



EMPLOYMENT TRIBUNALS

Claimant: Mr. Joan Beltri

Respondent: Impact Teachers Ltd

Heard at: Reading by CVP

On: 16 September 2022

Before: Employment Judge S. Matthews

Representation

Claimant: In person

Respondent: Miss Bayliss (Counsel)

RESERVED JUDGMENT

The Claimant's claims for breach of contract and wrongful dismissal are dismissed.

REASONS

Introduction

1. By a claim form issued on 18 October 2021 the claimant claims breach of contract and wrongful dismissal against the respondent, an employment agency which provides teachers to schools.
2. The claim initially included a claim for unfair dismissal. This was dismissed upon withdrawal on 4 August 2022.
3. The claimant represented himself and gave sworn evidence. The respondent was represented by Miss Bayliss of Counsel and called sworn evidence from Mr. Ronald Rosati and Miss Ashley Yee. Witness statements were provided prior to the hearing by the claimant and Mr. Rosati. I granted permission to the respondent to call Miss Yee during the hearing and the claimant consented to this.
4. I considered documents from a bundle of 140 documents. I also admitted page 146 from a previous bundle (see paragraph 6 below).

5. The following documents were admitted in evidence during the hearing by consent of both parties:
 - 5.1 email chain between claimant and police dated 24.12.21 to 4.1.22 (morris 1)
 - 5.2 email chain between claimant and police dated 5.1.22 (morris 2)
 - 5.3 email exchange between Morgan Hunt and claimant dated 13.9.21 (morgan 1)
 - 5.4 email exchange between Morgan Hunt and claimant dated 16.9.22 (morgan 2)
 - 5.5 email dated 20.7.21 from Claimant to Ashley Yee (DBS Ashley)
 - 5.6 Guidance entitled Disclosure and Barring Service Regulated Activity with Children in England (7 pages)
6. At the beginning of the hearing there was a discussion about the bundle of documents. A previous bundle of 150 pages had contained documents at pages 137-145 which the respondent had disclosed inadvertently and which the respondent stated were privileged. The claimant confirmed that he did not object to their removal from the documentation available to me at the hearing.
7. On discussion with the parties I identified that the issues for me to decide were:
 - 7.1 Was the contract between the claimant and the respondent an illegal contract that could not be enforced by the claimant?
 - 7.2 Was the contract contingent on express or implied terms that the claimant had not been barred from teaching?
 - 7.3 Was the claimant in breach of the contract?
 - 7.4 If the claimant was in breach of the contract can the claimant enforce the contract?
8. Counsel for the respondent further submitted that the claimant could not pursue a claim for wrongful dismissal as he was not an employee but a worker. I deal with this in my conclusions below.

Findings of Fact

9. I found the relevant facts as follows; where I had to resolve a conflict of evidence I have done so at the material point. References to page numbers are to the agreed bundle of documents.

Initial contact and Screening Interview

10. The claimant was in contact with the respondent from May 2021. Mr. Beltri denied in oral evidence that he contacted the respondent to apply for a specific vacancy. He maintains that he told them from the outset that he was barred from teaching. He says that he was looking for perhaps 'three days a month in different colleges in London' which he understood he was permitted to work without a DBS check.
11. The claimant's initial contact with the agency led to a 'screening' interview by telephone on 14 June 2021 (63). The notes of the interview undertaken by Nathalie Hunter state:

‘Ideal Position: looking for Maths role PT in secondary, FE, open to SEN schools and mainstream, avail 3 DAW’

12. Mr Beltri denies that he indicated that he could work in a role in a secondary school. He says that he was looking for teaching for three days a month in colleges (see paragraph 10 above). The notes of the screening interview do not support his oral evidence. On the basis of these notes and taking into account the fact that he subsequently accepted a teaching role in a school, I do not accept his evidence that he stated that he was not able to teach in a secondary school.

