



EMPLOYMENT TRIBUNALS

Claimant: Mr P Butler

Respondent: Thames Water Utilities Limited

PRELIMINARY HEARING

Heard at London South: by CVP

On: 17 August 2023

Before: Employment Judge Truscott KC (sitting alone)

Appearances:

For the claimant: Mr T Wood barrister

For the respondent: Mr N Singer barrister

JUDGMENT on PRELIMINARY HEARING

The employees of Clancy Docwra Limited, Mr J Duncan, Mr Sayers and Mr Haws were not acting as agents of the respondent. The claims of harassment, direct discrimination and subjected him to a detriment on grounds of making a protected disclosure against the respondent based on their actions are dismissed.

REASONS

Preliminary

1. The claimant alleges, in his claim, that three employees of Clancy Docwra Limited Mr J Duncan, Mr Sayers and Mr Haws, committed acts of harassment, direct discrimination and subjected him to a detriment on grounds of making a protected disclosure against him [68-83].
2. The Preliminary Hearing has been listed to consider whether these individuals were acting as agents of the respondent.
3. The Tribunal heard evidence from the claimant and Mr Peter Leeman, Head of Commercial and Facilities at the respondent. There was a bundle of documents to which reference will be made where necessary.

Findings

1. The claimant commenced employment with the respondent on 17 August 2020, he worked as an inventory operative. He was suspended pending an investigation on 22 October 2020. The suspension was lifted on 12 April 2021 but because of the claimant's ill health, he did not return to work until 26 April.
2. The site at which he primarily worked had been the subject of a Transfer of Control of Premises ('TOCOP') which is more fully described later.
3. Also working on that site were, Mr J Duncan, Mr Sayers and Mr Haws who were employees of Clancy Docwra Limited ('Clancy'). They were not employed by the respondent.
4. The respondent contracts out its services through a tender process and in 2014-2015 there was such a tender process. It was a formal process that took approximately 9 months. There were 5 bidders. When deciding to whom to award the contract, the respondent considered a wide range of factors including the bidder's ability to meet standards in respect of Health and Safety, customer experience, value for money, people and teams, collaboration, technical capability, innovation and sustainability. In addition to requiring bidders to provide information on leadership biographies, case studies, Health and Safety, technical questions and commercial proposals, the bidders were also subject to behavioural interviews and workshops and organisational alignment tests.
5. As a result of this tender, KCD was awarded the contract on 2 April 2015 and they entered into an agreement. The relationship between the respondent and KCD is set out in the Alliance Contract for Infrastructure Alliance dated 29 January 2015 [146-200].
6. The contracting parties are the respondent and an unincorporated joint venture, Kier Integrated Services Limited ('Kier') and Clancy. The combination of Kier and Clancy is known as KCD. KCD takes its directions from the Agreement.
7. KCD are not an employing entity, but the constituent organisations such as Clancy and Kier are. Most individuals working under the KCD umbrella are employed by Clancy but some members of management are employed by Kier.
8. The background of the Agreement [at A, B and C-150] delineates a boundary between the two parties, the respondent is recorded as owning and operating certain water and wastewater facilities and distribution networks pursuant to the agreement and requiring certain works to be done. The Alliance Members, Kier, Clancy, J Murphy and Morrison are identified as offering specialist expertise in relation to such matters and that the respondent may wish to appoint them to carry out such services and works.
9. The contract [185 at 12.1] states that the Alliance, through its own actions, cannot cause the respondent to be responsible for a breach of contract that the respondent had made with a Third Party, so the Alliance cannot affect the respondent's legal relationships with others.

10. The contract explicitly rules out the creation of any agency relationship between the Parties [189 at 37.4].

11. Clause 9.8 [184] says that Alliance members agree to ensure that all behaviour standards set out in the contract manual were observed by all of its employees and supply chain members.

12. An issue with the respondent's assets will be identified through a customer reporting it to the customer centre, for example, leaking water. Alternatively, an issue may be identified by a separate contractor responsible for leakage direction. Regardless of how the issue is identified the process is the same. The respondent issues 'Service orders' for work which include a number, usually hundreds, of jobs for KCD to carry out. This might include the repair and maintenance of water pipes in South London. The details of each specific job will be assigned to KCD through the respondent's 'Work Management System' which records and assigns all repair and maintenance work. KCD are required to travel to the site of the reported issue, review the location and where leaks or other problems are identified, fix the issue.

13. Generally, KCD are given a wide degree of freedom to operate and provide services in the manner it chooses so long as it conforms with the Agreement. For example, the respondent does not have any input as regards who attends the site, or when, provided the jobs are done within the agreed time frame. Once the respondent has issued the service order with the jobs included, it is left to KCD to ensure that the job is done.

