she'd need to have a contract in place with them to do that and it's the first we've heard she's not been paid it. Seemed to agree after that but who knows.'

41. On 9/8/2019 Mr Hancox contacted the claimant to say that he may have a permanent role coming up with Roche and asked if the claimant was interested (page 673).

42. On 22/8/2019 Mr Hancox confirmed to the claimant Mundipharma were keen to speak with her and he suggested some dates and times (page 675).

43. At no point during the engagement did the claimant claim to be an employee. She did not request holiday pay or raise any query or expectation of maternity absence (such as an entitlement to maternity leave and pay). The first time the claimant suggested that she was an employee was in a letter dated 24/6/2019 (page 943).

The Law

44. The claimant claims to be an employee of both R1 and R2 within the meaning of s. 230(1) Employment Rights Act 1996 (ERA):

> Employees, workers etc.
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (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;

and any reference to a worker's contract shall be construed accordingly.

45. If so, which respondent was her employer?

46. Was the claimant in 'employment' (under a contract of employment or a contract personally to do work) of R1 or R2 for the purposes of s. 83 (2) Equality Act 2010 (EQA)?

Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

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

47. Was the claimant a contract worker under s. 41 (7) EQA of either respondent?

Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

(3) A principal must not victimise a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

48. Was the claimant a work seeker under s. 55 EQA in respect of R2?

Employment service-providers

(1) A person (an "employment service-provider") concerned with the provision of an employment service must not discriminate against a person—

(a) in the arrangements the service-provider makes for selecting persons to whom to provide, or to whom to offer to provide, the service;

(b) as to the terms on which the service-provider offers to provide the service to the person;

(c) by not offering to provide the service to the person.

(2) An employment service-provider (A) must not, in relation to the provision of an employment service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by not providing the service to B;

(c) by terminating the provision of the service to B;

(d) by subjecting B to any other detriment.

(3) An employment service-provider must not, in relation to the provision of an employment service, harass—

(a) a person who asks the service-provider to provide the service;

(b) a person for whom the service-provider provides the service.

(4) An employment service-provider (A) must not victimise a person (B)—

(a) in the arrangements A makes for selecting persons to whom to provide, or to whom to offer to provide, the service;

(b) as to the terms on which A offers to provide the service to B;

(c) by not offering to provide the service to B.

(5) An employment service-provider (A) must not, in relation to the provision of an employment service, victimise a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by not providing the service to B;

(c) by terminating the provision of the service to B;

(d) by subjecting B to any other detriment.

(6) A duty to make reasonable adjustments applies to an employment service-provider, except in relation to the provision of a vocational service.

(7) The duty imposed by section 29(7)(a) applies to a person concerned with the provision of a vocational service; but a failure to comply with that duty in relation to the provision of a vocational service is a contravention of this Part for the purposes of Part 9 (enforcement).

49. S. 56 EQA provides:

Interpretation

(1) This section applies for the purposes of section 55.

(2) The provision of an employment service includes—

…

(d) the provision of a service for finding employment for persons;

(e) the provision of a service for supplying employers with persons to do work;

50. A bundle of authorities was provided and they were all considered. In particular, the Tribunal was referred to: Camden LBC v Pegg UKEAT/0590/11, Tilson v Alstom Transport [2010] EWCA Civ 1308, James v London Borough of Greenwich [2007] IRLR 168, Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217, Halawi v WDFG UK Ltd [2014] EWCA Civ 1387, Halawi v WDFG UK Ltd UKEAT/0166/13, Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, Chet v Capita Translation and Interpreting Ltd UKEAT/0086/15, Bates van Winkelhof v Clyde & Co Llp [2014] UKSC 32 and Uber BV v Aslam [2021] UKSC 5.

51. The Tribunal was referred to paragraph 85 in Uber:

> 'In the Carmichael case there was no formal written agreement. The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.'

