



EMPLOYMENT TRIBUNALS

Claimant: Mrs Donkor-Baah

Respondent: University Hospitals Birmingham NHS Foundation Trust and others

Heard at: Birmingham Employment Tribunal (by CVP)

On: 28 September 2021

Before: Employment Judge Mark Butler

Representation

Claimant: Representing herself

Respondents: Ms Tokhai (Solicitor) for the first respondent and Mr Olaseinde (solicitor) for the fourth respondent.

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

OPEN PRELIMINARY HEARING (JUDGMENT)

1. The claimant's claims brought under Regulation 5 of the Agency Workers Regulation 2010 against the first and fourth respondent have no reasonable prospects of success and are struck out.
2. This decision does not affect any of the other claims in this case.

REASONS

Introduction

3. This is the Fourth Preliminary Hearing that has taken place in this case, with the list of issues in this case still not settled. And this is despite the case having been listed for an Alternative Dispute Resolution Hearing ('ADR Hearing') to take place on 17 December 2021 and a Final Merits Hearing to take place between 24 January 2022 and 11 February 2022. This is a matter that needs to be addressed

as a matter of urgency, to enable this case to proceed. This case so far has had preliminary hearings before Employment Judge V Jones on 12 June 2020, and Employment Judge Cookson on both 01 October 2021 and 01 June 2021.

4. Unfortunately, due to time issues in this case, in this hearing I was only able to complete evidence and hear closing submissions on the issue of the date on which the claimant's assignment with the first respondent ended, if at all, and on whether to strike out the Agency Worker complaint or apply a deposit order. I was unable to address directions for the final hearing or consider the list of issues. Although I am conscious of the history of this case in terms of preliminary hearings, a further preliminary hearing is needed in this case, and separate directions on this will be sent to the parties. In effect, I am converting the ADR Hearing that has been listed to take place 17 December 2021 to be a closed preliminary hearing to settle the issues in this case, and to make directions toward a Final Merits Hearing.
5. A practical difficulty presented itself in this case in that, despite directions from the tribunal, the parties were not able to agree on a joint bundle (I attach no blame on this matter as it was something that could be accommodated). This resulted in two separate bundles being presented. The claimant's bundle ran to 148 pages, whilst a bundle presented on behalf of the first and the fourth respondent ran to 373 pages. Unfortunately, the bundle presented by the first and fourth respondent was not in electronic format, and the hard copy had not been sent out to me in advance of this hearing. I am grateful for Mr Olaseinde for getting an electronic version to me during the course of the morning, which enabled this hearing to proceed, albeit with time lost.
6. For the avoidance of any confusion, if I refer to a document in this judgment that was contained on the bundle presented by the claimant I make reference to Bundle A. And where I refer to a document that was contained in the bundle presented by the respondents I make reference to Bundle B.
7. I was mindful throughout the hearing that the claimant was unrepresented and that English is not her first language. With this in mind I ensured that guidance from the Equal Treatment Bench Book was considered and applied. This ensured that the claimant was able to effectively participate in this hearing.
8. It was explained to the parties that I could only hear evidence on matters relevant to the narrow and specific issue that today concerned. This did lead me to having to interject on occasion so as to ensure that I did not hear evidence on matters that may well be relevant to the full case but not on matters before me today.
9. The claimant gave evidence today, and I heard evidence from Ms K Sanders of the fourth respondent. No witness evidence was presented by the first respondent.
10. The claimant's witness statement ran to some 113 paragraphs. It addressed a number of matters that were not needed in this hearing. It was explained that today we would only be focussing on the witness evidence in so far as it was relevant to the narrow issue of whether the first respondent suspended or brought to an end to the claimant's assignment then.
11. There were some IT issues in the hearing. There was a time lag in communication being received, in that there appeared to be around 4 seconds between something being said and the claimant receiving it. The respondents were reminded to pause to allow the claimant to hear any question posed and to respond.