14. When the Alliance was first formed in 2015, there was some overlap in reporting lines and supervision. However, by 2020, this was not the case. Employees of Clancy were instructed and supervised by other employees of Clancy. Similarly, the respondent's employees were instructed and supervised by the respondent's management. Clancy employees have Clancy email addresses, whereas Thames employees have Thames email addresses. Similarly, Thames employees wear Thames identity badges which Clancy employees do not. Clancy employees have Clancy identity badges identifying as them working for Clancy.

15. Save for Key Persons and Mr Duncan, Mr Haws and Mr Sayers were not such key persons under the Agreement, the respondent does not have any control over who Clancy employ and are not involved in their recruitment or training. The respondent does require all staff (whether the respondent's or otherwise) who are working on the site to have completed all the relevant Health and Safety training. This is because the respondent has a legal obligation as ultimate owners of the site to ensure it is meeting its legal obligations as regards health and safety on site.

16. On the site the claimant primarily worked, the respondent carried out a TOCOP of the area owned by it that KCD operated from 19 March 2020, this is known as the TOCOP Area. The effect of this TOCOP was to provide KCD with operational ownership of an area of land owned by the respondent. KCD are permitted the use of the respondent's depots and materials for co-ordination purposes so they can deliver services under the Agreement. Whilst the respondent had the power to terminate the transfer at any time under the Agreement, all the operations in the TOCOP area was KCD's responsibility.

17. The TOCOP area is different to the rest of the Thames sites. KCD had their own signage and branding in the TOCOP Area and their cabins are different colours, they are red and green which are Clancy's company colours. Within the TOCOP area, KCD had their own cabins. The respondent had one cabin within TOCOP area which was cream. The TOCOP area was left to KCD to manage. The respondent was not responsible for anything to do with the provision of management of PPE, tools or consumables, fleet, plant, signing, lighting and guarding or management of waste skips. The responsibility was with KCD.

18. On occasion, Thames employees would enter the TOCOP area, but this would generally be for a specific purpose such as speaking to a supervisor in respect of a specific job. However, Thames employees would be able to identify that the TOCOP Area was operated by KCD separately to the rest of the Thames site given the signage.

19. The claimant worked at the TOCOP site daily as an inventory operative; the various pipes and fittings that he would have dealt with were stored in storage containers on the TOCOP site. A Clancy employee would have come to the claimant who managed the inventory of stock to ask for specific parts to enable them to do repairs or maintenance work, but Thames and Clancy had separate roles and responsibilities because specific projects and responsibilities were outsourced to the Alliance under the agreement.

Submissions

20. The Tribunal heard oral submissions from both parties with written submissions from the respondent.

Law

21. Section 109 of the Equality Act states: -

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer. (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

22. The section was considered in **Ministry of Defence v. Kemeh** [2014] ICR 625 CA. The claimant was a cook in the British army who brought a claim of discrimination against the Ministry of Defence as he said he was the victim of racially abusive comments. There were two comments. One, irrelevant for present purposes, was made by an employee of the Ministry of Defence. The other was made by a Ms Ausher who was a civilian butcher. Ms Ausher was employed by Sodexo who was a sub-contractor of Serco. Serco entered into a commercial contract with the Ministry of Defence to provide facilities management. Under that contract it was agreed that those working in the butchery would aid the non-commissioned officer in charge of butchery and carry out tasks as directed by that officer. It was in this context that Ms Ausher made the comment to the claimant.

23. The Court held that: -

- a. Section 109 (2) only applies where the agent discriminates in the course of carrying out the functions he is authorised to do, but it does not matter whether the principal knew or approved of what he did [paragraph 11 and S.109 (3)].
- b. It is not essential that the putative agent should have authority to bind the principal contractually, but it is not enough that someone who is employed by a contractor performs work for the benefit of a third party employer [paras 38-40].
- c. The common law legal concept of agency cannot be disregarded [paragraph 46].

24. The Court stated that being able to veto the presence of an individual was a 'limited degree of control' and that it came 'nowhere near constituting an authorisation by the Ministry of Defence to allow Ms Ausher to act on its behalf with respect to third parties' [para 41]. The Court of Appeal went on [paragraph 43]: -

"I would respectfully agree that the fact that someone is employed by A would not automatically prevent him from being an agent of B, and I would not discount the possibility that the two relationships can co-exist even in relation to the same transaction. But in my judgment there would, particularly in the latter case, need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed. There is a complete lack of such cogent evidence here."

