EMPLOYMENT TRIBUNALS

Claimant: Mr P Davidson

Respondent: Anord-Mardix (UK) Limited (1)

Blitz International Holdings Limited t/a Industrial Work Solutions (2)

HELD AT: Manchester (preliminary hearing in public) **ON:** 22 November 2024

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Unrepresented
Respondent: Mr Ben Jones (counsel for R1)
Mr Fred Cascarini (solicitor for R1)
Mr Matthew Crossley (Operations Director for R2)

JUDGMENT

The judgment of the Tribunal is that:

<u>The second respondent</u>

(1) The claim brought by the claimant against the second respondent is struck out.

(2) This decision has been made because no complaint has been identified in relation to the second respondent which the Tribunal has jurisdiction to hear and accordingly this claim has no reasonable prospects of success in accordance with Rule 37(1)(a) of the Employment Tribunals Rules of Procedure.

(3) Insofar as it remains relevant and with reference to the second respondent's application dated 28 August 2024, the second respondent is removed from these proceedings as it is not in the interests of justice for them to remain as a party in accordance with Rule 34.

The first respondent and the Agency Workers Regulations 2010

(4) The allegations of less favourable treatment contrary to Regulation 12 of the Agency Workers Regulations 2010 as described by Judge Slater in the draft list of issues at sub paragraphs 11.1.1, 11.1.2 and 11.1.3, and as clarified by the claimant are struck out. This is because these complaints have no reasonable prospects of success in accordance with Rule 37(1)(a).

(5) The further allegation of less favourable treatment contrary to Regulation 12 of the Agency Workers Regulations 2010 relating to his exclusion from a meeting room as described in the particulars of claim is struck out. This is because this complaint has no reasonable prospects of success in accordance with Rule 37(1)(a).

(6) This means that there are no remaining allegations of less favourable treatment under the Agency Workers Regulations 2010 and for the avoidance of doubt, this claim is dismissed from these proceedings.

The claims remaining to be determined in these proceedings

(7) The Tribunal notes that Judge Slater dismissed the claimant's complaints of unfair dismissal, age discrimination and discrimination because of religion/belief upon withdrawal by the claimant in her judgment of 5 August 2024.

(8) Accordingly, the remaining complaints brought against the first respondent (and now sole respondent), of:

(a) detriments arising from the making of a protected disclosure (Part IVA of the Employment Rights Act 1996),
(b) harassment and discrimination relating to race and victimisation (sections 13, 19, 26 & 27 of the Equality Act 2010),

are unaffected by this judgment and will be determined at a later date.

REASONS

Introduction

Background

1. This judgement arose from applications which were made by the first and second respondents following the preliminary hearing case management before Judge Slater heard on the 31 of July 2024.

2. The first respondent had made an application on 17 September 2024 that the complaint brought by the claimant under regulation 12 of the Agency Workers Regulations 2010 be struck out contrary to Rule 37(1)(a) of The Employment Tribunals Rules of Procedure. This is because they believed that the Tribunal did not have jurisdiction to hear that claim. In the alternative, they wished to apply for a deposit order under Rule 39.

3. The second respondent had also made an application on 28 August 2024 that they be removed from the proceedings because they believed that the claimant had not identified any claim which they could reasonably answer. They believed that the claimant had been given an opportunity to particularise his claim by Judge Slater but had failed to do so in relation to the second respondent. The claimant had objected to this application.

The claimant's conduct during the hearing and its impact

4. This was unfortunately a problematic preliminary hearing. This was because the claimant who was unrepresented found the preliminary hearing to be extremely frustrating. I made allowances so as to take account of his unrepresented status, but nonetheless the claimant continuously interrupted the other parties' representatives and even myself during case management and during my delivery of the judgments above.

5. Although I took full account of the Equal Treatment Bench Book and was mindful any possible physical, mental, or neurological issues that could affect the claimant's ability to regulate himself during the hearing, none were identified to me by the claimant or other parties. When he did speak his explanations concerning the case were overly lengthy and not relevant to the core issues identified by Judge Slater and considering the information available before me today. The claimant was undoubtedly very unhappy with events that had taken place while working at the first respondent's premises and his dealings with the second respondent agency. However, despite many attempts by me to listen to what was being said and to focus upon the acts, when they took place and who was responsible, he did not listen and address the matters under consideration.

