EMPLOYMENT TRIBUNALS

Claimant: Mr M Lamjafjaf

Respondents: (1) Runnymede Borough Council
(2) RBC Services (Addlestone One) Limited

Heard at: London South Employment Tribunal by CVP **On:** 30 May 2022

Before: Employment Judge Braganza QC

Appearances

For the claimant: In person
For the first and second respondent: Mr S Horsfield, solicitor

PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that:-

1. The claimant was not an employee or worker of the first or second respondent under s230 of the Employment Rights Act 1996 and his claim for notice pay is dismissed.

2. The claimant was a worker under s43K of the Employment Rights Act 1996 and his claims for being subjected to detriments on the ground that he made protected disclosures under s47B of the Employment Rights Act 1996 (the whistleblowing claims) will proceed.

REASONS

The issue

3. By a notice of hearing dated 11 February 2022 a preliminary hearing was listed for 30 May 2022 for the Tribunal to decide "whether the claim should be dismissed

because the claimant is not entitled to bring it if they were not a worker of the respondent as defined in section 230(3) of the Employment Rights Act 1996."

Procedure

4. The preliminary hearing was conducted as a remote hearing by CVP. A face to face hearing was not held because it was not practicable. There was no objection to this by the parties and they had a full opportunity to present their case.

5. The Tribunal was provided with a bundle of 78 pages, the additional pages of the ET3 that were missing from the bundle, and the authorities of James v London Borough of Greenwich [2008] EWCA Civ 35, Keppel Seghers UK LTD v Hinds UKEAT/0019/14 and McTigue v University Hospital Bristol NHS Foundation Trust UKEAT/0354/15. The claimant gave evidence. Both the claimant and Mr Horsfield made submissions. In reaching its decision, the Tribunal considered these submissions, the evidence it heard and the documents and authorities to which it was referred.

Amendment to add the second respondent

6. At the outset of the hearing Mr Horsfield informed the Tribunal that he acted on behalf of both Runnymede Council, the first respondent, and RBC Services (Addlestone One) Limited, who he explained was the correct respondent. He did not have any documentary evidence in support of RBC Services (Addlestone One) Ltd being the correct respondent and relied only on his oral instructions. He explained that the proposed second respondent was a wholly owned subsidiary of the first respondent with five employees and its own management structure.

7. The claimant maintained that he was employed by Runnymede Council, the first respondent. RBC Services (Addlestone One) Limited, he said, was just an office, like a portacabin. Mr Horsfield agreed to provide any further documentation as to the correct respondent within 14 days. In light of the necessary further information, RBC Services (Addlestone One) Limited was added as a second respondent so that the correct respondent could be clarified at the final hearing.

8. The Tribunal noted that the document titled "Assignment Details Form" dated 2 August 2021 at [72] of the bundle named the claimant as the agency worker and Runnymede Borough Council, the first respondent, as the hirer. The form set out the particulars of the agreed placement between the Spencer Clarke Group, described as the "company", and the claimant, described as the "contractor". A further document entitled "Managed Services for Temporary Agency Resources Customer Agreement" [28] dated 17 March 2021 evidenced an agreement again between the first respondent and Matrix SCM Limited as the Service Provider responsible for providing all "Temporary Agency Workers" [36].

Background and findings of fact

9. The claimant claimed that he was employed by the first respondent from 3 August 2021 until 14 September 2021 as an electrical maintenance operative. His claim was for 1 week's notice pay and various detriments, including dismissal, because

he raised health and safety breaches: he was demoted to more basic roles, he was discouraged by his line manager from applying for an assistant manager's post and ultimately, he was dismissed without notice.

10. The respondents asserted that the claimant was not an employee or a worker under s230(3) of Employment Rights Act 1996 but an agency worker, who was supplied to the second respondent as a building operative. The respondents put the claimant's start date at 2 August 2021.

11. The respondents accept that the claimant was a worker under section 43K of the ERA for the purposes of his whistleblowing claims.

12. It is not in dispute that there was no express contract between the claimant and either of the respondents as the end user. A Managed Services for Temporary Agency Resources Customer Agreement [29] of 17 March 2021 was entered into by the first respondent, referred to as the "customer", and Matrix SCM Limited, as the "service provider". The service provider was defined as the provider and or those agencies with whom the service provider will contract to supply Temporary Agency Workers to the customer. Clause 4.3 [36] set out

> "The Service Provider will be responsible for providing all Temporary Agency Workers (either himself or through Agencies) as ordered from time to time from the Service Provider by the Customer. This will include administrative and clerical, operational, social care, and professional including teaching and education ancillary staff and technical categories of Agency staff."

