EMPLOYMENT TRIBUNALS

Claimant: Mrs Donkor-Baah

Respondent: University Hospitals Birmingham NHS Foundation Trust and others

Heard at: Birmingham Employment Tribunal by cvp

On: 1 June 2021

Before: Employment Judge Cookson (sitting alone)

Appearances
For the claimant: In person
For the first, second and third respondent: Ms Tokhai (solicitor)
For the fourth respondent: Mr Olaseinde (solicitor)

JUDGMENT having been sent to the parties on 25 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Written reasons were requested for my determination that the claimant's claim under Regulation 12 of the Working Time Regulations made against the first respondent is struck out under Rule 37 of the Employment Tribunal Rules of Procedure because it has no reasonable prospects of success.

2. I have also determined that the fourth respondent, 4 Recruitment Services Limited, is to be added as a party to the claim under Regulation 12 of the Working Time Regulations 1998 in substitution of the first respondent.

3. In reaching my decision I considered oral and written submissions from the parties and a bundle of documents presented for this hearing.

4. In her claim form received in 8 May 2019 the claimant brought, amongst other claims, a claim under regulation 12 of the Working Time Regulations 1998 (WTR) against the first respondent only. The background to this claim is that the claimant was an agency worker who was engaged by the first respondent via the

fourth respondent, an employment business. At all material times she worked as a Band 5 Staff nurse at Good Hope Hospital, Sutton Coldfield. The second and third respondents were at all material times employees of the first respondent at Good Hope Hospital. The claimant is of black African ethnicity and a number of her claims relation to alleged race discrimination and victimisation. She also brought claims under the Agency Workers Regulations, breach of contract and unlawful deduction from wages.

5. By way of background all of the claims in the case arise, essentially, from an incident on the night of 8 February 2019 when the claimant was unable to take her rest break in the staff room of the department where she was working. Following this incident, she says she was subjected to bullying, harassment and discrimination by various individuals, including the second and third respondents, and was suspended by the third respondent after a false allegation was made against her by the second respondent. Her assignment with the first respondent was subsequently terminated. The claimant says her complaint about these matters was not investigated properly. She complains she was victimised as a result of making the complaint.

6. These written reasons are concerned only with the regulation 12 WTR claim.

7. Following a previous preliminary hearing and of my own volition I had asked the parties to make representations to me about whether the claimant could bring her claim in relation to the interruption of her rest break against the first respondent under regulation 30 of the Working Time Regulations, as on reflection I was concerned that the tribunal may not have jurisdiction to consider that claim, notwithstanding that this was not a matter which had been raised by the first respondent.

8. Regulation 30 states as follows:

"Regulation 30 (1) A worker may present a complaint to an employment tribunal that his employer -

(a) has refused to permit him to exercise any right he has under
(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4) or 13(1);
(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; or
(iii) regulation 25(3) or 27(2); or

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1)."

9. Accordingly claims under the WTR must be brought against the employee's "employer" but there is a provision to deal with agency workers in Regulation 36 and I asked the parties to particularly address whether the claimant fell within the scope of that regulation.

10. *Agency workers not otherwise "workers"*

"Regulation 36.—(1) This regulation applies in any case where an individual ("the agency worker")

(a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but

(b) is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and

(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—

(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work,

and as if that person were the agency worker's employer."

11. In interpreting these provisions, it is important to have also have regard to the relevant provisions of Regulation 2, which provide definitions of the various terms. It seems to me the relevant definitions are:

….

"employer", in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed;

"employment", in relation to a worker, means employment under his contract, and "employed" shall be construed accordingly;

….

"rest period", in relation to a worker, means a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations;

"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;

…".

12. In written submissions received by email on 12 February 2021 before the hearing the claimant said that Regulation 36 did not apply to her. In later written submissions first respondent also asserted that the claimant did not fall within regulation 36 because the claimant was employed by the fourth respondent as a worker under a contract for services and points out that in any event it was the

fourth respondent which was responsible for paying the claimant and would therefore be the employer for the purposes of Regulation 36.

13. Turning then to the claim in this case, the claimant's claim about the alleged failure to allow her a statutory rest break on the evening of 9 February 2018 has been brought against the first respondent. Although at times the claimant did appear to seek to take a slightly different position, her primary position appears to be that she holds the NHS Trust and its staff responsible for that alleged breach, not the fourth respondent. However, there is no provision under Regulation 30 for a claim to be brought against any person other than the employer (as defined) expect in the limited circumstances allowed by regulation 36 and, as I have noted above, the parties agree Regulation 36 does not apply here.