6. Consequently, following lengthy discussions I concluded that the claimant had a reached a point where he was obsessed with being released from his engagement by the first respondent and the second respondent agency's acquiescence to this decision. Despite much prompting, he was unable to provide the necessary clarification of allegations to reveal an arguable case in relation to the Agency Worker Regulations 2010. Nonetheless, the claimant was afforded every opportunity to advance his case and he ultimately let his temper get in the way of providing clear and cogent arguments to resist the two respondents' applications before the Tribunal.

7. The application for removal of the second respondent as a party was considered first because it was proportionate and there were no obvious amendments being proposed by the claimant that would bring them into

consideration as a party. The particulars of claim were very much focused upon the claim against the first respondent.

8. Once the second respondent had been removed from the proceedings matters eased to some extent. However, unfortunately, and despite my continual reminders, the claimant continued to interrupt and this caused additional stress which restricted the progress of the preliminary hearing to the determination of the respondents' applications.

9. Consequently, although Judge Slater had also provided that today's one day preliminary hearing would consider questions relating to a final list and further case management orders, it was necessary to stop the preliminary hearing at 1:30 pm. This was because it had become clear that the claimant would need some time to digest the judgement made during the morning and it appeared that he would struggle with the remaining matters to be considered. It was in the interests of justice for a further preliminary hearing to be listed to resolve the outstanding list of issues and to make further case management orders.

Applications under consideration at the preliminary hearing today

The second respondent's application to be removed as a party

10. The first application was to consider the second respondent's application to have them removed as a party to these proceedings. The application was made and initially considered under Rule 34.

11. Once Mr Crossley began explaining his application on behalf of the second respondent, it became clear that the claimant had only identified within the list of issues (which he had amended in accordance with Judge Slater's case management orders), that a potential complaint against the second respondent would only relate to the complaint brought under Regulation 12 of the Agency Worker Regulations 2010.

12. However, as Mr. Jones correctly identified this was a complaint where Regulation 14(6) only allowed liability to pass to the hirer and not the agency when a complaint under regulation 12. The second respondent was the agency that supplied the claimant and accordingly they could not be liable for a complaint brought under regulation 12. This intervention was appropriate given that Mr Crossley was unrepresented and it was relevant to the matters under consideration with this application.

13. I also explained to the claimant that I had concerns about whether he had actually advanced any complaint which could be identified against the second respondent and which the Tribunal would have jurisdiction to hear.

14. The claimant responded at some length and he had an undoubted unhappiness concerning his relationship with the second respondent. Unfortunately, however, he was unable to translate this into an actual complaint that demonstrated an arguable case. Moreover, even allowing for

his unrepresented status, there was no application to amend his claim before me.

15. I also noted that the list of issues which had been originally drafted as a framework by judge Slater had been amended by the claimant in accordance with her case management orders and despite providing considerable narrative, he had not identified any specific complaints whether relating to discrimination, detriments for whistle blowing or additional Agency Worker Regulations allegations which could be applied to the second respondent. He was therefore unable to present an arguable case that the Tribunal could hear against this party.

16. I explained to the claimant that had he proceeded with a complaint under regulation 5, there may have been scope for the second respondent to be liable for alleged acts as provided by regulation 14(3). However, even then, there would be a consideration of a 'reasonable steps' defence and in any event, the claimant had previously discounted a complaint under regulation 5 because he did not satisfy the 12 week qualifying period under regulation 7.

<u>The application of Rule 37(1) in relation to the claim against the second respondent</u>

17. I therefore explained to the claimant that because this preliminary hearing was listed as a public hearing and I was permitted by Rule 37, to consider the question of strike out of my own volition, it was in the interests of justice for this sanction to be considered in relation to claim brought against the second respondent. This was because there appeared to be no reasonable prospects of success in bringing a claim against the second respondent based upon the documents before me and the information I had heard from the claimant. I was therefore of the opinion that Rule 37(1)(a) was potentially triggered.

