



EMPLOYMENT TRIBUNALS

Claimant: Ms A Baird

Respondent: Cumberland Council

HELD AT: Liverpool (by CVP) **ON:** 26 March 2024

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Unrepresented

Respondent: Mr K McNerney (counsel)

JUDGMENT

(And reasons made following a request by the claimant on 15 April 2024)

The judgment of the Tribunal is that:

The preliminary issue

- (1) The claimant was not a worker within the meaning of section 43K Employment Rights Act 1996. This means that the complaint of detriments arising from the making of protected disclosures under Part IVA of the Employment Rights Act 1996 (commonly known as whistleblowing) and made against the respondent cannot proceed and are dismissed.

Remaining matters

- (2) Although it appears that the Note of Preliminary Hearing made by Employment Judge Serr on 8 November 2023 indicates in paragraph 8 that

the claim is limited to whistleblowing only, it is not possible to dismiss the entire claim in this judgment.

- (3) This cannot happen until there is clarity concerning the dismissal of the complaints of unfair dismissal and discrimination on grounds of religion or belief.
- (4) The parties will be contacted in separate correspondence by Judge Johnson in order that this remaining matter can be clarified.

REASONS

(Provided following a request made by the claimant on 15 April 2024)

Introduction

1. This preliminary hearing was listed by Judge Serr on 16 January 2024 under R53(1)(b) of the Employment Tribunals' Rules of Procedure, to determine the respondent's revised position in its amended grounds of resistance concerning the claimant and her status as a worker under s43K Employment Rights Act 1996, (ERA).
2. The claimant and the respondent had previously attended the preliminary hearing case management (PHCM), on 8 November 2023 before Judge Serr and although the respondent had initially accepted the claimant's worker status, Judge Serr accepted that they were able to resile from this position during their consideration of the their amended grounds of resistance which had been provided as part of case management orders ordered by him at the PHCM.

Issues

3. Whether the claimant was a worker within the meaning s43K ERA in relation to the whistleblowing complaint she had brought against the respondent and the protected disclosures she claimed had been brought against her employer Orian and the respondent. The respondent, Cumberland Council had entered into an agreement with Orian whereby they would provide the respondent with cleaning services across its presmies, including the claimant's place of work, Keswick library.
4. It should be noted that Orian are not a co respondent in these proceedings and the claim has been brought solely against the respondent Council. The claimant says that the respondent Council employed a person with whom she had raised issues against following concerns that she had in the workplace.

Evidence and documents used at this preliminary hearing, (PH)

5. This was the respondent's application and they had produced a large 'PH bundle' of several hundred pages including proceedings, case management

orders, employment contractual documents between the claimant and Orian and service agreement documents between Orian and the respondent.

6. Mr McNerney provided a brief skeleton argument augmented by oral submissions during the PH.
7. Ms Baird provided submissions in reply objecting to the application. In considering her objection, I considered the overriding objective under Rule 2 and the relevant chapter of the Equal Treatment Bench Book relating to unrepresented parties. This was important because the issue under consideration was quite technical and I wanted to ensure that Ms Baird as an unrepresented claimant could participate as fully as possible.
8. I kept a note of the submissions and considered them as part of my deliberation in this matter.

Law

9. S43k(1)(a) ERA is relevant in this case. It is worth setting out the relevant part of section 43k(1)(a) ... (ii) *"The terms on which he is or was engaged to do work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them"*.
10. This PH is all about the terms on which the claimant was engaged, what they were and who substantially determined those terms.
11. Mr McNerney referred to 3 cases which considered this section:
 - a) *McTigue v University Hospital Bristol NHS Foundation Trust* UKEAT/0354/15/JOJ
 - b) *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399
 - c) *Day v Health Education England* [2017] EWCA Civ 329
12. Having considered the 3 cases of *McTigue* (determined by the Employment Appeal Tribunal (EAT)), *Day* (Court of Appeal) and *Sharp* (Court of Appeal), the following broad legal principles are established: -
 - a) There must be a contract (*Sharp*) but it need not be directly between the respondent and the claimant (*McTigue*).
 - b) The claimant could be a worker or employee of Orian.
 - c) The claimant can be at the same time both an employee/worker of Orian and a worker under Section 43k of the respondent Council.
 - d) It is possible both Orian and the respondent Council to have substantially determined the claimant's terms of engagement (*McTigue*).

- e) There is no need for a comparison exercise in answering the question of whether the respondent substantially determined the terms as between the respondent and Orian.

Discussion

13. Mr McNerney argued that the starting point should be to look at the fundamentals of the claimant's engagement by Orian in relation to (as required by s1 ERA 1996):
 - a) Her rates of pay.
 - b) Her place of work.
 - c) The name of her employer.
 - d) Her hours of work.
 - e) Her holiday entitlement.
 - f) Her sick leave/pay entitlement.
 - g) Her notice for terminating her contract.
 - h) Her job title.
14. Page 68 of the PH bundle contained the claimant's contract of employment. It contained the things mentioned above in relation to section 1, but does not refer to the respondent placing a requirement on Orian and the claimant in how those terms are devised.
15. This is not the end of things because as Mr McNerney properly submitted, I must consider wider corporate documentation involving the respondent and Orian that might suggest a (as I put it), '*a shadowy hand*' or influence by the larger bargaining party being the respondent Council in relation to how the smaller contractor Orian organises its employees.
16. The respondent Council's Service Agreement with Orian to provide cleaning services across the local authority buildings is inevitably a lengthy document and such is the way of things with service level agreements and related contractual documents in these sectors. Local authorities are subject to considerable regulation and scrutiny concerning procurement and must be able to demonstrate the fair and proper engagement of external service providers given that public money is being used to agree high value contracts with the private sector. Good governance is essential, but this can produce complicated documentation.
17. I noted that paragraph 20.1.1 of the Service Agreement (page 98 of the bundle) provided requirements concerning Orian's staff. This short section required Orian to provide:

'sufficient suitably qualified personnel...to comply with its obligations under this agreement, including ...during periods of sickness maternity leave, holidays training or otherwise'.