Issues

12. The issues to be determined at this hearing were defined by EJ Cookson at the Preliminary Hearing that took place on 01 June 2021. It is in paragraph 3 of the record of that hearing where EJ Cookson explained what the purpose of today's hearing was. I copy paragraph 3 in its entirety for the avoidance of any doubt:
 3. The purpose of this hearing is to determine:
 - (a) the date on which the claimant's assignment with the first respondent ended. (The reason why this it will be in accordance with the overriding objective for this issue to be determined on a preliminary basis is set out below) unless the employment judge determining this issue finds it is impossible to determine this issue without making a decision which making findings of fact which would embarrass the final tribunal based on the evidence he or she is presented with;
 - (b) depending on the outcome of that preliminary determination and entirely subject to the discretion of the employment judge determining the preliminary issue, the hearing may then go to consider the first and fourth respondents' applications for the claimant's claim under Regulation 5 of the Agency Worker's Regulations should be struck out or subject to a deposit order;
 - (c) case management orders required for the final hearing unless previously determined.
13. In essence, the claimant's position is that she was suspended by the first respondent on or around 10 February 2019, and that this suspension continued until 06 November 2019, when she was told that she could re-commence booking shifts with the first respondent. The claimant's claim under Regulation 5 of the Agency Worker Regulations is brought on the basis that this suspension was unpaid, which is treating her lesser than non-agency worker staff who would have been paid in these circumstances. Whereas, the first and fourth respondents' position is that the claimant's working with the first respondent was brought to an end after the shift that she worked on 09/10 February 2019, that there was no suspension, and therefore this claim for suspension pay has no basis and should be struck out.
14. The claimant's claim under Regulation 5 of the Agency Worker Regulations 2010 is reliant on her assignment with the first respondent continuing and having been suspended from around 10 February 2019 up until 06 November 2019. If this is not the case, then the claim brought under the Agency Worker Regulations has no reasonable prospects of success.
15. Unfortunately, due to time, I was unable to give the decision to the parties at this hearing nor to give case management directions in a case that really needs further case management.
16. However, I have sent the parties case management directions alongside this decision, which should hopefully help the parties in moving the case forward toward a final hearing. These directions are contained in a separate case management document.
17. I have been conscious throughout to ensure that in deciding the issues above, I have not made any findings that may cause difficulties to the tribunal that hears the final merits hearing.

Closing remarks/arguments/submissions

18. I received in advance of the closing remarks of the parties, a skeleton argument prepared on behalf of the first respondent. In addition to this document, I heard oral closing remarks on behalf of both the first and fourth respondent, and from the claimant. I do not repeat those here, but assure the parties that these have all been taken into account when reaching this decision.

Rules of Procedure to be applied

19. The tribunal's case management power of strike out is contained at Rule 37 of the And this provides that:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

20. The tribunal's case management power of imposing a deposit order is contained at rule 39 of the And this provides that:

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than

one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Findings of Fact

I make the following findings of fact based on the balance of probability from the evidence I have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted me in making our findings of fact this is not indicative that no other evidence has been considered. My findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why I made the findings that we did.

I do not make findings in relation to all matters in dispute but only on matters that I consider relevant to deciding on the issues currently before me. I have been extremely careful to try and avoid making any findings of fact that are best left to the tribunal at the final hearing, and which could potentially embarrass that tribunal.