18. I explained that in accordance with Rule 37(2), I wanted to give the claimant a full opportunity to reply and he was therefore encouraged to make representations that supported his objection to the removal of the second respondent.

19. Despite his explaining to me at some length that he had ongoing issues with the second respondent and the way these issues had affected his working life, I was left with no indication from the claimant that there was any potential complaint subsisting within the claim form or within his additional information which persuaded me that there was a viable claim that the Tribunal would have jurisdiction to hear.

20. For the avoidance of doubt, I also made enquiries with the first respondent represented by Mr Jones as an interested party to this matter. He confirmed that the first respondent had no objection to the application being made by the second respondent for them to be removed from the proceedings. My consideration of the application of Rule 37 did not change the first respondent's position regarding the continuation of the second respondent as a party.

21. Under these circumstances I did feel that the test for striking out the claim against the second respondent was met because there were no reasonable prospects of any claim succeeding against that party.

22. Accordingly, it was appropriate for them to be removed from the proceedings as well in accordance with Rule 34, although in effect the Rule 37 strikeout decision had already done that. But in any event, it was in the interests of justice for the second respondent to be removed as a party.

23. With the second respondent having been removed from the proceedings, Mr Crossley was then permitted to leave the hearing and did not return following the break which I called to allow the claimant to review the next application that will be considered.

The first respondent's application for strike out/deposit order

24. I then moved on to the question of the first respondent's application made under rule 37(1)(a) seeking the strike out of the claimant's claim brought under the Agency Workers Regulations 2010 on the basis that the claims had no reasonable prospects of success and the tribunal did not have jurisdiction to hear the complaints as asserted.

25. The claimant had relied at the preliminary hearing case management before Judge Slater upon three specific allegations of less favourable treatment under regulation 12. They could be found within Judge Slater's draft list of issues at section 11 of that document annexed to the Note of Preliminary Hearing dated 31 July 2024. They were as follows:

    11.1.1 - On 25 January 2024 HR not allowing the claimant to speak to managers or directors about the termination of his engagement.

    11.1.2 On 25 January 2024 HR terminating the call from the claimant.

    11.1.3 On 27 January 2024 after a short conversation the first respondents employee helpline telling the claimant they could not help him.

26. Mr Jones provided a skeleton argument and oral submissions in support of his application. He confirmed that no application was being made for strike out concerning the other potential complaints of race discrimination made under the Equality Act 2010 or whistleblowing detriments brought under Part IVA of the Employment Rights Act 1996.

27. Firstly, he reminded the Tribunal of the requirements of Regulation 12 and the definition of what amounted to *'collective facilities and amenities*.' He noted that at 12(3) reference was made (although not exclusively so) to examples of facilities and amenities. These were canteen or other similar facilities, childcare facilities, and transport services.

28. He also referred to the 2019 guidance provided by the Department for Business Innovation and Skills concerning the Agency Worker Regulations

(Agency Workers Regulations 2010: guidance) and which explained that in relation to regulation 12 when considering collective facilities and amenities this is not intended to extend to all benefits which a hirer might provide to directly recruited workers or employees. Rather, it applies to collective facilities provided by the hirer either to workers or employees as a whole or to particular groups of workers or employees.

29. The guidance describes that these may include:

- a canteen or other similar facilities.
- a workplace creche.
- transport services (…in this context, local pick up and drop offs, transport between sites - but not company car allowances or season ticket loans).
- Toilets/shower facilities
- staff common room
- waiting room
- mother and baby room
- prayer room
- food and drinks machines
- car parking

The guidance goes on to say that this is a non-exhaustive list but Mr Jones argued that it was an illustration and indication of which facilities should be included.

30. Mr Jones then moved on to the question of what or who constituted a comparable worker for the purposes of Regulation 12. He again referred to the guidance which stated that an agency worker's right is to treatment in relation to relevant facilities that is no less favourable than that given to an actual compatible worker. If there are no compatible workers or employees there is no entitlement to equal treatment. Effectively he was saying that unless a named comparator is identified by a claimant, they cannot rely upon the protection of this Regulation.

31. For completeness, Mr Jones confirmed that he was unable to find any case law authorities which will provide guidance concerning this matter.