13. The screening interview notes (63) also record:

‘DBS (on update): not clear, allegations of a learner at Westking College in Camden who was very disruptive and got failed who had an argument with him and went to the police, she accused him of slapping him, (witnesses and police confirmed all false allegations), DBS somehow heard of this he didn't know he had to respond and was barred, judge lifted appeal but with Covid got delayed, atm can do supply teaching’

14. Mr. Beltri said in evidence that he made it clear to the respondent in that interview as well as on initial contact with the respondent that he was barred from teaching in a school. This is inconsistent with the notes written by the interviewer which say the ‘judge lifted appeal’. Mr. Rosati (Director of the respondent company) gave evidence that he would interpret the words ‘lifted the appeal’ as indicating that the claimant was no longer barred. He admitted that the conversation would have raised alarm bells but as this was an initial screening interview and they were proceeding to do a Disclosure and Barring Service (DBS) check they were content to proceed. I find it credible that the respondent did not know the claimant was barred at this point. If the respondent had known he was barred it would not have proceeded to carry out a DBS check as it would not expect it to be clear. It would have ceased attempts to secure the claimant a teaching position.

15. The recruitment process therefore continued after the screening interview. On 20 July 2021 the claimant signed a document consenting to a DBS check (64). It stated:

‘I hereby give my consent for Impact Teachers to conduct a Status Check on my DBS Enhanced Disclosure using the Update Service.
Furthermore, I give permission for Impact Teachers to carry out future Status Checks on my DBS Enhanced Disclosure as and when required.’

Offer to teach at Woodbridge Park School

16. On 23 July 2021 an email was sent to the claimant containing an offer relating to a part time teaching post at Woodbridge Park School (the School) to commence on 7 September 2021. An email purporting to accept the offer was sent by the claimant on the same date (35 and 36).

17. This document cited the position as ‘Teacher Special Needs’ with a notice period of ‘One Term as per UK Academic Year’. It also stated:

'I understand that by agreeing to the details outlined in this document I am accepting the position as described above. I understand my role is subject to the clearance of all documentation required to work in the UK prior to the commencement date. I agree to keep Impact Teachers informed as to the progress of all documentation and will inform Impact Teachers immediately of any changes to my personal situation.'

18. The claimant conceded in evidence that the reference to 'all documentation required to work in the UK' would include an up-to-date DBS check. However, he maintained that this only applied if he was employed in a 'regulated activity'. He stated that this role was an exception because he was supervised by other members of staff and therefore, in his view at the time, it was not a regulated activity. I do not accept his evidence on this. There is no reference in the documentation to the role being exempt from the need for a DBS check or to levels of supervision.

19. Mr Beltri stated that he had contacted the DBS who informed him that it was the responsibility of the organisation offering him work to decide what is a regulated activity. However, Guidance entitled 'Disclosure and Barring Service Regulated Activity with Children in England Guidance' states:

'If that role working within the specified establishment is paid, then the individual will always be in regulated activity with children and eligible for an Enhanced DBS with a children's barred list check. This is regardless of the level of supervision they are under.'

I do not find it credible that Mr Beltri was unaware that the work he was carrying out was in breach of the Barred List restrictions.

Further Documentation

20. After acceptance of the offer further documentation was forwarded to the claimant. This consisted of a child protection policy (38), criminal records declaration and terms and conditions (58/59). The child protection policy stated:

'I am not on Barred List, disqualified from working with children or subject to sanctions imposed by any regulatory body....

.....

I am not, nor have I ever been, the subject of any disciplinary relating to working with children and I have never been the subject of any child protection concerns.

I understand that providing false information is an offence and could result in assignments being terminated and possible referral to the police and prosecution.'

This was accepted online by the claimant on 12 August 2021.

21. The terms and conditions define the claimant's employment status as a 'worker' at term 3.8 (52) and state:

'9 TERMINATION

9.1 Any of the Employment Business, the Temporary Worker or the Client may terminate the Temporary Worker's Assignment at any time without prior notice or liability.

9.2 The Temporary Worker acknowledges that the continuation of an Assignment is subject to and conditioned by the continuation of the contract entered into between the Employment Business and the Client. In the event that the contract between the Employment Business and the client is terminated for any reason the Assignment shall cease with immediate effect without liability to the Temporary Worker (save for payment for hours / days worked by the Temporary Worker up to the date of termination of the Assignment).'

This was accepted online by the claimant on 12 August 2021 (57).

Induction Interview

22. The claimant had a virtual interview with Ashley Yee on 17 August 2021(86) which the respondent termed an 'induction interview'. In that interview Miss Yee went through the documents required for the role at the School and highlighted documents that were outstanding. In an email to the claimant (86) she set out a 'Compliance Summary' which recorded 'Police Check DBS: In process via Impact Teachers'. I find that Mr. Beltri did not explain to her that he was on a barred list; if he had there would have been no point in the respondent proceeding with a DBS check.

