EMPLOYMENT TRIBUNALS

Claimant: **Mr M Perry**

Respondents: **(1) Tata Steel UK Limited**
(2) Acorn Global Recruitment Limited

Heard at: **Cardiff via CVP** **On: 24 November 2021**

Before: **Employment Judge S Jenkins**

Representation:
Claimant: In person
Respondents: Ms K Hosking (Counsel)
Mr J Anderson (Counsel)

JUDGMENT having been sent to the parties on 29 November 2021, and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. This hearing was to consider the employment status of the Claimant in relation to both the Respondents as a preliminary issue, that having been identified as needing to be dealt with by Employment Judge Moore following a Preliminary Hearing on 15 July 2021.

2. I heard evidence from Ms Suzanne Botterill on behalf of the First Respondent, via a written statement and answers to oral questions from the Claimant and from me, and from Ms Emily Meredith of the Second Respondent via a written statement. Ms Meredith was not put forward as a witness to be cross-examined and therefore I attached less weight to her evidence than would otherwise have been the case, although as her statement largely consisted

of references to written documents that perhaps had little impact overall. The Claimant did not provide a written witness statement but gave brief oral evidence and answered some limited questions from me and from Ms Hosking.

3. I was provided with an electronic bundle spanning 383 pages and read the limited number of pages to which my attention was drawn. I considered Ms Hosking's written and oral submissions and oral submissions from the Claimant. Mr Anderson did not make any submissions on behalf of the Second Respondent.

Issues

4. The issue for me to consider at this hearing was set out by Judge Moore in the summary she produced following the hearing on 15 July 2021. That was whether the complaints of unlawful discrimination contrary to the Equality Act 2010 should be dismissed because the Claimant was not entitled to bring them if he was not within the employment of either of the Respondents as defined in Section 83 of the Equality Act 2010 ("Act").

5. At the outset of the hearing I indicated that we would also need to consider whether the Claimant may have been a "contract worker" of the First Respondent, pursuant to Section 41 of the Act, as to focus purely on the issue of employment under Section 83 would leave another potential route to a claim on the part of the Claimant still open and unresolved. Ms Hosking confirmed that the contract worker issue had been discussed at the preliminary hearing before Judge Moore and that she had understood that it was an issue to be addressed. As that was the case, and as Ms Hosking had addressed the contract worker point in her skeleton argument, I was satisfied that it was appropriate to proceed to consider that point as well.

Findings

6. I heard only limited evidence as I was only focusing on the employment status issue that needed to be resolved. My findings therefore are only relevant to that preliminary issue. There was, in fact, little material dispute between the parties and my findings were as follows.

7. The Second Respondent entered into a framework agreement with the First Respondent to provide cleaning and maintenance services at various of the First Respondent's sites, including its site at Port Talbot. The Second Respondent had a dedicated team assigned to those services but did, on occasion, supplement that team with additional workers, depending on need.

8. The Claimant had previously worked at the First Respondent's Port Talbot site via the agency of the Second Respondent in 2015. In December 2020

he responded to an advertisement placed by the Second Respondent for temporary workers to work at the First Respondent's site. That then led to the Claimant entering into a contract for services with the Second Respondent on 8 December 2020.

9. That contract, described as the Second Respondent's Agency Workers Terms of Engagement, contained comprehensive terms. It stated that it governed all assignments for services to be performed for an end-user undertaken by the Claimant, but specified that no contract would exist between the Claimant and the Second Respondent between assignments. The contract stated that the Claimant was engaged on a contract for services, and that he was not an employee of the Second Respondent.

10. The contract confirmed that the Claimant was not obliged to accept any assignment offered by the Second Respondent, but that if he did accept an assignment that he was offered by the Second Respondent then he would comply with various obligations, including cooperating with the end-user's reasonable instructions, observing any relevant rules of the end-user, taking steps to safeguard his own and other's health and safety, and that he would not engage in conduct detrimental to the interests of the agency or the end-user.

11. Individuals engaged by the Second Respondent to work at the First Respondent's Port Talbot site, before being able to work at that site, were required to undergo a three-stage process. First, a "Passport to Safety" course; second, pre-employment health and safety induction training; and third, local work area induction. Completion of the second of these stages led to the provision of what was known as a G4 ID card which gave the individual access to the First Respondent's site.

