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EMPLOYMENT TRIBUNALS

(RESERVED)

Claimant: Mr P Winters

Respondent: Pertemps Recruitment Partnership Ltd

Heard at: Birmingham **On:** 24 June 2019 and on 10th July 2019
In Chambers

Before: Employment Judge Britton

Representation

Claimant: In person

Respondent: Ms Cox (HR Adviser)

JUDGMENT

The Respondent has breached its duty under Regulation 10 (c) of the Agency Workers Regulations 2010 to make a minimum payment between assignments (during the three week period week ending 31st August 2018 to week ending 14th September 2018) and is Ordered to pay three weeks pay to the Claimant in the sum of £869.13.

REASONS

1. This is a reserved judgment from the Hearing that was held on 24 June 2019. The claimant's claim form was presented on 8 February 2019, wherein he claimed to be entitled to be paid "between assignments" relating to the period of 9 weeks between 24 August 2018 and 26 October 2018. The Response was entered on 20 March 2019 and it is not in dispute that the claimant was employed by the respondent during that period, pursuant to a contract of employment.

2. I heard evidence on oath from the claimant and from Leanne Pike, team leader, who gave her evidence in support of the respondent's case. I also had regard to a bundle of documents produced by the respondent, consisting of 48 pages and a small number of additional documents provided by the claimant.

The Issues

3. It is the claimant's case that the respondent has breached its duty under regulation 10(1) (c) of the Agency Workers Regulations 2010 to pay a minimum amount of remuneration during a period under the contract (after the end of the first assignment under that contract) in which the claimant, in his capacity as an agency worker employed by the respondent, was not working temporarily for and under the supervision and direction of a hirer but was available to do so.

4. It is the respondent's case that the claimant is not entitled to be paid during the period between assignments because the claimant refused offers of suitable assignments during this period and/or in the alternative, that he was in fact paid the minimum amount of remuneration during the period in question because he was engaged to perform paid work by the respondent for a period of 8 hours in each week during that period.

5. Findings of fact

5.1 The claimant was employed by the respondent as an agency worker to work for third party hirers from 21 September 2015 to 26 October 2018. The claimant was employed from 14 March 2016 pursuant to a contract of employment that he signed on 6 January 2016. The terms of that contract of employment made it clear that the claimant was employed as an administrator and that he would be assigned from time to time to carry out work for clients under the direction of the client. Clause 1.3 of the contract stated that the claimant may be transferred to a new Assignment at any time, without restriction to location or client, as directed by the Company - "at whose premises you are assigned to work from time to time". It was also a term of the contract that the Company or the client may terminate an Assignment at any time without prior notice or liability. Termination of an Assignment is not termination of the claimant's employment.

5.2 During the period of any Assignment the claimant was entitled to be paid in respect of the hours that he worked at the agreed hourly rate. During the period 14 March 2016 to 29 March 2018 the claimant's services as a data assistant were provided to National Grid and he performed services for them as a Records Administrator until this Assignment ended on 24th August 2018.

5.3 Although the claimant was engaged to work on the assignments for National Grid in Warwick for a continuous period of over 2 years prior to his assignment ending in August 2018, it was made clear within his contract of employment, at clause 5.2 that when a particular client had no work available the respondent may invoke clause 1.3 in order to assign the claimant to "such other work as it has available with any other client at any other location".

5.4 The contract of employment made it clear that the respondent's branch responsible for managing the claimant and allocating assignments to him would be the one based in Leamington Spa and stated that the claimant "will be assigned from time to time to work at clients' premises within 2 hours travelling time of the branch address" (clause 6). This clause had the effect of qualifying clauses 1.3 and 5.2, insofar as the reference to "any location" otherwise purported to entitle the

respondent to assign the claimant to work at a client's premises without any restriction whatsoever.

5.5 The claimant's normal hours of work per week whilst on an assignment were expected to be the normal hours of work required by the client subject to a normal maximum number of 48 hours per week and, by virtue of clause 5.6, the respondent reserved the right to offer the claimant assignments "with different hours provided that the minimum number of hours offered shall be 8 hours per week".

5.6 During the period between 14 March 2016 and 29 March 2018, the claimant in fact reported primarily to the respondent's Warwick Branch and not Leamington Spa, and worked solely at National Grid's premises in Warwick.

5.7 The claimant's assignment with National Grid in Warwick was due to finish on 14 September 2018. However, the Claimant was notified by the respondent's Solihull Branch on 23 August 2018 that he was no longer required by the client to complete the project. The claimant last performed services for National Grid on 24 August 2018.

5.8 The claimant sent an email to the respondent on 30 August 2018 requesting payment for outstanding holiday pay. The claimant believed that he had to request his holiday pay or otherwise he would lose any accrued leave. The claimant did not receive a prompt response to this request and his next contact with the respondent was on 6 September 2018, when he received a call from Leanne Pike, Team Leader. The purpose of this call was to discuss the claimant's availability for work. The record of that call made by Ms Pike was minimal but she did note that the claimant had requested 5 days' holiday for the week ending 31 August 2018 and a further 5 days' holiday for the week ending 7 September 2018. This was denied by the claimant and Miss Pike had no actual recollection of the call.