DISCUSSION and DECISION

25. The Tribunal sought to apply the guidance in **Kemeh**.

26. The evidence of Mr Leeman derived from his responsibility for contract management at the respondent and for most operational contracts. He also manages several contract managers who dealt with third party contractors, such as Clancy. The Tribunal accepted his description of the nature of the contract and relationship between the relevant parties. To be fair to the claimant, he professed no such knowledge.

27. Mr Leeman described how the site should have appeared but he had not seen it. By reference to the respondent and KCD, he said that "The relationship was pretty adversarial at that time". The nature of the relationship was confirmed by what the claimant said at the investigatory meeting, see, for example: -

- a. [211] – where Mr Butler repeatedly refers to the independent actions of KCD who failed to contact him for 6 days and sent workers home without contacting anyone at Thames Water denoting separate organisations with separate reporting lines;
- b. [212] – the interviewer talks about Mr Duncan not wanting *his* staff to do it;
- c. [212-.214] – where the claimant complains that a KCD employee had his number and that she should have gone to her supervisor and not ring directly;
- d. [226] – there are repeated references which illustrate that the claimant perceives KCD as a totally different entity and is communicating with his employer to essentially keep him away from them;

e. [227] – the claimant emphasises that they are not Thames Water employees, but separate contractors.

28. The fractious nature of the relationship is further borne out in the further particulars provided by the claimant which have become lengthy issues [68-83]. That the relationship was poor does not prevent an agency being created but taken in the context of the other evidence, it points firmly away from creating an agency.

29. The tendering process and contract demonstrate that the respondent and the members of the KCD were arm's length organisations negotiating a commercial contract.

30. The contract itself contains clauses inconsistent with the creation of an agency relationship [185 at 12.1 and 189 at 37.4] which is a relevant factor.

31. The way the contract operated showed clear boundaries in that the respondent would use the subcontractors such as Clancy to do work for which it was responsible. The members of the Alliance – and by extension its employees - would have significant control of those tasks separate from the respondent. Aside from key persons (which Mr Duncan, Mr Sayers and Mr Haws were not) the respondent had no control over who to appoint. Moreover, in terms of removal whilst the respondent could require removal it was for KCD to investigate.

32. On the site where the claimant worked, KCD had operational control of the site, there was different branding, different coloured cabins and the respondent were not responsible for anything to do with the provision of management of PPE, tools or consumables, fleet, plant, signing, lighting and guarding or management of waste skips. Both witnesses agreed that the contractor used the respondent's vans which were separately identified to the contractor.

33. Mr Leeman said that the general practice at the respondent was that its employees are told that if they have any issues, they should go to their Line Manager to discuss these. Therefore, when the claimant joined the respondent, Mr Leeman's view was that he would have been told that if he had any issues, he should go to his own line manager (who was an employee of the respondent). He was not aware what had taken place at induction but while the Tribunal was prepared to accept that the induction was of a poor quality as described by the claimant [33], he was not told to report to Mr Duncan. Where the claimant now claims to be reporting to Mr Duncan [paras 4 and 5 of witness statement], his evidence was not accepted. The Tribunal did not accept that the reporting lines were not clear. He raised his various issues with his own line managers, Mr Rejeesh Pillali and Mr Fenner over time. The Tribunal does not accept that the claimant was told that Thames and KCD were the same entity.

34. The claimant plainly perceived KCD as a different organisation. He saw KCD employees, in particular Mr Duncan, as part of a distinct organisation. Whilst the claimant was prepared to complain about the alleged conduct of Mr Duncan to the respondent, it was KCD which carried out its own investigation [221, 222, 226]. The respondent merely had a right to require the removal of an individual [183, 9.5].

35. The claimant had interactions with Mr Duncan as a matter of necessity given the commercial arrangement between KCD and the respondent as he had been directed to do by the respondent. In his witness statement [paragraph 9], the claimant makes clear that in relation to his meetings with Mr Duncan, he was still directed by the respondent in how and when he should interact with Mr Duncan and apparently considered himself fully free to stop doing so when he wished to do so. The Tribunal did not accept the claimant's evidence at paragraph 9 but it is indicative of his attitude.

36. The requirement to align with the values and standards of the respondent is merely normal commercial practice and in the case of Health and Safety, a legal requirement.

37. The Tribunal heard little evidence about Mr Sayers and Mr Haws but took the view that if Mr Duncan was not an agent of the respondent, Messrs Sayers and Haws were not either.

38. As the Tribunal has found that Mr Duncan, Mr Sayers and Mr Haws were not acting as agents of the respondent, the claims of harassment, direct discrimination and detriment for making a public interest disclosure based on that agency are dismissed.

Employment Judge Truscott KC

29 August 2023