52. R2 contended that the claimant falls outwith s.55 EQA protection. Mr Caiden relies upon the *obiter* comments of the EAT in Chet v Capita Translation and Interpreting Ltd UKEAT/0086/15. He contends that Chet refers to s. 55 EQA not covering this case as the person protected is the 'employer to whom the 'person to do work' is supplied', in this case, that is R1, not the claimant. His second argument is that R1 was not in any event supplying the claimant; it was JMNL who was supplied to R1 by R2, not the claimant.

53. In the section Mr Caiden referred to, what was said in Chet, was:

35. As to 56(2)(e), the reference in 55(2)(a) is to A providing the service - that is the service of supplying employers with persons to do work - to B. Mr Humphreys acknowledges that B, in this context, is the employer to whom the "person to do work" is supplied. The same is true of B in 55(2)(b) and in (c). The issue, therefore, is whether B should be read in any wider sense in 55(2)(d). A natural reading would read it in precisely the same sense in respect of the same relevant service as B is to be read in (a), (b) and (c). To do otherwise would leave B as capable of being any person without limitation unless, as Mr Humphreys submits, there is an implicit limitation in the words "in relation to the provision of an employment service" in section 55(2), and the opening words. However, there is no inherent limitation in those words which I can see which would necessarily prevent B having a wide scope - one wider than it seems sensible to attribute to the intention of Parliament.

36. Mr Humphreys argues that the Equality Act provision is slightly wider than those in the provisions in the statutes which were replaced by it; namely the Sex Discrimination Act 1975 and the Race Relations Act 1976. So far as "in relation to" is concerned, those statutes provided at Race Relations Act section 78, under the definition of "employment agency", the cognate expression to "employment service provider" that it meant:

"…a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers" The words "in relation to" provide a broader scope. The words "persons who work" is a wider expression than "workers", which has its own restrictive definition. He submits, therefore, that by parity of approach I should read the rest of section 55 more widely than might otherwise have been the case.

37. I am unable to read those words in the way for which he argues. However, I would say this: the reasons I have given have been those which have turned upon a literal approach, mindful also of the purpose of the provisions. It may be that a more developed argument will be capable of showing that without some such approach as Mr Humphreys advocates a real case of discrimination could not be brought before the Courts in situations in which the public might expect that it should be. If so, this might be a powerful argument for supposing that my initial reaction to the statute is in error and it should be noted that since, as I have already indicated, I am not going to give permission for this point to be taken, these remarks should be seen as obiter and later Tribunals may wish carefully to consider whether they are indeed appropriate. However, had it been left to me in the present

case I would not have allowed this appeal on that ground for those reasons.'

54. The explanatory notes to s. 55 and s. 56 in the EQA read:

s. 55

Effect

188. This section makes it unlawful to discriminate against, harass or victimise a person when providing an employment service. It also places a duty on providers of employment services to make reasonable adjustments for disabled people. The duty is an anticipatory duty except for providers of a vocational service, so that in relation to the provision of vocational services, employment service-providers do not need to deal in advance with reasonable adjustments for disabled people. Employment services and vocational services are defined in section 56.

Background

189. This section replaces the separate provisions for vocational training, employment agencies and assisting persons to obtain employment in previous legislation with a single provision covering all these aspects.

Examples

- A company which provides courses to train people to be plumbers refuses to enrol women because its directors assume that very few people want to employ female plumbers. This would be direct discrimination.
- An agency which finds employment opportunities for teachers in schools offers placements only to white teachers based on the assumption that this is what parents in a particular area would prefer. This would be direct discrimination.
- An agency advertises job vacancies on its website. It will need to have the website checked for accessibility and make reasonable changes to enable disabled people using a variety of access software to use it.

s.56

Effect

190. This section explains what the provision of an employment service includes (such as the provision of training for employment or careers guidance), and what it does not include (such as education in schools), for the purposes of section 55.

Example

- Examples of the types of activities covered under this section include providing CV writing classes, English or Maths classes to help adults into work; training in IT/keyboard skills; or providing work placements.