5.9 I accept that the claimant believed that having finished his assignment with National Grid there was then an onus upon him to request his outstanding holiday pay. I accept also that he did not specifically request to take holiday and that it was more probably to have been the case that the respondent made an assumption that as the claimant had requested his holiday then the 2 weeks ending 31 August and 7 September 2018 respectively, should be treated as paid holiday.

5.10 In fact, there is no evidence that the claimant was not available for work during that period or that he had actually requested to take leave. The claimant had been requesting payment and not time off. I accept his evidence that he was unaware that he was not entitled to any pay in respect of untaken holiday unless his employment had been terminated, not just his assignment. By email dated 11 September 2018 the claimant was offered a one-day assignment at the respondent's own site in Hinckley on Friday 14 September 2018. The claimant worked 8 hours on 14 September 2018, in order to complete this assignment.

5.11 The claimant completed one-day assignments of 8 hours at the respondent's site in Hinckley on 21 September 2018 and also 28 September 2018.

5.12 The “assignments” completed by the claimant during September 2018, were not true assignments in the sense that he was not assigned to provide services to a third-party hirer. However, Ms Pike had face-to-face meetings with the claimant on 14 September 2018 and on 21 September 2018 to discuss any available roles that the claimant may be offered by way of an assignment. Although the claimant could not remember one meeting, the notes made by Ms Pike contemporaneously, and then compiled into the note at page 28 in the bundle, do confirm that there were in fact 2 face-to-face meetings. During these meetings the claimant made it clear that due to issues with pay rates, travel costs and location, he did not wish to be considered for assignments that the respondent could offer with Cadent in Hinckley, or anywhere else, because he was only prepared to consider assignments at National Grid in Warwick.

5.13 The pay rate at Cadent varied between £8.16 and £8.47 per hour, which the claimant considered was unacceptable as he had most recently been paid an hourly rate of £12.50 at the National Grid in Warwick. Although the claimant could not recall having a conversation with Miss Pike on 28 September 2018, I accept the written record provided by the respondent as accurate. I accept that it was a contemporaneous note that was made by Miss Pike on 28 September 2018, which is set out within the summary at page 28 of the bundle. I therefore find that the claimant did discuss available roles in Hinkley with Miss Pike on that day and that the claimant was informed that National Grid in Warwick had a recruitment freeze and that his stance with regards to only being available to accept assignments at National Grid in Warwick make it impossible for the respondent to offer him any assignments.

5.14 Although the claimant was unable to recall a conversation with Miss Pike on 5 October 2018, on the basis that I have explained above, I accept that the respondent’s record in this regard is also accurate and that the claimant was offered roles at Cadent in Hinckley, in particular, Plant Protection and Dispatch, which were declined because the claimant only wanted to work at National Grid in Warwick.

5.15 On 10 October 2018, Miss Pike telephoned the claimant in order to request his attendance at a formal meeting. The process for the meeting was explained to the claimant and he was informed that the likely outcome of the meeting was that he would be served notice of termination of his employment because he was only willing to make himself available to work at National Grid in Warwick. The claimant was informed that he had a right to be accompanied at the meeting. The claimant was provided with a summary of this call by Miss Pike by email on 10 October 2018.

5.16 The claimant attended the meeting with Miss Pike on 12 October 2018 and the upshot of this meeting was that the claimant was given 2 weeks’ notice of termination with effect from that date, which meant that the claimant’s employment ended on 26 October 2018. The claimant was informed that the respondent were terminating his employment due to the fact that the claimant had refused the available assignments at Cadent in Hinckley and that making himself available only to work at National Grid in Warwick had made it impossible at that time for the respondent to place him on any assignments with third party hirers.

5.17 The claimant worked at the respondent's Office in Hinckley in order to perform admin duties for 8 hours on 3 occasions in October 2018, namely, 5 October, 12 October and 15 October 2018. The claimant did not provide any services to the respondent beyond that date.

5.18 The respondent made unsuccessful attempts to contact the claimant by telephone with regards to potential work opportunities on both 17 and 19 October 2018. However, on 28 October 2018, the claimant decided to register with other branches and he provided Miss Pike with an up-to-date CV, which was sent to the respondent's branches in Leicester, Rugby and Coventry. The claimant had been registered solely with the respondent's Warwick Branch up until that point and had therefore only been offered assignments which were available at that Branch. The respondent did have potential assignments with Cadent in Hinckley, which the claimant refused to consider, even though those assignments would have been within a 2-hour travelling distance of the respondent's Branch in Leamington Spa.

