



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103945/2018

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Held in Glasgow on 10 August 2018

Employment Judge: Robert Gall

10 **Members: Martha McAllister
Ian Poad**

15 **Mrs E Lawson**

**Claimant
In Person**

20 **Rullion Engineering Limited**

**Respondent
Represented by:
Mr H Marshall -
Company
Representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is unsuccessful.

REASONS

30 1. This case called for hearing at Glasgow on 10 August 2018. The claimant appeared in person. She brought with her a bundle of documents to which reference was made during her evidence. Where a production brought by the claimant is referred to in this Judgment, it is preceded by the letter "C". The claimant gave evidence on her own behalf.

35 2. The respondents were represented by Mr Marshall. They also appeared with a bundle of documents. Some of those were the same as those which the claimant had produced. Where a production within the respondents' bundle

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is referred to in this Judgment, it is preceded by the letter “R”. Mr Burnett was the sole witness for the respondents.

3. The case was one brought under the Agency Workers Regulations 2010 (“AWR”). The claimant, along with other temporary agency workers, worked at the premises of Scottish Power UK plc alongside others who were on the permanent staff of that entity. The claimant’s working relationship with the respondents had come to an end. She said that this was because she had suggested that she was not being paid as much as a permanent employee with Scottish Power UK plc. The respondents said that the termination of the working relationship between them and the claimant was at the instigation of Scottish Power UK plc in circumstances where that entity had said to them that this should occur due to breach of confidentiality by the claimant, misquoting of a manager by the claimant and disruption within the team caused by the claimant. Termination of the working relationship had not therefore occurred, the respondents said, due to the suggestion made by the claimant that as an agency worker, she was not being paid as much as a permanent employee.
4. Scottish Power UK plc had been named as second respondents in the claim form presented by the claimant. There was however no ACAS Early Conciliation Certificate form produced by the claimant in relation to the claim against that entity. The claim, insofar as directed against Scottish Power UK plc could not therefore proceed. No ACAS early Conciliation certificate was ever submitted in relation to a claim against Scottish Power UK plc. This claim could not therefore proceed against that entity.

Facts

5. The following were found to be the relevant and essential facts.

The working relationship

6. The respondents entered into an agreement with individuals such as the claimant. That agreement is a contract for the individual to carry out specified work on standard terms and conditions and as detailed in what is known as a

Project Schedule Pack. A copy of the letter of offer, accepted by the claimant, and the Project Schedule Pack which applied insofar as the claimant was concerned appeared at R27 to R35, the same document appearing as tab one in the claimant's bundle.

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7. There was a working relationship between the claimant and the respondents. That however was not one of employment. There was no mutuality of contract between the claimant and the respondents. The respondents did not require to offer work to the claimant or to make payment to her. There was no obligation on her part to accept work offered by her by the respondents. The claimant was an agency worker.

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8. To provide a fuller picture of the working relationship in which the claimant was involved, the following facts are relevant. The claimant worked as requested by Scottish Power Energy Networks ("SPEN"). She completed timesheets. She submitted those to the respondents. If she was ill she was, in terms of the agreement, to alert the respondents to that within one hour of her scheduled start time. She was also to submit any medical certificates in respect of any absence to the respondents. The respondents were responsible for making payment to the claimant of remuneration in respect of the work carried out.

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9. The respondents were defined in the agreement as the employment business. There was reference within the agreement to a client. That was defined as:

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"the person, firm or corporate body, together with any subsidiary or associated person, firm or corporate body (as the case may be) to whom the Agency Worker is supplied or introduced."

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10. In the case of the claimant, the client was Scottish Power UK plc. The branch of that company involved was SPEN.

11. The following provisions appear in the agreement between the claimant and the respondents, specifically in the schedule at R31, R32 and R34:-

5 “2.2 *During an Assignment, the Agency Worker will be engaged on a contract for services by the Employment Business on these Terms. For the avoidance of doubt, the Agency Worker is not an employee of the Employment Business although the Employment Business is required to make the Deductions from the Agency Worker’s pay. These terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker, or the Agency Worker and the Client. The Agency Worker is supplied as an Agency Worker, and is entitled to certain statutory rights as such, but nothing in these Terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated.*

15 3.8 *If the Agency Worker considers that s/he has not or may not have received equal treatment under the Agency Workers Regulations, the Agency Worker may raise this in writing with the Employment Business setting out as fully as possible the basis of his/her concerns.*

20 “9.1 *Any of the Employment Business, the Agency Worker or the Client, may terminate the Agency Worker’s Assignment at any time without prior notice or liability.”*

25 12. The claimant commenced the relationship with the respondents on 20 October 2016. Zero days’ notice was required in order to end the relationship if any of the three parties mentioned decided that was the appropriate course.