55. The ECHR Employment: Statutory Code of Practice, refers:

Employment services

11.53 The Act places obligations on employment service providers that are similar to those placed on employers. The definition of an employment service is set out in paragraph 11.59 below.

ss.53 & 57 s.55

What the Act says

11.54 An employment service provider must not discriminate against or victimise a person in relation to the provision of an employment service:

- *in the arrangements that it makes for selecting people to whom it provides, or offers to provide, the service;*
- *in the terms on which it offers to provide the service to that person;*
- *by not offering to provide the service to that person.*

s.55(1) & (4)

Example: An employment agency only offers its services to people with European Economic Area (EEA) passports or identity cards. This could be indirect race discrimination as it would put to a particular disadvantage non-European nationals who do not hold a European passport but have the right to live and work in the UK without immigration restrictions. It is unlikely that the policy could be objectively justified.

11.55 In addition, an employment service provider must not in relation to the provision of an employment service, discriminate against or victimise a person:

- *as to the terms upon which it provides the service to that person;*
- *by not providing the service to that person;*
- *by terminating the provision of the service to that person; or*
- *by subjecting that person to a detriment.*

s.55(2) & (5)

Example: A headhunting company fails to put forward women for chief executive positions. It believes that women are less likely to succeed in these positions because they will leave to get married and start a family. This could amount to discrimination because of sex.

11.56 It is also unlawful for an employment service provider to harass, in relation to the provision of an employment service, those who seek to use or who use its services.

s.55(3)

Example: An advisor for a careers guidance service is overheard by a transsexual client making offensive and humiliating comments to a colleague about her looks and how she is dressed. This could amount to harassment related to gender reassignment.

11.57 Under the Act, an employment service provider has a duty to make reasonable adjustments, except when providing a vocational service. The duty to make reasonable adjustments is an anticipatory duty.

s.55(6)

Example: A woman who has dyslexia finds it difficult to fill in an employment agency's registration form. An employee of the agency helps her to fill it in. This could be a reasonable adjustment for the employer to make.

11.58 However, the anticipatory duty to make reasonable adjustments does not apply to vocational training (that is, training for work or work experience), where the duty is the same as in employment.

s.55(7)

What are employment services?

11.59 'Employment service' includes:

- *the provision of or making arrangements for the provision of vocational training, that is, training for employment and work experience;*

s.56(2)

- *the provision of or making arrangements for the provision of vocational guidance, such as careers guidance;*
- *services for finding people employment, such as employment agencies and headhunters. It also includes the services provided by, for example, Jobcentre Plus, the Sector Skills Council and intermediary agencies that provide basic training and work experience opportunities such as the Adult Advancement and Careers Service and other schemes that assist people to find employment;*
- *services for supplying employers with people to do work, such as those provided by employment businesses.*

11.60 The reference to training applies to facilities for training. Examples of the types of activities covered by these provisions include providing classes on CV writing and interviewing techniques, training in IT/keyboard skills, providing work placements and literacy and numeracy classes to help adults into work.

s.56(8)

Which employment services are excluded?

11.61 The provision of employment services does not include training or guidance in schools or to students at universities or further and higher education institutions.

s.56(4) & (5)

11.62 Those concerned with the provision of vocational services are subject to different obligations which are explained further in the code on Services, Public Functions and Associations under Part 3 of the Act (see Code on Services, Public Functions and Associations).

Conclusions

56. The first question is what was the true intention of the parties in this relationship? It is clear, the claimant considered herself to be an independent contractor, offering her services via JMNL. JMNL contracted with R2 and via the contract between R2 and R1, JMNL was supplied to R1 and it was the claimant who performed the services. During the engagement, that was what happened and it was also what the parties intended would happen. There was no sham and nor was any party misled as to the relationships or each party's contractual position.

57. It was never intended that the claimant would be an employee of R1 or R2. If anyone employed the claimant, it was JMNL. The Tribunal was not

provided with a written contract between the claimant and JMNL, however she did take a salary from JMNL.

58. There was evidence of JMNL having insurance, paying VAT and the claimant attempted to exercise the substitution clause on behalf of JMNL.

