



EMPLOYMENT TRIBUNALS

Claimant

AB

v

Respondent

United Living (South) Limited

Heard at: Norwich by CVP

On: 19 August 2024

Before: Employment Judge M Warren

Appearances

For the Claimant: In person

For the Respondent: Ms A Rumble, Counsel

JUDGMENT at a PUBLIC PRELIMINARY HEARING

The Claimant's claim insofar as it seeks to hold the Respondent liable for the actions of YZ on 15 March 2023 are dismissed on the grounds that YZ was not an employee of, nor Agent for, the Respondent. The Respondent is not therefore liable for his actions.

REASONS

Background

1. AB was an Agency Worker supplied to the Respondent providing admin support. The Respondent provides building construction services.
2. AB complains in part, relevant for today's purposes, that she was subject to sexual assault by the man identified as YZ. She complains of the Respondent's failure to properly deal with her complaint about that.
3. The Respondent says that YZ was not an employee or agent of it.

The Issues

4. The issues before me today at this Public Preliminary Hearing were identified for me by Employment Judge Dick at a Preliminary Hearing on 18 April 2024. He is responsible for listing today's Hearing. At paragraph 5

of his Hearing Summary, he said that today the Tribunal was to consider whether the Respondent be held liable in this Tribunal for the actions of YZ, either as a preliminary issue or by deciding the Respondent's Application to Strike Out that part of the claim.

5. At paragraph 11, EJ Dick said that the Tribunal will need to consider Section 109 of the Equality Act 2010 ("EqA") and in particular, whether the man was acting as an agent with the authority of the Respondent.

The Evidence

6. I had a Bundle from the Respondents, (it was a little irksome that some documents in the bundle did not have Optical Character Recognition, notably the contract). I also had a witness statement from an individual employed by the Respondent called Mr Mather, who is the Respondent's Construction Director.
7. EJ Dick ordered at paragraph 7 of his Orders that any documents, (including witness statements) the parties wish to rely on were to be sent to the other by 22 July 2024. At paragraph 8, the Respondent was to prepare an agreed electronic Bundle.
8. During the course of AB cross examining Mr Mather, it seemed to me she was raising matters about which I ought to hear evidence from her. So, at the conclusion of the cross examination, I took some evidence from her, I then allowed Ms Rumble to take instructions before then cross examining her. I also recalled Mr Mather so that he could deal with AB's new points.
9. I had before me a Skeleton Argument from Ms Rumble and some cases that she has referred to therein.
10. Immediately prior to the hearing, AB emailed the Tribunal a couple of documents, prompted apparently by having received at ten past nine, Ms Rumble's Skeleton Argument. The documents consisted of what one might call a chronology, although it seemed to primarily relate to other aspects of the case. The document was entitled, 'Response to Mr Mather's Testimony'; it was AB's response to Mr Mather's witness statement, rather than a response to the Skeleton Argument. Be that as it may, I read it through and decided insofar as it deals with matters relevant to the issue before me today, that we had already covered what we needed to cover.

The Law

11. I lean heavily on the Judgment from the Employment Appeal Tribunal of His Honour Judge Tayler in the case of Anderson v CAE Crewing Services Limited [2024] EAT 78.
12. First of all one considers the provisions of s.109 of the EqA 2010 which provides at subsection (1):

109. Liability of employers and principals

- (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.
13. "Principal and agent" are not defined in the Equality Act 2010. We must rely upon the common law for an understanding of the concept. Ms Rumbel and HHJ Tayler resort to a leading textbook called 'Bowstead and Reynolds on Agency'. I will quote some of the passages from that, which HHJ Tayler quoted:

"1-001 Agency is the fiduciary relationship that exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act also acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party."

"1-003 But in any case definitions are, however commonplace, of limited utility in law as elsewhere; in particular, reasoning based on presupposed definitions is often suspect. A longer explanation is usually required than can be encapsulated in the definition or form. No one has the monopoly of the "correct" use of this or any other term. The word "agency", to a common lawyer, refers in general to a branch of the law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties, by acts which the agent is said to have the principal's authority to perform on the principal's behalf and which when done are in some respects treated as the principal's acts, these acts are probably thought of as most likely to occur in connection with the formation and discharge of contracts and in the disposition of property but the same idea appears, sometimes in modified form, in many other parts of law."