30 13. In terms of her daily work routine, the claimant worked at a desk adjacent to others performing the same role as her, incident controller. Specifically, she worked next to someone who as detailed below became a permanent employee with SPEN, Jim Panton. There were around eight people in the

5 same role as the claimant. Some were agency workers, some were permanent employees. Various shifts were worked. The immediate managers in respect of those shifts were Gary Meikle and Jennifer Davies. Those two individuals reported to Stewart Little. The incident controllers, including the claimant, sat in an open plan area within which Mr Meikle or Ms Davies and also Mr Little sat.

- 10 14. Andrew Burnett was the Executive Account Manager who worked for the respondents and who managed customer and contractor relationships. This meant that he interacted with agency workers such as the claimant and also with clients such as SPEN.

Events in February 2018

- 15 15. By email of 6 February 2018, a copy of which appeared at C tab 5, document 2 and also at R40, Mr Burnett intimated to the claimant and other agency workers rates of pay which were to be applicable for the work which they were doing. There had been some confusion as to the correct rate of pay, with earlier emails at different stages over the preceding months referring to different rates of pay.

- 20 16. On 7 February 2018, it was confirmed to Mr Panton that he had become a permanent employee with SPEN. He was delighted by this. At the time when this news became known to him and when a copy of his contract as it was now to be was supplied to him electronically, the claimant was present as was Mr Meikle. Mr Panton expressed his delight and made known to those around him the payment rates which he was to receive as a permanent employee. There were other former agency workers who had become permanent employees at that time. They made it known both to the claimant and others within the team of incident controllers what their rates of pay were to be as permanent employees.

- 25 30 17. The claimant was concerned when she heard what the rates of pay applicable in the case of Mr Panton and others were. She believed them to be more than the rates of pay which she was receiving as an agency worker.

18. In light of this concern, she sent an email to Mr Burnett on 8 February. A copy of the claimant's email appeared at R39. Prior to so doing, she spoke to ACAS regarding the position of an agency worker and any obligation to make payment to such a worker at the same rate as permanent staff members. The claimant's email quoted the rates set out by Mr Burnett in his email of 6 February 2018 and also quoted the rates which were within the contract issued to Mr Panton on 7 February 2018. It mentioned Mr Panton by name and referred to the contract issued to him on the preceding day. The claimant concluded her email by asking:-

"Can you please look into this for me and advise why when we are doing the same role that there is a difference in wages?"

19. The claimant was then absent being unscheduled to work on 9, 10 and 11 February.

20. Mr Burnett took up the point raised by the claimant with SPEN. He did not mention the claimant by name, referring to an enquiry which had been made rather than naming her. He raised the query with SPEN Recruitment Manager Kirstyn Love. He received a reply, a copy of which appeared at R42, in the following terms:-

"In regards to the query you have raised. I can assure you that we are in full compliance of AWR in terms of pay rate. Agency workers should not be comparing themselves to permanent members of staff with no context to what they are looking at. Permanent members of staff are subject to performance management increases which non-permanent workers are not. Furthermore, length of service of permanent members of staff will also have an impact of pay rate.

I would like this person spoken to about accessing sensitive and personal information and I think it is also worth asking Stewart to reiterate Perm staff that this information should not be shared."

21. When the claimant came into work on 12 February, Mr Meikle spoke with her as she arrived. He asked her whether she had a problem with wages and said that Ms Davies wanted to know why she had not raised any query directly with SPEN. The claimant replied saying she had previously raised a matter with Ms Davies who had said to her at that point that any issues of that type should be raised with the respondents. Mr Meikle said that she should discuss the situation with Mr Little.
22. The claimant went to speak to Mr Little. She asked him why agency staff were not being paid the same as permanent staff. She found his response abrupt and aggressive. He said to her that agency staff were paid less than permanent members of staff and also mentioned that he was paid less than another manager. The claimant said to him that she had already spoken to ACAS who said that agency workers should be paid the same as permanent workers. The claimant then went to her own desk. She took the view that there was no point in further discussion.
23. Mr Meikle later came to the claimant's desk and asked how she got on in speaking to Mr Little. The claimant said that Mr Little had said to her that agency staff were paid less than permanent members of staff and that he had compared himself to a different manager in terms of what they earned. Due to these exchanges, the claimant was concerned that the respondents had informed SPEN that it was her who had queried pay rates. She believed that this was likely to have been the case given that when Mr Meikle had spoken to her, he had been aware that she had an issue with pay rates.
24. In the time between 12 February and termination of the relationship between the claimant and the respondents on 22 February, the claimant was not asked to work any overtime shifts. It was her understanding that others did work overtime in that period.

