



EMPLOYMENT TRIBUNALS

Claimant: Tracey Merritt-Hughes

Respondent: A24 Group Limited

Heard at: Bristol Employment Tribunal via CVP) **On:** Friday, 13th August 2021

Before: Employment Judge Mr. M. Salter

Representation:
Claimant: Ms. Owusu-Agyei, counsel
Respondent: Mr. Rees, director

JUDGMENT

The Claimant was not an employee of the Respondent.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons given for the judgment above. My judgment was reserved at the Preliminary Hearing and I ordered skeleton arguments to be provided by the parties. These written submissions were received by me on 24th September 2021.
2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February

2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in her ET1

3. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 9th November 2020, is in short, she was subject to disability discrimination in the form of discrimination arising from disability; a failure to make reasonable adjustments and a health and safety detriment under s44 of the Employment Rights Act 1996.

The Respondent's Response

4. In its Form ET3, received by the Tribunal on 15th January 2021, the Respondent denied the Claimant was an employee but contended accepted she was a worker within the meaning of the Equality Act 2010 and the Employment Rights Act 1996.

Relevant Procedural History

5. On 1st April 2021 the Tribunal ordered the matter be listed for Preliminary hearing to determine:

whether the Claimant was an employee within the definitions in s83 [Equality Act 2010] or s230 [Employment Rights Act 1996];

there would then be case management and the listing of a final hearing and to list any final hearing.

6. At no point did the parties request any other matters be considered at the is preliminary hearing, if they had a longer time estimate would have probably been needed.

THE PRELIMINARY HEARING

General

7. The matter came before me for a preliminary hearing. The hearing had a one-day time estimate. At the outset of the hearing the parties agreed that the issue to be determined in the hearing would be that of employment status.
8. The Claimant was represented by Ms. Owusu-Agyei of counsel and the Respondent was represented by Mr Rees, its finance director.
9. This was a remote hearing which was not objected to by the parties, being conducted entirely by Cloud Video Platform ("CVP"). A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted under rule 46.
10. The parties agreed to the hearing being conducted in this way.
11. 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, although the Claimant provide her evidence by telephone owing a technical issue at the outset of the hearing. The Respondent did not object to this approach.
12. The participants were told that it was an offence to record the proceedings.
13. Evidence was heard from the Claimant via telephone. I was satisfied that she was not being coached or assisted by any unseen third party while giving their evidence.
14. Evidence took longer than had been timetabled and so I had insufficient time to consider my judgment and give a decision. I therefore reserved my judgment and ordered written submissions and replies.

DOCUMENTS AND EVIDENCE

Bundle

15. I had before me an agreed bundle consisting of some 172 pages. This was forwarded to the tribunal on the afternoon of 12th August 2021 however, for reasons I do not understand and were never explained, the parties had left

out the ACAS Certificate, ET1, ET3 and the Notice of Hearing. from the bundle it was not clear what the hearing was for.

16. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

Witness Evidence

17. I heard evidence from the Claimant and from Mr Rees, on behalf of the Respondent.
18. The respective witnesses' statements were not forwarded to the tribunal until 0958 on the 13th August 2021. The hearing was to commence at 10am on that date.
19. Both witnesses gave evidence by way of written witness statements that were read by the me in advance of them giving oral evidence. Both witnesses were cross-examined

SUBMISSIONS

Opening Submissions

20. The Claimant provided opening submissions at 0920 on the morning of the hearing along with a 73-page authorities' bundle. I had read the submissions before the hearing commenced.
21. The Claimant's skeleton argument contained submissions on the applicability of s44 of the Employment Rights Act 1996 to workers. This had not been identified as an issue to the tribunal prior to receipt of the skeleton argument some 40 minutes before the Preliminary Hearing and was not identified in issues to be determined at the Notice of Hearing.

Closing Submissions

22. At the end of the hearing I ordered written skeleton arguments. These were supplied to the tribunal and then forwarded to me.

23. Since both parties have provided skeletons in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions.

MATERIAL FACTS

General Points

24. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant and Mr. Rees in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
25. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

26. The Respondent is a medical staffing agency that supplies agency care workers to care homes in the UK. The care homes are clients of the Respondent.
27. The care homes would contact the Respondent as and when they needed assistance. The Respondent would, historically, then call around its workers and see who would accept the assignment. Now the system is that the assignments are posted online and those who are willing to accept it accept it online, the process is now, as Mr Rees described it, one of saying you are available rather than saying you are not.