13. A letter dated 30 July 2021 from Sapphire Accounting to the claimant [57] set out

> Sapphire DNP Limited will become your employer and you will be carrying out your services as our employee. A copy of your employment contract is enclosed for you to read, review and sign.
>
> When your assignment starts, we will make payments to you upon instruction and payment from your recruitment agency. As we will become your employer and to ensure we can make onward payments to you each period, we will require certain personal information about you to ensure that the correct tax and other deductions are made.

14. An Employee Personal Details Form dated 31 July 2021 [58] set out the details of the claimant and the agency details of Spencer Clarke. A document entitled Key Information Summary [60] dated 31 July 2021 and signed by the claimant set out that the claimant will become an employee of Sapphire DNP Limited. It also set out that the Recruitment Agency and End Client are not the claimant's employer.

15. An Assignment Details Form of 2 August 2021 [72] confirmed particulars of the agreed placement between Spencer Clarke Group Ltd, referred to as the company, and the claimant, referred to as the contractor. The Form provided Sapphire Accounting Limited as the limited company contractor, the claimant as the agency worker supplied by the limited company and the first respondent as

the hirer, with a start date of the assignment on 2 August 2021. This was signed by the claimant on 3 August 2021 [74].

16. The claimant did not dispute the genuineness or validity of these documents.

17. The documents evidenced that the first respondent entered a contract with Matrix, a vendor neutral provider of agency staff, which through an agency, Spencer Clarke, supplied the claimant, in turn provided by Sapphire, to the first respondent as the end user. Matrix issued an invoice to Spencer Clarke, who paid Sapphire, who in turn paid the claimant.

18. The claimant relied on his interview with the first respondent to assert that he was an employee. There was no dispute and the Tribunal accepts that the claimant attended an interview with the first respondent and specifically, Mr Melia, his future supervisor. The claimant said that in the first half of the interview it was "strongly implied" that because of his skills a role might be created for him to be employed by the first respondent. He said this was his incentive for applying for the assistant manager role. The claimant was supplied with a uniform, security passwords and entry key codes. The respondents did not take any disciplinary action against him.

Relevant law

19. Section 230 of ERA 1996 provides as follows:

> (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".

20. In James v London Borough Of Greenwich [2007] IRLR 168 the Court of Appeal set out §23:-

> "After a valuable review of the relevant case law covering the range of circumstances which give rise to the question whether a contract of employment exists and, in particular, the circumstances of agency workers, in which there is normally no express contract of any kind between the end user and the worker, it was stated that the question is whether some contract, pursuant to which work is being provided between the worker and the end user, can properly be implied according to established principles. The judgments of this court in **Dacas** and **Muscat** were cited and analysed. It was

correctly pointed out (paragraph 35) that, in order to imply a contract to give business reality to what was happening, the question was whether it was *necessary* to imply a contract of service between the worker and the end user, the test being that laid down by Bingham LJ in **The Aramis** [1989] 1 Lloyd's Rep 213 at 224.

> "…necessary …in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

21. The Court of Appeal concluded §51

> "In conclusion, the question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user."

22. The Court of Appeal confirmed in Tilson v Alstom Transport [2011] IRLR 169 that whether a contract should be implied is ultimately a matter of law and involves an objective analysis of all the relevant circumstances. Further:-

> "The mere fact that there was a significant degree of integration of a worker into an organisation was not at all inconsistent with the existence of an agency relationship in which there was no contract between worker and end user. In most cases, it would be quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business to a degree and that would inevitably involve control over what was done and, to an extent, the manner in which it was done." [44]
>
> …
>
> the parties' understanding that there is no such contract in place explaining the terms of their relationship, and their inability to reach an agreement on the terms such a contract should contain, are extremely powerful factors militating against any such implication." [50]

23. In McTigue v University Hospital Bristol NHS Foundation Trust UKEAT/0354/15 the then President of the EAT, Mrs Justice Simler (as she then was) held:-

> "However, an important purpose of s.43K is to extend cover to agency workers in relation to victimisation for protected disclosures made while working at the end user." [27]

Conclusion

24. As set out, the question is whether the claimant was employed by the first (or second) respondent end user under a contract of employment. There is no express contract of employment between the claimant and either respondent. In the absence of an express contract of employment, which may be written or oral, the question is whether it is necessary to imply a contract of employment between the claimant and either of the respondents. A contract of service should not be implied where the contractual arrangements in place adequately explain the working relationship. The Tribunal concludes that to be the case here. The claimant relies on the interview he had with Mr Melia in which Mr Melia indicated the possibility of a future intention to employ the claimant directly. The content of that interview is not sufficient to identify an implied contract. It is at best an agreement at some point in the future to consider employing the claimant directly. Further, the parties' understanding that there is no such contract in place explaining the terms of their relationship at that time is a further powerful factor militating against any such implication.

25. The Tribunal therefore finds that the claimant was not employed by either respondent and dismisses the claimant's breach of contract claim for 1 week's notice pay. The whistleblowing claims will proceed to a final hearing.

Employment Judge Braganza QC
24 July 2022