12. The Claimant obtained his Passport to Safety qualification prior to attending at the Respondent's site on 9 December 2020 for the health and safety induction training. That training was carried out at the First Respondent's Visitor Centre situated at the entrance to the First Respondent's Port Talbot site, although outside the fenced perimeter of the site. The health and safety training was provided by a third party contractor engaged by the First Respondent.

13. An incident arose during the health and safety induction, the details of which I did not need to consider, which led to the Claimant not completing the training and being required to leave the site. He contends that his treatment amounted to discrimination on the ground of disability, and that either or both the First and Second Respondent discriminated against him.

14. The Claimant indicated, and it was not challenged by either Respondent, that had he completed the health and safety induction he would then have gone

into the fenced perimeter the site for the local induction, and would then have commenced work.

Law

15. The general sections of the Equality Act 2010 which prohibit discrimination are Sections 39 and 40, and all relevant parts of those sections refer to "employment" and to an "employer" and an "employee". Section 83(2)(a) defines "employment" as "*employment under a contract of employment, a contract or apprenticeship or a contract personally to do work*", Section 83(4) then confirms that references to employer and employee are to be read with that definition of employment.

16. In addition to the sections prohibiting discrimination against employees, Section 41 of the Act also prohibits discrimination against contract workers by principals. In that regard, Section 41(5) notes that 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)*", and a contract worker is then, "*an individual supplied to a principal in furtherance*" of such a contract.

17. The reference within Section 41(5) to a principal making work available for an individual who is employed by another person brings in the concept of employment by that other person, i.e. by the agent, in the sense of the definition set out in Section 83.

18. The Employment Appeal Tribunal ("EAT"), in ***London Borough of Camden -v- Pegg*** **(UKEAT/0590/11)**, noted that an agency worker supplied to an end-user by an agency could be an employee of the agency, and a contract worker of the end user, once they had accepted the particular assignment.

19. It is conceivable that a claimant in an ostensibly tripartite arrangement involving an agency, the worker and the end user may establish that they were in fact, by implication, an employee of the end user, but the EAT in ***James -v- London Borough of Greenwich*** **[2008] EWCA Civ 35**, noted that that would only arise in specific circumstances which would be rare.

20. It is clear that whilst there must be a contract between the worker and the ultimate employer, this need not be an employment contract, as the section refers to a "contract personally to do work", and that includes individuals who may, on the face of it, be self-employed, the key issue being whether they are engaged personally to do work.

Submissions

21. Ms Hosking, on behalf of the First Respondent, contended that the First Respondent was not an employer of the Claimant, even under the extended definition of Section 83(2)(a) of being engaged under a contract personally to do work, as there was no contract between it and the Claimant and no need to imply one.

22. Ms Hosking further contended that the First Respondent also was not a principal of the Claimant for the purposes of Section 41, as the Claimant had not, by the relevant time, become eligible to be offered an assignment, and it followed that he had therefore not been offered an assignment. It was contended that that was the position regardless of the underlying relationship between the Claimant and the Second Respondent, i.e. whether the Claimant was employed by the Second Respondent for the purposes of Section 83 or not.

23. Ms Hosking contended that the ***Pegg*** case supported her analysis, as the EAT in that case had upheld the Employment Tribunal's findings that the claimant, Ms Pegg, was a contract worker once she had accepted the assignment from the end-user, the London Borough of Camden, via the agency. She contended that it followed that before Ms Pegg accepted the assignment, the local authority, the end-user in that case, was not her principal. She contended that the Claimant in this case similarly could not become a contract worker of the First Respondent until he accepted an assignment with it. As he had not completed the health and safety induction training that could never have happened.

24. As I heard no submissions from the Second Respondent, I was left with considering the content of its Response. That noted that the Second Respondent was an employment business and that the Claimant signed a contract for services with it which made clear that the Claimant was not an employee of the Second Respondent. The Response did not however make any further comment regarding the broader concept of employment in Section 83(2)(a).

<u>Conclusions</u>

25. Considering the issues I had to address in light of my findings and the applicable law, my conclusions were as follows.

26. First, looking at whether the Claimant could be said to have been employed by the First Respondent in the context of Section 83(2)(a), there was no express contract between the Claimant and the First Respondent. Also, none of the features set out in the ***James -v- Greenwich*** case, which might have

led to the implication of a contract of employment between the Claimant and the First Respondent, applied.