The Claimant

28. The Claimant has supplied her services to the Respondent as an agency care worker under an agency contract. Within this contract it stated that:
- (a) Clause 2.1: no contract for services exists between the Claimant and Respondent between assignments [48];
 - (b) Clause 2.2: the terms of the contract shall not give rise to a contract of employment [48];
 - (c) Clause 3.1 and 3.2: whilst the Respondent will endeavour to look for assignments it will not be liable if no suitable work is available and there is no obligation on the Respondent to provide assignments [48] [60];
 - (d) Clause 3.5: there is no obligation on C to accept any assignment [48], [60];
 - (e) Clause 9.3 and 9.5: the Respondent may terminate an assignment at any time without prior notice or liability [51][62];
 - (f) Clause 9.4 9.7: The claimant may terminate an assignment at any time without a period of notice or liability [51][62].
29. The Claimant's evidence (both cross examination and re-examination) to me was that:
- (a) since 2015 she worked for three agencies at the same time, although only two now;
 - (b) she decided to go to agencies for the flexibility they provided her with;
 - (c) when faced with a choice of work from two agencies she would decide to accept a job (and decline the other offer) on the basis of continuity of work and the client she would be working for;
 - (d) she could decline work when she wanted and in her words "can work when I want and manage my own diary";
 - (e) it was entirely her choice as to whether she accepted work or not;
 - (f) she liked agencies as they gave her flexibility to work when she wanted as this suited her personal life, as her husband worked away. She could accept work when it fitted in with her and decline it when it did not;
 - (g) when she commenced her engagement with the Respondent she underwent a screening process. She accepted these were background checks and that they were necessary for those working in the care sector;
 - (h) she undertook training with the Respondent that was "about the same" as the other agencies she was signed up with;
 - (i) she would often duplicate her training by taking training with the Respondent and also training with another agency, even if it was the same subject matter e.g. manual handling;
 - (j) she would get called when the assignments came up. Sometimes the assignments came up early in the morning and the call to her was made then. Sometimes the Claimant did not answer the call. If the call came at what she considered to be an "unreasonable time" she would not answer them;
 - (k) if she was placed at a location in which she had no experience she would call the agency and she would be replaced;
 - (l) she accepted she was able to "choose where I worked so I went to the same homes"

- (m) she did not read the terms of engagement that specifically state the Respondent did not need to offer her work and she did not need to accept that work that was offered, but is aware of it now and agreed it reflected the relationship;
 - (n) she could cancel an assignment she had accepted, and agreed she could simply not turn up, although morally she would not do this. She agreed there was nothing legally requiring her to attend an assignment she had agreed to undertake. She did not have to turn up to a shift if she did not want to;
 - (o) she accepted that pages [54-57] did not contain any material differences in her working hours or pay;
 - (p) she was not told that the Key Information document, only needed to be provided to new staff commencing with an agency after April 2020;
 - (q) when at a placement she was under the direction and control of the staff of the care home, and not those of the Respondent. The care home staff would tell her what was required, and the Respondent had involvement in the management of the Claimant;
 - (r) Whilst the Claimant could not replace herself with someone “off the street” if there was another person with the relevant background checks and training in place the Claimant could replace her with that other person;
 - (s) the requirements the Respondent had in place for its workers (training, immigration checks and police checks) were common in the industry and these were set by the Care Quality Commission, for instance a DBS check;
 - (t) the Respondent does not require uniforms to be worn, but the client might. The Respondent did not enforce the wearing of uniforms;
 - (u) she wore an identity badge with her photograph on, and her profile (containing a photograph) was sent from the agency to the client, and this was to ensure the integrity of the person presenting themselves at the care home;
 - (v) the client should return an end of placement form to the Respondent;
30. The Claimant backtracked from an assertion in her witness statement that she had seen other workers of the Respondent not wearing uniforms (CS18) as she said in evidence she was not sure about this.
31. The Claimant confirmed that the contact she had with the Respondent reflected the reality of the situation of her relationship with the Respondent.
32. In his evidence to me Mr. Rees:
- (a) accepted there may be some errors in the Respondents record keeping in relation to when the Claimant commenced with the Respondent;
 - (b) accepted the Claimant was a worker of the Respondent;
 - (c) explained that agency workers, irrespective of status are entitled to Statutory Sick Pay and holiday pay;
 - (d) explained that the Respondent was legally required to pay tax and