23. Mr Beltri stated in evidence that he signed the documents referred to at paragraphs 20 and 21 above on the understanding that they related to future assignments and not to the one with the School. He said that a person at the respondent had specifically told him this and that the documents were 'just a template'. He was unable to recollect who told him this and I do not accept his evidence on this. It would have been clear to him that the induction interview with Ashley Yee and the documents which were referred to related to the role with the School. By formally accepting the documents online he was representing that the contents were true and that he agreed to the terms and conditions.

The School

24. On 7 September 2021 the claimant started work at the School, working as a teacher for 2 days a week. The DBS check had not been received by the respondent on that date. A barred list check would have given the required information within 72 hours but the respondent could not do a barred list check due to its status as an agency. It was possible for the School to do such a check. When the School did so on 5 October 2021 it revealed that the claimant was barred from teaching. The School asked the claimant to leave the premises immediately. The School's contract with the respondent was terminated.

Termination and subsequent events

25. The respondent, relying on term 9.2 in their terms and conditions (55) which is set out at paragraph 21 above, terminated their contract with the claimant on 5 October 2021 without notice. The claimant argued that he was entitled to notice and issued the ET1 on 18 October 2021. On 28 October 2021 the respondent received a DBS certificate confirming that the claimant was barred from teaching.

26. The claimant was arrested by the police at Heathrow airport shortly before Christmas 2021 and placed on bail. He was not charged with an offence (morris 1 and 2). I make no findings in relation to the arrest or subsequent decision not to charge him. What happened after the termination of the contract with the respondent is not relevant to my conclusions.

The Law

27. The contractual relationship between the claimant and respondent is governed by the common law rules regarding the formation of a contract. In order to form a contract there needs to be an offer, acceptance and consideration.

28. Whether a contract can be enforced depends on whether it is an 'illegal contract'. An illegal contract includes one that is in breach of statutory legislation from its inception. Whether such a contract is enforceable depends on the circumstances. The range of factors to be taken into account were outlined in Patel v Mirza 2017AC 467, SC. They are

28.1 the underlying purpose of the law that had been breached, and whether that purpose would be enhanced by the claim being refused

28.2 any other relevant public policy which might be affected by the denial of the claim, and

28.3 whether denial of the claim would be a proportionate response to the illegality (bearing in mind that punishment is a matter for the criminal courts).

29. Counsel for the respondent also referred me to the case of ParkingEye Ltd v Somerfield Stores Ltd [2012] EWCA Civ 1338, an earlier case where the proportionality factor was applied.

30. Section 3(2) of the Safeguarding Vulnerable Groups Act 2006 provides that:

A person is barred from regulated activity relating to children if he is—
(a) included in the children's barred list..

31. Section 7(1) of the Act provides that

An individual commits an offence if he—
(a) seeks to engage in regulated activity from which he is barred;
(b) offers to engage in regulated activity from which he is barred;
(c) engages in regulated activity from which he is barred.

32. Section 9(2) provides that:

A personnel supplier commits an offence if—
a) he supplies an individual (B) to another (P),

- (b) he knows or has reason to believe that P will make arrangements for B to engage in regulated activity from which B is barred, and
- (c) he knows or has reason to believe that B is barred from that activity.

33. The Tribunal's jurisdiction to hear a claim for breach of employment contract arises under s. 3(2) of the Employment Tribunals Act and Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. For a tribunal to be able to hear a contractual claim that claim must arise or be outstanding on the termination of an employee's employment and seek damages for breach of a contract of employment or any other contract connected with employment.

Submissions

34. The claimant's case is that the contract was formed on 23 July 2021 when he accepted the offer. He maintained that it was up to the respondent to ensure that the role offered to him was compliant with DBS legislation. He submitted that the documents after that date do not relate to the contract terms he accepted on 23 July 2021. Therefore, in his submission, the respondent was not entitled to terminate the contract under the terms referred to at paragraph 21 above as those terms did not apply to the contract. He was entitled to one term's notice under the terms of the offer he accepted on 23 July 2021. He claims nine months' notice in total inclusive of 2 months for distress.