25. In that ten day period, Ms Davies did not speak with the claimant. She sent the claimant an email querying how a matter had been dealt with by the claimant. That email however was in response to an enquiry from those dealing with a particular job as to how it had been logged as an incident. The
5 enquiry raised by Ms Davies was unrelated to the question asked by the claimants as to rates of pay.

26. It is matter of dispute between the parties as to whether Mr Burnett did or did not telephone the claimant on 14 February to communicate that the result of
10 enquiries made by the respondents with SPEN was that there had been no breach of AWR arising from payments made to the claimant compared to payments made to permanent staff.

27. By email of 21 February 2018, a copy of which appeared at R44 and C tab 5
15 number 4, Mr Burnett sent the following to Incident Controllers:-

“In response to some questions which have been raised recently regarding the rates paid to both agency staff and permanent employees working as incident controllers within Scottish Power, I can confirm the following:

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We carry out (sic) the required due diligence with Scottish Power in accordance with the AWR requirements for aligning temporary workers with permanent workers, and can confirm that we are satisfied with their replies which indicate that there is a pay grade structure and company performance pay. All of which is taken into account when reviewing the comparator rate. In your case, we can confirm that the pay rate due to you is correct.

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Should you have any questions surrounding this or any other issue, please do not hesitate to contact me directly.”

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Termination of working relationship between the claimant and the respondents

28. Mr Little contacted Mr Burnett in the afternoon of 21 February. He said that he no longer wished the claimant to be part of his team. He referred to the claimant having shared private information of another employee (a reference to the salary of Mr Panton set out by the claimant in her email referred to above and specifically said to be the salary of Mr Panton), that he had been misquoted by the claimant and that she had disrupted the team.
29. On the basis that it was the wish of the client to terminate the arrangement in respect of the agency working of the claimant on those grounds, the respondents set up a meeting with the claimant for 22 February.
30. At this meeting, Mr Burnett said to the claimant that the contract between the claimant and the respondents was now being terminated. He mentioned the reasons as being that the claimant had sent on confidential information, that she had misquoted a manager and that team disruption had been caused. The claimant was upset during this meeting. She asked whether the arrangement was being terminated because she had queried pay. Mr Burnett said that was not the case. He offered to help the claimant find alternative work. The meeting was a brief one.
31. When the meeting concluded, Mr Little was at the door. He gave the claimant her possessions and security personnel then left the building with her.
32. The assignment which involved the claimant working at SPEN was scheduled to terminate on 25 June 2018.

Events since 22 February

33. The following day, the claimant obtained an alternative job. The rate of pay which she receives in this alternative employment is £6 an hour less than that which she was receiving from the respondents. She has been working more hours, albeit at this reduced rate of pay, to try to close the gap between the payment she received when with the respondents and that which she now

receives. She receives from her new employers marginally over £4,000 per annum less than she formerly received from the respondents.

The issues

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34. The following were the issues for the Tribunal:-

10 (1) Was the termination of the relationship between the respondents and the claimant an act done on the ground that the claimant had alleged that there was a breach of AWR?

(2) If that was the ground on which termination had been an act done, what remedy was to be awarded as far as the claimant was concerned?

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Applicable law

35. AWR provides that there is an automatically unfair dismissal if the reason for dismissal, or principal reason, is one specified in paragraph 3 of regulation 17.

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36. Paragraph (3) of regulation 17 sets out the reasons which might potentially be the reasons for dismissal and which, if they were, would form the basis of an automatically unfair dismissal. Those include:-

25 (v): *“alleged that a temporary work agency or hirer has breached these Regulations.”*

Submissions

37. Both parties made brief submissions.

30 Submissions for the respondents

38. Mr Marshall said that the claimant was an agency worker. AWR were the relevant regulations. This was not an employee/employer relationship. There was a temporary worker contract. There was no supervision, direction or control by the respondents in relation to how the work was carried out.
5 There was no mutuality of obligation.
39. The fact that Scottish Power were not respondents made the case problematic as there was limited verbal evidence. There was also very little in writing which would assist. There was for instance no termination letter
10 sent which would provide evidence as to the reasons given to the claimant at the time when the relationship came to an end.
40. The respondents had however done as was expected under AWR, said Mr Marshall. There had been a query by the claimant as to her pay as compared
15 to permanent members of staff. That had been relayed on to SPEN. A reply had been received. That information had been then given to the claimant.
41. Mr Marshall highlighted the ability to terminate the relationship as between the claimant and the respondents. This was in terms of clause 9. He referred
20 to the fact that zero days' notice was involved. The respondents were also obliged to carry out any request of SPEN. They could try to negotiate and to seek further information before acting. They were ultimately however obliged to act as SPEN asked them to in terminating the relationship with an agency worker.
- 25 42. I explored to a degree with Mr Marshall whether he was saying that no matter what reason SPEN gave for termination of the working relationship, the respondents had to follow through on that. I wondered whether he was, for example, saying that if the Tribunal found that SPEN may have acted as they
30 did because of the pay query raised, the respondents could nevertheless say that they had acted as directed by SPEN and were not liable. Unfortunately, Mr Marshall was not able to help the Tribunal to any great extent in that area. His submission was that the claim should be unsuccessful.