21. The claimant was booked onto a shift with the first respondent on a shift by shift basis. The claimant was not on a block booking with the first respondent. The claimant would identify shifts that she wanted to work and fill in the necessary request. The fourth respondent would email the claimant to confirm the booking and ask the claimant to confirm the booking by phone (there are two examples of this process being followed at pp95 and 96 of Bundle A). Ms Sanders gave clear evidence on this under cross examination that was consistent with the approach in these documents.
22. On 08 February 2019, the claimant identified and completed a booking request in respect of two shifts. A booking was made by the claimant to work a shift starting at 19.30 on 09 February 2019 and finishing at 07.30 on 10 February. This booking was made at 13.20 on 08 February 2019 (see p.95 of Bundle A). A second booking was made by the claimant to work a shift starting at 19.30 on 10 February 2019 and finishing at 07.30 on 11 February 2019. This booking was made at 13.18 on 08 February 2019 (see p.96 of Bundle A).
23. Whilst working the shift that was taking place between the hours of 19.30 on 09 February and 07.30 on 10 February, Ms Chesney, the nurse in charge of that night shift, issued a report to Senior nurse Mr Casson identifying a number of matters.
24. On the basis of Ms Chesney's report, Mr Casson made the decision to bring the claimant's shift to an end, and sent her home at 2.30am. The claimant accepted under cross examination that she was sent home at 2.30am. And this is consistent with the documentary evidence (see for example the shift record at p.130 of Bundle A).
25. The claimant was never told by the first respondent that she was being suspended. This is because the first respondent was not suspending the claimant but it was terminating the claimant's assignment with it at 2.30am on 10 February 2019. Although the claimant denies this, and seeks to argue that the first respondent did not terminate her assignment at that time, it is more likely than not that the first respondent ended the claimant's assignment at this time. The

shift records (p.130 Bundle A) clearly record the claimant's 09/10 February 2019 shift as being ended at 2.30am. The claimant accepts that she was told to end her shift and go home at this time. The claimant records in her claim form that her employment ended on 09 February 2019 (see p.4 of Bundle A), as well as recording in her particulars of claim that there had been a wrongful termination of her assignment (see p.16 of Bundle A). I do not accept the claimant's explanation that these references in her claim form and the date given by her was to a misunderstanding as English was not her first language. And the reason why I do not accept this is that the claimant has never requested an interpreter despite being aware that she could, and therefore must have confidence in her ability to communicate in English in this process. The documents that she has produced and the way that she presented herself today supports that she has a good working understanding of the English language: she was able to answer questions, cross examine Ms Sanders and make closing submissions. And further, my finding above and the claimant's position in her claim form is consistent with the claimant not being able to make future bookings until an investigation was concluded (see temporary staffing complaints form at pp.236-238 of Bundle B). And is further supported by the email of 11 February 2019 from Ms Salter to the fourth respondent where it is expressed that the claimant 'will be unable to book any further shifts' and to '...ensure that all pre-booked shifts are cancelled'. All of this consistent with the evidence of Ms Sanders.

26. The first respondent cancelled all future shifts that the claimant had booked before the incident on 10 February 2019 at 02.30. The claimant accepted this under cross-examination.
27. The fourth respondent in effect treated the claimant as if she had been suspended with pay at 02.30 on 10 February 2019, and paid her for the full shift that she was engaged to do. However, this suspension was only for this shift, as the claimant was booked on a shift by shift basis, and this suspension came to an end when the shift ended at 07.30 on 10 February 2019. This was the unchallenged oral evidence of Ms Sanders. She accepted that the fourth respondent suspended the claimant with pay at this time. That the fourth respondent paid the claimant for the full shift. And that the suspension only covered the duration of the shift on 09-10 February 2019, as the claimant was not engaged on a block booking.
28. The claimant was never given a further shift by the first respondent after the 10 February 2019.

Conclusions

29. Given the findings above, the claimant's agency working with the first respondent came to an end at 02.30 on 10 February 2019. The claimant was not engaged in a block booking with the first respondent from which she was suspended.
30. The matter was confused somewhat by the fourth respondent treating the claimant as suspended with full pay for the duration of the shift across 09 and 10 February 2019. But this does not alter the fact that the claimant's agency working relationship with the first respondent was brought to an end on 10 February 2019.
31. The claimant's Agency Worker claim against both the first and fourth respondent is brought on the basis that she was suspended by the first respondent from the date of the incident until the conclusion of her grievance, that being 06 November 2019. As there was no suspension in the relationship between the claimant and the first respondent, and I have concluded that the relationship was ended on 10 February 2019, it follows then that the claim brought by the claimant under Regulation 5 of the Agency Worker Regulations against both the first respondent

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and the fourth respondent has no reasonable prospects of success. And is therefore struck out pursuant to Rule 37.

Employment Judge **Mark Butler**

Date: 19 October 2021