Paragraph 20.1.2 gives the respondent:

'power to reasonably require the service provider to remove from the provision of services any individual member of the service provider staff...'

This might seem like some control being asserted by the respondent. However, it is not a substantial determination of the claimant (and her colleagues') terms of engagement. I accepted that it is simply a reasonable requirement by a public body to seek the removal of those Orian employees or workers who might no longer be suitable due to issues in the workplace, because of safeguarding or other legal issues. It does not seek to require their dismissal from Orian, but simply their removal and it can only be deployed by the respondent if *'reasonably required'*.

18. Similarly, there is a requirement for Disclosure and Barring Service (DBS), certification for those staff at paragraph 20.1.2, (pp97-8). However, I observed that the respondent Council is a public body and it is a commonplace requirement for those working on premises where they might encounter children and vulnerable adults. Safeguarding must therefore be managed, accordingly and the clause is not something that can amount to a substantial determination of the claimant's terms of engagement.
19. The Provision of Building Cleaning Specification Services document was included within the bundle from page 120. It was a lengthy document which clearly states how the respondent's premises should be cleaned. While this might be the case, it does not begin to interfere with the way in which Orian's employees or workers should be engaged. Indeed, it is a normal service level document which does not go beyond explaining what services are required and the minimum standard expected by the respondent. This document does not suggest a link between Orian and the respondent Council which results in the latter of the two making a substantial determination of the claimant and her colleagues' terms of engagement.
20. The claimant Ms Baird, referred to the Orian 'Values' document at page 143. However, again this was very much a document devised by Orian and takes the typical form of aspirations communicated to staff. It is certainly not connected with any obvious influence on the part of the respondent.
21. The claimant was based at Keswick library which was a building belonging to the respondent. However, this was inevitable given the nature of the service agreement between Orian and the respondent to provide cleaning services at local authority buildings. While the claimant argued that this indicated a substantial determination of her contract by the respondent, there was no evidence to suggest that they had controlled how and where she would be allocated to work in the library service.
22. She may have later been moved following her complaint which was rejected by the respondent as being false and not substantiated. But they requested

this of Orian in an email dated 24 February 2023 and this was a detriment in the whistleblowing complaint. This should be contrasted with something which related to the actual protection afforded by section 43K and which supports there being a correctly reported protected act under s43B. I noted that the respondent did not require Orian to dismiss the claimant, but simply to asked that she be removed from the Keswick library site following its investigation. It did not amount to a substantial determination of the place of work as the respondent had not determined her placement in the first place.

23. Similarly, the claimant referred to a variation to her contract on page 74 of the PH bundle. It was a letter dated 27 October 2022 which varied her working pattern by reducing the hours of work at Keswick library from 6 hours to 4.5 hours per week. This would have understandably been distressing for her given the rise in the cost of living as she described and which affected everyone in the UK at that time. However, this was very much a situation where the respondent Council was revising its service provision at its sites.
24. I took judicial notice of the fact that the respondent like most local authorities across England suffered a great deal because of many years of austerity in relation to their central government grant. This has forced them to reduce costs at those services where it has some discretion as to what it spends. Inevitably this often falls on leisure services which includes libraries. But this was not a case of the respondent exercising any control over whether or not Orian continued to employ the claimant and whether they would look to make up the reduction in her hours by offering work elsewhere.
25. Based upon evidence before me, this preliminary hearing involved a simple case of the level of service being reduced rather influence being exercised over the way in which Orian engaged the claimant. There would need to be *something more evidentially* (my emphasis), for it to amount to a substantial determination of the terms of engagement and it was a matter for Orin as to whether they varied the claimant's hours of work or explored finding hours at other locations instead.

Conclusion

26. Accordingly, for the reasons given above, I must conclude that the claimant is not a worker within the meaning of section 43K Employment Rights Act 1996 and therefore her complaint of detriments arising from protected disclosures made against the respondent must fail.
27. There does remain however, the outstanding matter of complaints which appear to have been withdrawn by the claimant but where a formal judgment dismissing the complaints upon withdrawal have not been made. The parties are referred to the Note of Preliminary Hearing made by Judge Serr on 8 November 2023 which indicates in paragraph 8 that the claim is limited to whistleblowing only.
28. As it is not possible to dismiss the entire claim in this judgment until there is clarity concerning the dismissal of the complaints of unfair dismissal and discrimination on grounds of religion or belief. I confirmed to the parties that

they will be contacted in separate correspondence so that this remaining matter can be clarified.

Employment Judge Johnson

Date 7 May 2024

JUDGMENT SENT TO THE PARTIES ON
14 May 2024

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