32. Mr Jones' argument was that the 3 alleged detriments did not describe matters which could be considered as being collective facilities or amenities. This was because the two relating to the HR call did not meet the description provided by Regulation 12 or the BIS guidance. This also applied to the third allegation, namely the employee helpline but additionally, Mr Jones noted that the call took place on the 27 January 2024 and this was the day after his engagement had terminated with the first respondent. Mr Jones noted that Regulation 12 required the claimant to be working for the respondent at the material time as Regulation 12(1) referred to rights existing *'…during an assignment'.*

33. I was concerned that the claimant had an opportunity to provide his arguments in reply to this application. However, I also reminded and

summarised to him the arguments being advanced by Mr Jones so that he could give thought to how he might oppose the grounds that were relied upon.

34. Unfortunately, the claimant simply provided background information concerning what happened in the workplace and the consequences of the treatment that he had experienced from respondent which ultimately led to the decision for his engagement to end. He was unable to explain how the HR and helpline facilities could amount to collective facilities and amenities. Nor despite prompting, could he identify a specific comparator who in similar circumstances was an employee or worker for the first respondent and who did not experience the alleged treatment as part of this complaint. I noted that this had been discussed before Judge Slater and he had been given ample opportunity to provide meaningful additional particulars when replying to her proposed draft framework list of issues.

<u>The missing allegation from the list of issues under Regulation 12</u>

35. As we discussed the case further, I noted that within the claim form/particulars of claim and within the further information provided by the claimant to the draught list of issues reference had been made to him being asked to leave a meeting room on the 23rd of January 2024. This appeared to have been related to alleged less favourable treatment under Regulations 12 and should have been included within the draft list of issues.

36. Mr Jones accepted that this involved a complaint which had been present since the claim form was presented and the respondent would not expect an application to amend from the claimant. However, I nonetheless required clarification from the claimant as to what this related to so it could be added to the list of issues under Regulation 12 as an allegation. I would then give Mr Jones the separate opportunity to make an application under Rule 37 concerning that complaint if he wished to do so.

37. The claimant found it difficult to explain precisely what the collective facilities were that he was relying upon and the less favourable treatment that he had received. However, eventually it became clear that what he was referring to was his ability to use a meeting room for urgent telephone calls and that he should not have been prevented from using this meeting room. He argued that it was generally available to employees or workers of the first respondent. The background to this complaint involved the claimant having to make an emergency call and then being asked by the managers to leave the room immediately.

38. The claimant was unable to identify a specific comparator who had been allowed to use the room in the way that he had alleged and who had not been asked to leave when doing so. He did say that everybody in the shift that he worked with would not have been subject to this less favourable treatment.

39. Mr Jones wished to include this additional allegation as part of the application for strike out under Rule 37. He disputed that this was a collective facility and said that for it to be the case, it would have to involve employees and workers of the first respondent having a general right to use that room and for the

claimant to be excluded when he tried to use it. He disputed that this was the case.

40. Moreover, he said that no named comparator was identified. At its highest he said, this seemed to be a complaint about being prevented from taking an emergency call in a meeting room and being asked by two managers who are booked this room 2 leave the room.

My consideration of the first respondent's application and the additional allegation

41. Having considered these matters, I dealt with the first respondent's original application separately from the additional allegation when determining these issues under Rule 37. It was in the interests of justice to deal with the second allegation matter under Rule 37 given that there were genuine concerns about it amounting to an arguable case and both parties could easily address the Tribunal concerning its merits. This was a proportionate use of the resource is available at the hearing today.

Regulation 12

42. Regulation 12 of the Agency Workers Regulations 2010, provides the following rights:

12 Rights of agency workers in relation to access to collective facilities and amenities

(1) An agency worker has during an assignment the right to be treated no less favourably than a comparable worker in relation to the collective facilities and amenities provided by the hirer.

(2) The rights conferred by paragraph (1) apply only if the less favourable treatment is not justified on objective grounds.

(3) "Collective facilities and amenities" includes, in particular—

(a) canteen or other similar facilities;

(b) child care facilities; and

(c) transport services.

(4) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(a) both that individual and the agency worker are—

(i) working for and under the supervision and direction of the hirer, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills;

(b) that individual works or is based at the same establishment as the agency worker or, where there is no comparable worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements; and

(c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

43. During an assignment an agency worker has a right to be treated no less favourably than a comparable worker in relation to the collective facilities and amenities provided by the hirer, (Regulation 12(1)). These are 'day one rights' and are unlike most of the rights identified within the Regulations in this respect.

44. A failure by a hirer to afford these rights is subject to the defence of justification on objective grounds, (Regulation 12(2)). It is understood that the first respondent is not seeking to rely upon this ground as part of their application today and instead disputes that the alleged breaches of Regulation 12 in the draft list of issues amounted to things that could be described as collective facilities.

45. A comparative worker is defined by Regulation 12(4) and the identity or lack of identity by the claimant of a comparative worker is relevant to the first respondent's application seeking strike out under Rule 37(1)(a).

Agency Worker Regulations 2010: guidance

46. Under the Agency Worker Regulations 2010: guidance, the following is said regarding comparable workers under Regulation 12:

'Access to facilities – comparable worker

An agency worker's right is to treatment in relation to relevant facilities that is no less favourable than that given to an actual comparable worker 2 – an employee or worker directly employed by the hirer.

First, the hirer should establish if there are any comparable workers or employees. To be comparable they should be:

• doing the same or broadly similar work to the agency worker

• working at the same location as the agency worker or, if there is no such person, be in another location owned by the hirer (this is to avoid any confusion when a company has several different locations and may have, for example, a canteen in one particular location to which all direct employees in all the locations have access).

If there are no comparable workers or employees there is no entitlement to equal treatment.'

47. The guidance is therefore suggesting that the hirer should identify comparable workers or employees, but that they should be carrying out broadly similar work or working at the same location as the claimant agency worker. However, there must be comparable workers to rely upon this regulation and the Tribunal cannot simply utilise a hypothetical comparator as might be used in discrimination complaints under the Equality Act 2010.

The first respondent's application in relation to the three original allegations

48. In relation to the first respondent's application made under Rule 37, I concluded that it was appropriate to strike out the original three allegations on grounds that the Tribunal did not have jurisdiction to hear them and therefore there was no reasonable prospects of success in accordance with Rule 37(1)(a).

49. In relation to the first two allegations regarding HR, this was a case where the claimant despite having had his engagement ended, was permitted to have access to HR facilities. It was not argued by the first respondent that as an agency worker, HR facilities could not form part of the claimant's 'Day one rights' under the Regulations. But what the claimant is saying had happened to him in this case was that he was unhappy that HR would not allow him to engage with management and secondly, that the call was ended. This is not the same as being denied access to these facilities and the claimant was simply unhappy with the resolution and for this to happen, access was allowed.

50. I was also concerned that Regulation 12 made reference to collective facilities during an assignment and all three allegations (and especially the third involving the employee advice line), arose from the ending of the assignment. At this point the correct avenue to complain or challenge the hirer's decision, was through the claimant's agency.

51. Additionally, based upon the reading of the Regulations and the 2019 guidance, the HR facilities did not fit in with the collective facilities envisaged by this legislation or the government department responsible. While the examples provided were not exhaustive, there was a clear indication that they related to those sometimes small but often significant benefits that could make work easier for employees and workers. HR and employee help lines are very much derived from the personal nature of the employment contract with employees and workers. In this respect, I am not persuaded that the HR facilities and certainly facilities used upon the termination of the assignment met the category of collective facilities and amenities.

52. In terms of comparable workers when dealing with access to facilities, I noted that the first respondent disputed that the claimant had named a comparator in accordance with Regulation 12(4). While there was an expectation that the first respondent as hirer must establish comparable workers, Judge Slater had asked the claimant to name the comparators whom he wished to rely upon as part of the further information he was ordered to provide regarding the draft list of issues that she had prepared.

53. By this stage of the proceedings, the claimant had an opportunity to request further particulars from the first respondent as hirer. However, what had become clear was that he knew who the members were of the 'Emerald' shift where he worked and who were those employees and workers whom he might compare himself with. The first two original allegations related to the claimant accessing HR and he was unable to identify a way in which his colleagues would have been treated differently (i.e. not less favourably than him) and ultimately, it became clear that he was simply using the allegations as a vehicle to express his feeling of unfairness about the decision to end his contract.