59. R2 did not exercise any control over the claimant and there was no obligation upon it to offer JMNL any work, or for JMNL to accept any offer. Indeed there was evidence of the claimant refusing offers of work which R2 made to JMNL. Furthermore the contract between JMNL and R2 did not require personal service from the claimant. JMNL was able to send a substitute for the claimant and R2 agreed to that, albeit R1 did not ultimately agree to this proposal.

60. The claimant had had the engagement options explained to her by R2. She chose to be an independent contractor. She knew the risks and the benefits. The benefits were in the main financial and the claimant took her accountant's advice and structured JMNL's affairs so that she as the sole shareholder and director directly benefitted. The risk was that JMNL's contract with R1 may not be extended or may be terminated (as it indeed was). The claimant was aware of this and it is noted that she attempted to get R2 to agreed that JMNL would be guaranteed a replacement contract, once the one with R1 ended. The claimant deliberately chose to incorporate JMNL and to offer her services via that entity.

61. There was no mutuality of contract between the claimant and R1 and there was no contract between them, or indeed between R1 and JMNL.

62. It is not necessary to imply a contract. The contracts which existed reflected the business reality, the intentions of the parties and how it was intended the relationships would operate in practice. For example, R1 expressly did not wish to take on a permanent employee as it envisaged the role was temporary.

63. JMNL was incorporated prior to it being supplied by R2 to R1. The claimant challenged parts of the contract between JMNL and R2 and she negotiated the rate of pay. There was no requirement by either R2 or R1 for the claimant to offer her services via JMNL.

64. The claimant never queried her status during her engagement. It may have been the case that it was not possible to distinguish the claimant from R1's employees. She had part of an induction and training to use R1's system. That does not transfer her into an employee and the Tribunal was told that different i.d. cards were issued to contractor and employees. R1 was also careful to distinguish contractor and employees,

for example the requirement for a nominal payment to attend the Christmas party.

65. The claimant cannot get away from the fact that she attempted to use the substitution clause and had R1 permitted it, she would have done so.

66. To qualify as a worker, the claimant has to undertake to do or to perform personally any work or services. The claimant was not subjected to this obligation and she was not obliged to personally perform any work. The claimant was a self-employed contractor in business on her own account. The claimant was not a worker of either R1 or R2.

67. The claimant was not a vulnerable individual. She was an experienced business woman and she negotiated over several aspects of the contract, She offered her services as self-employed via her limited company. She knew the distinction between being engaged as an employee, a worker or as a self-employed contractor. She chose for JMNL to be engaged by R2 and supplied to R1.

68. R1 and R2 had no control over and indeed were not aware of the contract between the claimant and JMNL. Subject to the requirements of HMRC, it was entirely up to the claimant how that was structured. As far as R2 was concerned, it had contracted with JMNL. R2 had in turn contracted with R1 and via JMNL, R1 was supplied with the claimant.

69. As the claimant was a self-employed contractor, she was not a worker of R1 or R2.

70. Turing to R2's submission in respect of s. 55 EQA, the Tribunal respectfully disagrees with the contention that in section (2) (a) to (d) that the 'B' referred to is the end-user (in this case R1), rather than the individual person. That is not the interpretation contended for in the explanatory notes and the ECHR Code. If, in s. 55 (2)(c) EQA 'B' was the end user, the clause would read:

> An employment service-provider (A) [in this case R2] must not, in relation to the provision of an employment service, discriminate against a person (B) [in this case the claimant] –
>
> (c) by termination the provision of the service to B [R1].

71. Even if that were correct, R2 did not terminate the service it provided to R1.

72. Irrespective of the lack of personal service and the lack of a contract between R2 and the claimant; it is clear from the facts that R1 did not

terminate the service it provided to JMNL. Furthermore, R2 did not terminate any service it provided to the claimant; R2 continued throughout 2019 to offer engagements to JMNL.

73. The status the claimant contended for under s. 55 EQA was against R2 only, not R1.

74. For those reasons, the Tribunal finds that the claimant was neither an employee or worker of either R1 or R2 and she was not a work seeker for the purposes of s. 55 EQA in respect of R2.

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Employment Judge Wright
Date: 9 July 2021

Sent to the parties on
Date: 15 July 2021