- national insurance for the Claimant, as did all agencies;
- (e) stated the Respondent does not have self-employed workers
 - (f) described that if a client required a worker to wear a uniform, and the worker did not, if this was raised by the client the Respondent would raise it with the worker;
 - (g) detailed how if a worker accepted an assignment but did not turn up, they would not be paid as they had not done the work. The Respondent pays for work done and not assignments accepted;
 - (h) said that taking training through the Respondents not a requirement of them taking work through the Respondent;
 - (i) accepted the word “employee” appears in the handbook at various points, for instance [29]

THE LAW

Statute

33. So far as is relevant the Equality Act 2010 states:

83 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;
 - ...
- (3) This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—
 - (a) references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;
 - (b) references to associated employers are to be ignored.
- (4) A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.

34. So far as is relevant the Employment Rights Act 1996 states:

230 Employees, workers etc

- (1) In this Act “employee” mean an individual who has entered into or works under (or, where the employment 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 phrase “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.

35. There is no single test for determining whether an individual is an employee within the meaning of s 230(1). Each case depends on its own facts. There is, however, an "irreducible minimum", without which there can be no contract of employment. That minimum comprises:

- (a) *Mutuality of obligation* - an obligation on the employer to provide work and on the employee to accept and perform the work offered;
- (b) *Control*- put simply, that ultimate authority over the purported employee in the performance of his or her work must rest with the employer; and
- (c) *Personal service* - the employee must be obliged to perform the work personally, subject to a limited power of delegation.

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433; Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 CA; Carmichael v National Power plc [2000] IRLR 43.

36. It is also relevant to have regard to the following passage in the Judgment in Hall v Lorimer [1994] ICR 218 when considering the issue of employment status:

"This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail. Not all details are of equal weight or importance in any given situation.

CONCLUSIONS ON THE ISSUES

General

37. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

The Claimant's Evidence

38. The Claimant was candid in her evidence and frequently gave answers in her evidence that differed immensely from that in her witness statement. She even reaffirmed some of these differences in re-examination. Her evidence, as a whole, was, therefore contradictory and troubling.

Findings on the Issues

Issue 1: Employment Rights Act 1996: the irreducible Core of an employment contract

39. I have decided that, on the evidence before me the irreducible core of a contract of employment does not exist between the Respondent and Claimant.
40. The claimant, on a number of occasions, accepted she was free to undertake work as and when she wanted to, often did this so as to fit in with her personal circumstances, and she agreed the Respondent was not required to offer her work.
41. There was therefore, on both parties' evidence, no mutuality of obligation: the Respondent contended, and the Claimant accepted and repeated a number of times, she was able to accept the work as suited her personal circumstances and her desire to work at a particular home. The Claimant had an unfettered right to refuse, or not accept, the assignments that were offered, and the Respondent was under no obligation to offer them.
42. If called on I would have found that there was not sufficient control exercised by the Respondent over the Claimant. Compliance with the CQC and others requirements were not unique to the Respondent and the Claimant gave no evidence of the Respondent controlling how she undertook the work or went about her activities when she had accepted the work, indeed she accepted it was the care home staff who directed her when on assignment.

43. I find therefore that there was no irreducible minimum of a contract of employment. Having determined this I do not need to consider whether the contract between the Respondent and claimant was, in fact, one of employment for the purposes of the Employment Rights Act 1996.

Issue 2: Equality Act 2010 employee.

44. The Equality Act 2010 has a different definition of employment that includes contracts to perform work personally. I consider that, when focussing on the relationship during the period of any assignment, the Claimant was contracted to perform work personally. Indeed, the “integrity” (as Mr Rees called it) of the process required that the worker who took the assignment was the one who attended the care home and would assist the vulnerable service users.
45. However, all parties agreed there was a limited power of replacement. The power was limited to those people who met the industry wide requirements of DBS checks and the like. The Claimant confirmed this power of substitution existed and reflected the reality of the situation between her and the Respondent. I do not consider it to be a sham.
46. I consider that on the evidence I have heard the Claimant would not have been an employee under this wider definition of employment.
47. However with the Respondent’s concession that the Claimant was a worker within the meaning of the Equality Act 2010 my finding does not increase or restrict her claims under the Equality Act 2010 in any way.

Employment Judge Salter
Date: 12 October 2021

Judgment & reasons sent to parties: 28 October 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.