14. One of the matters arising out of those passages is this issue over whether or not the agent has authority to bind the principal in law. HHJ Tayler made reference to Elias LJ's remarks in Ministry of Defence v Kemeih [2014] ICR 625. In essence, Elias LJ thought that it is not really necessary for there to be authority to bind the principal legally, for an agency arrangement to arise; it is possible that an agency situation can exist even

where the agent does not have power to affect the principal's legal relations with third parties.

15. The question here is, did the putative agent have the putative agent's authority to act on its behalf?
16. How does this apply in this case? Let us look at the facts. I find the facts as follows.

The Facts

17. Neither AB nor YZ were employees of the Respondent. AB was supplied by an Agency and was employed by the Agency.
18. On 18 July 2022, the Respondent entered into an agreement with a company called Simi Homes Limited, who are confusingly, described in the contract as "the Consultant", for the provision of professional services. Under the contract, Simi Homes was to appoint a Quantity Surveyor (QS) for a particular project the Respondent was undertaking. The QS appointed pursuant to that agreement was YZ.
19. The contract between the Respondent and Simi Homes is in the Bundle, starting at page 53. It says there at page 54 in the recitals,

"The Contractor [the Respondent] wishes to appoint the Consultant [Simi Homes] to provide the services of a Quantity Surveyor."
20. YZ was not engaged on anything other than the particular project. He was not engaged on any other projects. He was acting under the authority of Simi Homes. Thus we see at paragraph 9.1 of the contract,

"The Consultant [that is, Simi Homes] shall, before commencing performance of the Services, appoint an appropriately qualified and experienced persons to carry out the Services. Such persons or any replacements approved by the Contractor [the Respondent] under clause 9.2 shall have full authority to act on behalf of the Consultant for all purposes in connection with this agreement."
21. Clause 2 of the Contract, 2.1 provided,

"The terms and conditions of this Agreement and the warranties and on undertakings which it contains are deemed to apply to all services performed and to be performed by the Consultant [Simi Homes] in relation to the development both before and after the date of this Agreement.
22. At 2.2,

"The Consultant [Simi Homes] shall provide the Services in accordance with this Agreement and with such reasonable instructions as the Contractor [the Respondent] and / or

representative of the Contractor notified the Consultant in writing may give the Consultant.”

23. At 2.4,

“The Consultant [Simi Homes] warrants that it has exercised and shall continue to exercise in the performance of its duties under the Agreement the reasonable skill, care and diligence as is to be expected of a properly qualified and competent member of the profession experienced in carrying out work such as its duties under this Agreement in relation to developments of similar scope...”

24. It is important to remember that the Consultant is not YZ, the Consultant is the company. The company, the Consultant, appoints YZ and YZ is not a Director of or a person of any significant control of, the Consultant Simi Homes Limited, not by YZ. In practice, YZ was providing the Respondent with a service as a QS, not acting on its behalf in dealing with third parties.

25. The fees were to be paid to Simi Homes with VAT, not to YZ. He was paid by Simi Homes. YZ did not sign any contract or enter into any contracts with or on behalf of the Respondent. He did not have any managerial responsibilities. AB has made reference to YZ being involved in some way in recruitment. I accept the evidence of Mr Mather that all recruitment at the Respondent was via a Central Recruitment Team and a process of authorisation.

26. The Respondent was caught by surprise this morning by AB’s references to YZ interviewing individuals. But it is clear, even on her evidence, that he was liaising with agencies for the supply or end of supply of other Agency Workers. YZ was agent for Simi Homes, not the Respondent.

27. I find that YZ was not an agent, nor an employee of the Respondent.

28. I therefore dismiss the claim insofar as it relates to seeking to hold the Respondent responsible for the actions of YZ.

Employment Judge M Warren

Date: 21 August 2024

Sent to the parties on: 20/11/2024

For the Tribunal Office.

Public access to Employment Tribunal decisions

Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>