27. Similarly, there was no contract between the Claimant and the First Respondent for him personally to do work, and I concluded that there was no need to imply one as there existed a contract between the Claimant and the Second Respondent. Therefore my conclusion, even applying the broader definition, was that the Claimant was not employed by the First Respondent.

28. Turning to whether the Claimant could be said to have been employed by the Second Respondent, I noted that whilst there was a contract entered into between the Claimant and the Second Respondent, that was expressly described as a contract for services, and expressly stated that the Claimant was not an employee of the Second Respondent. I saw nothing to suggest that any implied relationship of employment could be said to have existed between them.

29. I then looked at the broader element of the definition, that is whether the Claimant was engaged by the Second Respondent under a contract personally to do work. As I have indicated, there was a contract in existence, so the key question for me was whether, notwithstanding that it was not a contract of employment, it was nevertheless a contract personally to do work.

30. In that regard, I noted that, between assignments, no contract was said to exist between the parties. However, the terms of the contract indicated that, when assigned, the Claimant would undertake work personally. Subject therefore to the question of whether the Claimant was assigned at the relevant time, which I discuss further below, that seemed to me to be a contract personally to do work. Indeed the decision in the ***Pegg*** case supported that analysis, with the Tribunal's conclusion being that, once the claimant in that case accepted an assignment to work for the end-user, she was subject to obligations personally to do work. Those obligations in fact were very similar indeed to the Claimant's obligations in this case under his contract with the Second Respondent.

31. Ultimately therefore, my decision boiled down to the question of whether the Claimant was undertaking an assignment, when he attended at the First Respondent's premises for the health and safety induction, or not. In my view he was. He had obtained his Passport to Safety qualification, and had been sent by the Second Respondent to the First Respondent's site to undergo the health and safety induction. Whilst that was not within the First Respondent's fenced perimeter, it was at the entrance to it, and was within its Visitor Centre. To my mind, that supported the Claimant's evidence, which was in any event not challenged, that, had he passed the health and safety induction, he would have gone on to the main site and undertaken the next and final induction

stage, that being the local work area induction, and then on to physically undertake work.

32. In my view, those circumstances pointed to the Claimant having been sent on assignment by the Second Respondent to the First Respondent on the day in question. By the Second Respondent's own written terms of engagement, that led to there being a contract in place between the Claimant and the Second Respondent at that time, and, as noted, that contract required the Claimant personally to do work. I therefore concluded that that Claimant was employed by the Second Respondent for the purposes of Section 83(2)(a), thus entitling him to pursue his claim against the Second Respondent.

33. I then turned to consider the question of whether the Claimant was a contract worker of the First Respondent as principal. In terms of the overall application of Section 41, I have concluded that the Claimant was employed, in the broader Section 83(2)(a) sense, by the Second Respondent, and he was supplied by the Second Respondent to the First Respondent in furtherance of its contract with it. On its face therefore, Section 41 appeared to apply.

34. As I have noted, Ms Hosking's submissions were that the First Respondent could not become a principal of the Claimant, as the Claimant had not completed the process to become eligible to be offered an assignment, relying on the ***Pegg*** case as support for that. In that regard I noted that Ms Hosking's contentions focused on the Employment Tribunal's decision in the ***Pegg*** case that Ms Pegg was a contract worker once she had accepted the assignment. In that case the position was straightforward, as Ms Pegg, after accepting the assignment, went on to work for the end-user for nearly a year.

35. However, I did not consider that the EAT's Judgment in ***Pegg*** was restricted to circumstances in which a worker physically undertakes work for the end-user. Its words were, "*Once Ms Pegg accepted the assignment with Camden she owed express contractual duties to BBT [the agency] which required her to do the work personally*".

36. In this case, I considered that the Claimant had accepted an assignment from the Second Respondent to work at the First Respondent's site when attending the specific health and safety induction provided by the First Respondent, which was to be followed by the local work area induction and then by the work itself. In those circumstances I was satisfied that the Claimant was then engaged in contract work for the First Respondent, and is therefore also entitled to pursue his claim against the First Respondent.

Employment Judge S Jenkins
Dated: 27 January 2022

REASONS SENT TO THE PARTIES ON 8 February 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche