EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Nankhonya	**v**	**MEDACS Healthcare Plc**

Heard at: **Sheffield** **On:** **13 February 2017**

Before: **Employment Judge Maidment**

Appearances

For the Claimant: **Did not attend**

For the Respondent: **Mr J Keeble, Solicitor**

PRELIMINARY HEARING

JUDGMENT

Pursuant to Rule 27 of the Employment Tribunals Rules of Procedure 2013, the Claimant's claim is dismissed owing to the Tribunal having no jurisdiction to consider it and it having no reasonable prospect of success.

REASONS

1. The Claimant lodged his complaint with the Employment Tribunal on 30 July 2016. In the box of the form ET1 requiring employment details to be provided he referred to employment having started on 8 October 2015 and ended on 30 September 2016. He described his job as having been a locum consultant physician. In box 8, where any claimant is required to indicate the type of complaint they are making, the Claimant ticked the box referring to "other payments" but not, for instance, the boxes relating to notice pay, holiday pay or arrears of pay. He then ticked the further box stating that he was making "another type of claim" which an Employment Tribunal could deal with.
2. The Claimant went on to describe having worked as a locum hospital doctor *"under the umbrella of MEDACS, a locum agency who failed to link their working relationship with me to the GMCUK when they should have done so. This led to my dismissal from the hospital …"* The Claimant further described having worked as a locum through another agency for three years and only

having moved to MEDACS the previous year. He described it as a prerequisite of any agency that it had to support any doctor in continuing education and re-validation and that *"normally the Agency finds jobs for the doctor and negotiates contract"*. The Claimant described working at a hospital in Rotherham *"under MEDACS umbrella"*, a hospital which was familiar with the Claimant's work from his previous engagement there. He described a communication by the GMC on 21 April 2016 with Dr Wareham, medical director (presumably of Rotherham NHS Trust) and that soon after his contract was terminated by the hospital. He then referred to there being no link with a designated body at the GMC and that situation having arisen due to an administrative error on the part of MEDACS.

3. On consideration of the Claimant's Tribunal application, Employment Judge Burton issued an Order pursuant to Rule 27 of the Employment Tribunals Rules of Procedure that the claim would stand dismissed on 26 August 2016 unless before that date the Claimant had presented written representations explaining why the claim should not be dismissed. In his reasons he identified that the claim appeared to relate to the Claimant as a locum consultant physician being in dispute with his locum agency, the Respondent, by reason of an alleged administrative error which led to the Claimant losing the opportunity to find gainful employment with local hospitals. Employment Judge Burton was unable to identify any matter over which the Employment Tribunal had jurisdiction and therefore was of the view that the claim had no reasonable prospects of success.

4. The Claimant in response to such Order submitted written representations together with supporting documentation – representations which this Employment Judge has also considered today.

5. The Claimant's representations were reviewed by Employment Judge Jones who directed that the matter be listed for a hearing for the Claimant to identify the jurisdiction within which his claim fell and why therefore it should not be dismissed for having no reasonable prospects of success. That Preliminary Hearing was ultimately listed for 26 October 2016. Clarification was given in advance that the hearing fell within Rule 27(3) and that the Respondent might, but need not, participate. A stay in the requirement for the Respondent to submit its ET3 response was continued.

6. Late in the afternoon of 25 October, the Claimant telephoned the Tribunal's office in Leeds to explain that he had been unaware of the Preliminary Hearing and, as subsequently set out in correspondence from Employment Judge Little to the Claimant, *"was apparently not prepared and in any event had an appointment with lawyers on another matter unrelated to these proceedings fixed for 26 October".* Employment Judge Little stated concern that the correspondence to the Claimant had been correctly addressed and had been sent to the same address as other correspondence which had reached the Claimant.

7. In any event, Employment Judge Little decided to postpone the Preliminary Hearing but wrote to the Claimant with some preliminary observations commenting that these might result in there being no need for a hearing or at least prepare the way for a more effective one. The benefit to the Claimant taking legal advice was highlighted within this letter. Employment Judge Little explained that not every dispute in the workplace or which is directly or indirectly connected to employment can be brought before an Employment Tribunal. He noted that it was not clear whether the Claimant constituted an

employee or worker vis a vis the Respondent continuing: *"if the Claimant is alleging that the so called administrative mistake of the Respondent was an act of negligence, the Tribunal does not have power to deal with negligence claims. Alternatively if the Claimant is saying that the alleged error amounted to a breach of contract, the Tribunal does have power to deal with some breach of contract cases – but only if the person bringing the claim was an employee (rather than a worker)."* The Claimant was ordered to address these points and to confirm which employment right he was seeking to enforce by no later than 21 November 2016.

8. The Claimant indeed made further written representations on 19 November which again this Employment Judge has reconsidered. These indicated that the Claimant thought that *"we are dealing with a clear example of breach of contract leading to my loss of employment"*. He referred to *"employment with MEDACS"* but provided no explanation or justification for that being the nature of the relationship. He stated that he did not know whether the Respondent was also negligent.

9. The Rule 27(3) hearing was re-listed for today by a notice sent to the parties on 9 December 2016. A further notice was sent to the parties on 12 December.

10. The Claimant corresponded further by email with the Tribunal on 6 February, copied to the Respondent's representatives, contending that he had clarified the claim the Respondent had to meet and that the Tribunal ought to proceed to make Case Management Orders including a requirement that the Respondent submit its defence.

11. On attending the Sheffield Employment Tribunal this morning, this Employment Judge learnt from the Tribunal's case file, where he saw a letter apparently emailed to the Leeds Employment Tribunal on Friday 9 February, that solicitors acting for the Claimant were requesting a postponement of this hearing. No determination had been made on this postponement application and the Tribunal was aware that Mr Keeble, representing the Respondent, was in attendance in the Sheffield Employment Tribunal waiting for the hearing to commence.

12. The Tribunal considered the postponement application which referred to the solicitors in fact not acting on the Claimant's behalf in any employment matters but in his separate *"professional issues"*. It informed the Tribunal that the Claimant had another hearing on Monday 13 February at 10am at Stockport County Court which was listed for three hours. The point was made that the Claimant could not be in two places at once.

13. On the basis of this information, the Tribunal was not minded to postpone this hearing, particularly in circumstances where there was no explanation as to why the application had been made at such a late stage and no evidence, for instance, of when the County Court hearing had been listed. It appeared to the Tribunal to be unlikely that a three hour County Court hearing had been listed for today only on the preceding Friday. Furthermore, there had already been considerable delay in the progress of these proceedings including delay due to the fault of the Claimant. The Claimant or his solicitors had never been told that today's hearing had been postponed and there was no basis for them making any assumption that it had been.

14. Before finally determining the request for postponement, the Tribunal convened shortly after 10am and Mr Keeble was asked regarding his own

knowledge of the postponement application. This application had not been received by Mr Keeble, the email to the Tribunal of the previous Friday had not been copied in to him. He had however received a call on the previous Thursday from solicitors who had said they were not instructed formally regarding employment matters, but had the Claimant with them. They told Mr Keeble about a hearing to deal with GMC matters listed in Stockport for this morning. Mr Keeble had enquired as to when the Claimant had been aware of the County Court hearing but was not given any detail regarding the date he had become aware of it. Mr Keeble did say in this conversation that he was minded not to object to any application for postponement (where not least he saw value in the Claimant becoming represented in these proceedings) and there was some discussion regarding the possibility of the matter resuming as a telephone hearing. Mr Keeble had telephoned the Employment Tribunal in Leeds around midday on the Friday to see whether any application for postponement had been made but had been told that none had been at that point in time. He was not, as already referred to, aware of any application to postpone until the commencement of today's hearing.

15. Having considered what Mr Keeble had to say and given its earlier considerations as set out above, the Tribunal was of the view that this hearing should proceed and time was spent by the Tribunal reviewing the Claimant's claim and previous submissions made by him. The Tribunal was also provided by Mr Keeble with a copy of the Respondent's *"Terms of Engagement of Workers"* document which was clearly a standard form of document used by the Respondent which was described therein as an *"employment business"*. The Tribunal was also shown a registration form the Claimant had signed with the Respondent as part of which he had confirmed that he had read and agreed to adhere to the aforementioned terms of engagement.

16. The Tribunal considered those terms of engagement which were drawn up as a relatively standard set of terms and conditions regulating the engagement of an agency worker. In terms of their substance the agreement recited that the terms formed a contract for services. It was provided that the Respondent *"is an employment business which supplies temporary workers to its Clients".* Clause 2 went on to state:

    "You wish to be provided with paid Assignments including work which falls within the category specified above. The Company will not charge you a fee for finding Assignments. The Company will endeavour to find suitable Assignments for you with Clients in accordance with and subject to these Terms. You are not obliged to accept any Assignment offered to you by the Company … You agree that you may be transferred to a new Assignment at any time without restriction to either location or client, as directed by the Company".

17. Further at Clause 3 it was provided:

    "The relationship between the Company and you shall not be one of employment. The Company shall have no obligation to provide any minimum period or number of Assignments. It shall be entirely within the discretion of the Company to determine whether you are suitable for any Assignment and whether you are more suitable than any other worker with whom the Company has an agreement".

18. At Clause 8 it was provided that the Respondent would deduct income tax and national insurance contributions from payments due to the Claimant.

19. Clause 12 provided as follows:

    "During any Assignment, you shall be under the direction control of the Client from the time you report at the start of any Assignment until its conclusion".

20. The Tribunal referred to the documents sent to the Tribunal by the Claimant which included *"validation agreements".* Mr Keeble explained that separately the Respondent might agree with individuals to assist in their re-validation as a medical practitioner for a separate fee. Hospitals could undertake this process if they wished but it was accepted that the Claimant had agreed with the Respondent that it would take responsibility for his re-validation.

21. The Employment Tribunal has no jurisdiction to hear any complaint of negligence. There was within these proceedings no complaint of unfair dismissal. Nor was there any complaint alleging unauthorised deductions from wages or a failure for instance to pay holiday pay where the requirement would have been for the Claimant to be a worker i.e. not necessarily someone engaged pursuant to a contract of employment but at least someone who had contracted to perform personally any work or services for another party whose status was not by virtue of the contract that of a client or customer of any profession or business (see Section 230 of the Employment Rights Act 1996).

22. The only identifiable claim, where the Claimant might be able to show that the Tribunal had jurisdiction to hear it, was a claim seeking damages for breach of contract. Essentially, the Claimant was arguing that the Respondent had a contractual obligation to take steps, not least pursuant to a contractual duty of care, to ensure that he had the necessary accreditation/validation/linkage to an appropriate organisation for GMC purposes in order to be allowed to practice medicine. That appeared to be a claim which arose or was outstanding at the termination of employment but of course that was predicated on there having been at any material point in time any relationship of employment between the Claimant and the Respondent. Article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994 extends the Employment Tribunals' jurisdiction to hear contract claims *"of an employee"* – it does not extend jurisdiction to *'workers'*.

23. The Tribunal was clear on the basis of the Claimant's written submissions, the documents submitted by him and the documents now provided to the Tribunal by the Respondent, that the Claimant was at no material point employed by the Respondent. He was an agency worker. He had agreed to provide personal services to the Respondent, those personal services effectively being his availability to be placed with a client of the Respondent pursuant to its employment business. However, whilst that formed one part of the "irreducible minimum" said to have to exist for there to be a relationship of employment, the Claimant could not satisfy the other requirements. In particular, there was no mutuality of obligation. The Respondent was under no obligation to provide work to the Claimant and the Claimant had a choice whether or not to accept any assignment. The contract with the Respondent could be terminated at any time by either party without notice. Further, the Respondent had no control over the Claimant in terms of the performance of any duties or responsibilities by him. That control rested with the Respondent's client with which he might be placed, in this case the

Rotherham NHS Trust. The Tribunal looked at all other relevant factors to determine whether they pointed one way or another. The deduction of tax and national insurance was a requirement and common feature of agency worker arrangements and did not indicate any relationship beyond that of an agency worker. Nor was the provision, for instance, of holiday pay indicative of any relationship beyond that of the more limited 'worker' status.

24. The Tribunal was therefore in a position to conclude that the Claimant, not having been an employee of the Respondent, had no entitlement to bring a complaint of breach of contract against the Respondent in the Employment Tribunal. The Employment Tribunal had no jurisdiction. Nor was any other claim brought where jurisdiction could be identified.

25. Alternatively, this was a case where, for reasons of the lack of jurisdiction, the Tribunal could say that the Claimant had no reasonable prospect of success in his complaints against the Respondent.

26. The Tribunal has considered that it was indeed capable of arriving at these conclusions without having to hear from the Claimant today and the Tribunal could not imagine the Claimant having been able to make any representations which would have affected this conclusion. There was no basis whatsoever, for instance, for the Tribunal concluding that the contractual arrangement between the Claimant and the Respondent was a sham or did not reflect indeed the true intention of the parties.

Employment Judge Maidment

Date: 23 February 2017