14. Notwithstanding this the claimant argued before me that the claim against the first respondent is correctly brought and she relied upon regulation 17 in support of that assertion.

15. Regulation 17 provides this:

"Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable."

16. The claimant argument is that the reference in Regulation 17 to separate provision means she should be able to rely on the Agency Workers Regulations to bring this claim against the first respondent because those regulations allow claims against the hirer as well as the employing employment business.

17. I have found that this is misreading of Regulation 17. Regulation 17 deals with the situation where workers have a right to time away from work under statutory provisions of the Working Time Regulations and also in, say, in a contract of employment or a staff handbook. It is a provision to ensure that employees who are entitled to longer rest breaks or leave under the non- statutory provisions do not lose that more generous entitlement because of the terms of the WTR but equally clarifies that workers cannot claim both contractual and statutory entitlements to rest breaks or leave. It enables the worker to rely on another provision to determine how long the rest break or leave should not be, not how remedy for breach of any provision should be determined.

Conclusion

18. I do not accept the claimant's argument that Regulation 17 of the WTR enables her to bring a Reg 12 WTR claim against the first respondent. The parties that a Reg 12 claim can be brought against is determined by Regulation 30 and 36 and applying those provisions the only possible respondent is the party the claimant

had her contract with, that is the fourth respondent. The AWR is irreleveant to this claim. Accordingly I have concluded that the claimant's claim against the first respondent has no reasonable prospect of success.

Substitution of the fourth respondent

19. In the circumstances I did however conclude that it would be in the interests of justice and in accordance with the overriding objective to substitute the fourth respondent as the correct respondent to this Regulation 12 claim and allowed the claimant to amend her claim accordingly.

20. The fourth respondent objected to the claimant being allowed to add it as a party to this claim under Rule 34. Mr Olaseinde argued that this claim is not raised against it in the claim form and, because he says the fourth respondent had no part to play in the timing of rest breaks for the workers it supplies to end users, it would not be in the interests of justice to allow the claimant to amend her claim in the way given the costs of defending a claim for which no compensation would in any event be payable.

21. I determined that the claimant should be allowed to amend her claim so that the first respondent is substituted by the fourth respondent in relation to the Regulation 12 of the WTR. The approach I adopted was to consider all of the circumstances of the case including the balance of hardship and injustice of allowing the amendment against that of refusing it and I took into account the guidance in *Ali v Office of National Statistics* [2004] EWCA Civ 1363.

22. I found that the reasons the claimant had brought her claim against the wrong respondent were understandable in all the circumstances. In practical terms, as will be the case for most temporary workers supplied by an employment business, so called "agency workers" like the claimant, the timing and arrangements for rest breaks will be managed by the managers of the hirer. For that reason the claimant's perception that the fault must lie with the first respondent is understandable. I also noted that the first respondent had not raised any jurisdictional objection to this claim in terms when the response was filed and it was therefore understandable that the claimant's application to amend was being sometime after the claim had initially been made.

23. Although it had not been named as being responsible for the alleged breach the fourth respondent has been aware of the regulation 12 WTR claim since the claim was served upon it. In joining the fourth respondent as respondent to this claim there is no change to the substance of the claimant's claim – her complaint is still that she was deprived of her statutory rights to a break on the night of 8 February 2019 in the course of her work, the issue is simply who should have ensured she was able to exercise those rights.

24. I do not consider that the fourth respondent's arguments about the disproportionately of the remedy for this claim in terms of the costs it will face in defending the claim are relevant to the question of whether the amendment should be allowed. The remedy for breach of rest breaks is always declaratory. If the monetary value of the claim was relevant to whether it should be allowed to

continue claimants would be denied the remedy they have been provided by Parliament under the WTR. This issue of costs does not arise from the fact the substitution is made outside the statutory time limit, it arises as a result of the nature of the claim and there is no additional prejudice to the fourth respondent. The original claim and the factual basis for it was brought in time and I find that it is in the interests of justice for that claim to be determined by the employment tribunal as envisaged by the legislation, albeit that the claim is correctly to be determined against a different respondent because of the way the law applies to these particular contractual and working arrangements.

Employment Judge Cookson
30 July 2021