Submissions for the claimant

43. Mrs Lawson said that she accepted she probably should not have named Mr Panton when she wrote to the respondents. Her belief however was that her email had simply been forwarded by Mr Burnett. As a result SPEN knew both that she had mentioned Mr Panton by name and that it was her who had raised the query as to payment being equivalent. She could not explain any other route which would have led to Mr Meikle and Mr Little knowing that she had had an issue as equivalence of pay.
44. The fact that Scottish Power had not reacted favourably was illustrated by overtime not being offered to her after she queried the pay rates. Similarly, Ms Davies had not spoken to her after that had occurred. Ms Davies had also raised a query with the claimant's work, something which had never happened prior to that. Ultimately, the claimant had been escorted off the premises. Given that she had never been absent from work and had never had a work issue, all of this showed the reaction of SPEN to her query on pay.
45. Mrs Lawson urged that the Tribunal accept that the first time she knew of any response was in terms of the email of 21 February 20018 from Mr Burnett rather than in any telephone call from him as he had suggested to the Tribunal.

Discussion and decision

46. This was a difficult case to determine. There was no witness for or evidence from anyone from SPEN. As mentioned above, there had been an attempt to bring the claim against the current respondents and also Scottish Power UK plc. Due to the absence of an ACAS certificate, the claim against those potential second respondents could not be registered. The claim against that entity was never re-presented.
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48. Useful evidence might have been obtained had Scottish Power UK plc been a party to the claim. For example, given that it was said that Mr Meikle was present when Mr Panton openly revealed the sum which he was being paid,

the suggestion that the claimant had accessed confidential information or passed on confidential information could have been explored at Tribunal. On the evidence of the claimant, she had not accessed confidential or sensitive information but rather had it made known to her by the individual involved.
5 That was not therefore blameworthy conduct on her part.

49. Equally, the evidence was that other incident controllers had revealed details of their salaries to the team. Whether Mr Meikle became aware of dissatisfaction on the part of the claimant with the suggested disparity in
10 payment through the respondents revealing that to him or through some other route could have been explored..

50. Ultimately, what the Tribunal has to do is consider whether the termination of the working relationship by the respondents was automatically unfair on the
15 basis that the reason or the principal reason for termination was that set out in regulation 17 (3)(v) of AWR.

51. In other words, the Tribunal has to determine whether the reason or principal reason for termination of the relationship by the respondents was that the
20 claimant had alleged that there was a breach of AWR. In her circumstances, this had been her suggestion that agency workers were paid less than permanent workers.

52. On the evidence which it had, the Tribunal could not so find. It required to
25 consider the mind of the respondents. Although the respondents' actions were not particularly supportive of or sympathetic to the claimant from the evidence the Tribunal heard, the Tribunal was satisfied that the respondents had no issue with the claimant querying whether the pay rates were equivalent or not or challenging the rates on the basis that permanent employees might
30 be paid more than agency workers.

53. It appeared to the Tribunal that Mr Burnett had accepted what Mr Little had told him namely that SPEN wished the working relationship terminated on the basis of passing on confidential information, Mr Little having been misquoted

by the claimant and the claimant having disrupted the team. The Tribunal does not regard there as being an onus on someone in the position of the respondents in that scenario to enquire further or to challenge the reasons given to them by the client (in this case SPEN).

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54. It may of course have been that a claim brought against Scottish Power UK plc would have a greater prospect of success. In any such claim, the decision maker would be giving evidence and his thought process and motivation would be open to scrutiny and determination by the Tribunal. He would have had to satisfy the Tribunal as to what the reason or principal reason was for his decision that the working relationship involving the claimant should come to an end. Matters such as his interaction with the claimant and the tone adopted by him would then be capable of further exploration. That would be likely to inform the view reached by the Tribunal.

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55. Looking to the claim as brought however and potential liability on the part of these respondents, the Tribunal unanimously concluded that the claim was unsuccessful.

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Employment Judge: Robert Gall
Date of Judgment: 21 August 2018
Entered in register: 29 August 2018
and copied to parties