35. The respondent contests the claim. It says that the claimant's contract with the respondent was for a defined post with a third party. The third party terminated the contract with the respondent and the respondent was entitled to terminate the contract with the claimant under the terms of its contract with him. The respondent further submits that, in any event, the claimant cannot enforce the contract as it is an illegal contract. The claimant could not carry it out as he was barred from teaching. The contract consisted of all the terms and conditions referred to after 23 July 2021 and was contingent on a term that the claimant was able to carry it out. As he had been barred from teaching he was in breach of the contract. It was further submitted that the claimant could not claim wrongful dismissal as he was not an employee but the remedy for breach of contract was available to him if I found that the respondent was in breach.

Conclusions

36. On the basis of the oral and documentary evidence I find that the claimant and the respondent entered into a contract for the claimant to teach at the School from 7 September 2021. This was a regulated activity from which the claimant was barred under the Safeguarding Vulnerable Groups Act 2006 (the Act).

37. I find that the contract was an illegal contract. The Act clearly sets out that an individual commits an offence if he seeks to, offers to or engages in an activity from which he is barred. A personnel supplier commits an offence if he supplies an individual to engage in such an activity when he knows

or has reason to believe that the individual is barred from that activity. Therefore, the claimant would be committing an offence by entering into the contract and the respondent would also be committing an offence if the respondent knew or had reason to believe that the claimant was on the barred list.

38. I have applied the factors in *Patel v Mirza* in deciding whether the claimant should be allowed to enforce the contract.
39. First I have considered the underlying purpose of the law that was breached, and whether that purpose would be enhanced by the claim being refused. The purpose of the law is to safeguard children. The explanatory notes to the Act state that the purpose is 'to minimise the risk of harm posed to children and vulnerable adults by those that might seek to harm them through their work ... It seeks to do this by barring unsuitable individuals not just on the basis of referrals but also at the earliest possible opportunity as part of a centralised vetting process that all those working closely with children and/or vulnerable adults will need to go through.' I have decided that refusing to allow the claimant to enforce the contract aligns with the purpose of the legislation as it means that individuals on the barred list cannot benefit by illegally engaging in a regulated activity. It does not impact adversely on any other relevant public policy.
40. Secondly, I have considered whether it was proportionate response to the illegality. I have decided that it was entirely proportionate. The requirement for a clear DBS check was central to the contract and the public policy reasons for it (the safety of children) are overwhelming.
41. Having decided that it was an illegal contract I do not need to consider the date of formation or the terms. As I find that it was an illegal contract the decision to reject the claimant's claim does not hinge on whether the contract was formed as alleged by the claimant on 23 July 2021 or at the later date alleged by the respondent. It does not hinge on which terms were incorporated into the contract. Nevertheless, I will go on to consider these briefly in the alternative.
42. I find that, whether the date of formation of the contract is the date submitted by the claimant or by the respondent, the clause set out at paragraph 17 is incorporated. The claimant accepted the term that the role was subject to the clearance of all documentation required to work in the UK prior to the commencement date. He was in breach of this term as he was barred and an up-to-date DBS check could not be obtained. This was a fundamental or repudiatory breach going to the heart of the contract and the respondent was therefore entitled to treat the contract as at an end.
43. I find that documents referred to at paragraphs 20 and 21 were incorporated into the contract. I do not accept the claimant's evidence that he was under the impression that they related to a future assignment. It would have been quite clear to an objective bystander that they related to the assignment with the School and they were required to give business

efficacy to the contract. The contract could not operate unless the claimant had an up-to-date DBS check. The claimant signed the documents. He was in breach of the terms and the respondent was entitled to treat the contract as at an end.

44. In addition, having found that the terms in the document at paragraph 21 were incorporated into the contract, I find that the respondent was entitled to terminate the contract when the School terminated the contract with the respondent.
45. Finally, I was not asked to determine the claimant's employment status and I have not done so. If the claimant was a worker rather than employee the Tribunal would not have jurisdiction to decide the claimant's breach of contract. As I have decided, on the basis of the oral evidence and the bundle of documents, that the contract was an illegal contract the claim would not succeed in any event.

Employment Judge S. Matthews

Date 27 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20/10/2022

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FOR EMPLOYMENT TRIBUNALS