54. The same principles could be applied to the third allegation of the employee helpline, but this was something that was accessed following the termination of the engagement and was simply not consistent with taking place *'during an assignment'* as described by Regulation 12(1). By this point he was not accessing facilities as an agency worker working for the hirer, but one who had ceased to be working an assignment.

55. For these reasons, while I sympathised with the claimant's frustration concerning the termination, he had not identified an arguable complaint in relation to the three original allegations identified by Judge Slater in the draft list of issues and they must be struck out under Rule 37(1)(a) as having no reasonable prospects of success.

The additional allegation and the applicaition of Rule 37(1)(a)

56. In relation to the additional complaint which involved the meeting room I was also unable to conclude that there was jurisdiction to allow this complaint to proceed as there were no reasonable prospects of it succeeding.

57. This was because the claimant was not relying upon a collective facility as such, but circumstances where he would not be ejected from a meeting room by managers. Despite a lengthy discussion with him concerning this allegation, he was unable to provide the basis of an argument whereby he was alleging that agency workers were forbidden from using a meeting room whereas employees and workers on his shift were able to use the meeting room freely as communal facilities.

58. Instead, this was another instance where he felt there was a lack of kindness or consideration by management when he had chosen to use what was the only vacant room to take a telephone call relating to a personal emergency. He said that managers had booked that room had asked him to leave. He did not provide any examples of comparators who would have been allowed to continue to use that meeting room despite knowing the names of those on the Emerald shift that he was working on. For the avoidance of doubt, the claimant's managers could not be considered comparable workers as they were not working for and under the supervision of the hirer in the same way as his comparable shift working colleagues as they occupied more senior roles than he did. The claimant did not seek to argue that they were comparable in any event.

59. Once again it was understandable that the claimant was very unhappy about what had happened when he was working for the first respondent but he was unable to articulate a meaningful complaint which could be allowed to advance under regulation 12. That is not to say that the respondents behaved well towards him at this time simply that he was unable to identify an arguable allegation and complaint under Regulation 12 which would have any prospects of succeeding.

60. The claimant was able to present a claim and his particulars were produced in considerable detail. Judge Slater permitted him an additional opportunity to clarify his claim when she drafted the list of issues and in doing so he was able to remind the tribunal of the incident involving the meeting room. But ultimately identifying an incident where an employee is unhappy with his treatment by managers, is not enough to justify a breach under Regulation 12 unless it can be shown that there is an arguable complaint of less favourable treatment when seeking to access collective facilities and amenities.

Conclusion following the decision to strike out the Agency Workers Regulations 2010 complaint

61. There are of course the remaining complaints relating to detriments arising from the making of a protective disclosure and also allegations of discrimination harassment and victimisation relating to race.

62. These would now continue against the first respondent but further discussion would be required in order that the allegations could be finalised.

63. As already mentioned, it became clear once the question of the applications and Rule 37(1)(a) had been resolved by 1:30 PM in the afternoon, progress had been slower than expected.

64. The claimant had not only interrupted the other parties but had also interrupted me during my delivery of my decisions in relation to the applications. This meant that it was difficult for the ex tempore judgments to be delivered in full, but also for the claimant and indeed the other parties to make a fair note of the decision being made.

65. These difficulties therefore required me to remind the claimant on several occasions that he must not interrupt me during the hearing and also required me to repeat things that I had already said. This was far from satisfactory and it became clear that a point had been reached in the hearing where it was not reasonably practicable to continue and to attempt to resolve the other remaining matters on the agenda for the preliminary hearing and that had been listed by Judge Slater.

66. Accordingly, I felt that it was in the interests of justice to stop the hearing for the day, focus upon providing a detailed judgment and reasons and I determined that those remaining matters will be dealt with at a later hearing. I would also produce a separate Note of preliminary hearing for today.

Employment Judge Johnson

Date: 26 November 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 4 December 2024

FOR THE TRIBUNAL OFFICE

Notes

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