6. The law

6.1 The Claimant was an agency worker employed on a permanent contract within the provisions of Regulation 10 of The Agency Workers Regulations 2010, Regulation 10 (1) provides as follows:-

- (1) To the extent to which it relates to pay, Regulation 5 does not have effect in relation to an agency worker who has a permanent contract of employment with a temporary work agency if –
 - (a) –
 - (b) –
 - (c) During any period under the contract after the end of the first assignment under that Contract in which the agency worker is not working temporarily for and under the supervision and direction of a hirer but is available to do so –

The temporary work agency takes reasonable steps to seek suitable work for the agency worker;

If suitable work is available, the temporary work agency offers the worker to be proposed to a hirer who is offering such work; and

The temporary work agency pays the agency worker a minimum amount of remuneration in respect of that period.

- (2) For work to be suitable for the purposes of paragraph 1 (c) the nature of the work, and the terms and conditions applicable to the worker whilst performing the work, must not differ from the nature of the work and the terms and conditions included in the Contract of Employment under paragraph (1) (a).

6.2 The Guidance on The Agency Workers Regulations 2010 notes that, if the agency worker refuses a suitable assignment, depending on the circumstances and the terms of the Contract between the agency worker and the temporary work agency, the agency worker may not be available for work and therefore not entitled to receive the minimum amount of pay between assignments.

CONCLUSIONS

7. It is the claimant's case that he is entitled to be paid between assignments for the 9-week period between 24 August 2018 and 26 October 2018 on the basis that he was available to work at the National Grid in Warwick but the respondent failed to provide him with any assignment with that client at those premises or at all. The respondent contends that the claimant is not entitled to pay between assignments because he was in fact provided with the minimum required 8 hours work on 14 and 21 September 2018, and also 5, 12 and 15 October 2018. In addition, and/or in the alternative, the respondent contends that the claimant is not entitled to pay between assignments because he unreasonably refused to consider assignments other than National Grid in Warwick.

8. The assignments that were offered to the claimant at Hinckley were within a 2-hour travelling distance of Leamington Spa. The claimant's contract of employment made it clear that the claimant could be required to perform an assignment with any client at any location within a 2-hour travelling distance of Leamington Spa. The claimant's contract of employment did not guarantee an hourly rate of £12.50, or any hourly rate save that the claimant would be paid at least the National Minimum Wage.

9. The "assignments" that the claimant performed for the respondent at the respondent's Office in Hinckley consisted of general admin duties only and were not set out in any identified job description.

10. The claimant was offered "assignments" with Cadent in Hinckley on 14 September 2018, 21 September 2018, 28 September 2018, 5 October 2018 and 12 October 2018. The details of these roles were set out at page 30 in the bundle. Those roles were all of an admin nature and were full time. The hourly rates ranged between £8.16 per hour and £8.47 per hour and were all suitable roles which the claimant refused to consider.

11. During the period following the completion of the claimant's assignment at National Grid and the termination of his employment on 26 October 2018 the respondent did not have any suitable vacancies to offer to the claimant at National Grid in Warwick. The claimant contends that the roles that he performed for the respondent at the respondent's offices in Hinckley were not genuine assignments and were jobs that the respondent "invented" in order to avoid having to pay him between assignments in accordance with their statutory obligations.

12. Following the end of the National Grid assignment on 24 August 2018, the respondent took reasonable steps to seek suitable work for the claimant and when suitable work was available, the respondent was willing to offer the claimant to the proposed hirer who was offering such work. In reality, because of the relationship that the respondent had with Cadent it was likely to have been the case that the respondent would have been able to place the claimant with the hirer to perform an

assignment without the claimant having to undergo any formal interview or other recruitment process.

13. The respondent did not pay the claimant the minimum amount of remuneration in respect of the entire 9- week period as required by regulation 10(1) (c) of the Agency Workers Regulations 2010 or his contract of employment. Clause 7.5 of the contract of employment states “that when you are not on an assignment, you are obliged to contact the Company at regular intervals to confirm your availability to undertake further assignments”. The claimant did not make contact with the respondent following the end of the assignment on 24 August 2018, otherwise than to request holiday pay.

14. My findings are that in respect of the week ending 31 August and 7 September 2018, the claimant was available for work notwithstanding the fact that he had not made contact with the respondent to confirm the position. I believe that the respondent would have appreciated that the claimant was available for work unless he had notified them to the contrary, bearing in mind the way in which the longstanding relationship had operated between them.

15. Clause 8.1 of the contract of employment stated that the claimant would receive the minimum remuneration during any period between assignments provided that the claimant was available to work on an assignment and had not unreasonably refused any offer of suitable work. Under regulation 10, the phrase “suitable work” is defined as being work where “the nature of the work, and the terms and conditions applicable to the Agency worker whilst performing the work, must not differ from the nature of the work and the terms and conditions included in the contract of employment.

16. In my judgment the work offered to the claimant was work of a type envisaged by the contract of employment and was also consistent with the terms of the contract of employment with regards to pay and location. I therefore find that the claimant did unreasonably exclude himself from suitable alternative employment and was therefore not available for work from week ending 14 September 2018 onwards. The claimant is therefore not entitled to any further payment under Regulation 10 or under the terms of the contract of employment for the period beyond 14 September 2018. However, I find that the claimant was available for work during the period week ending 31 August and 7 September 2018. During this period the claimant did not unreasonably refuse any offer of suitable work and he is therefore entitled to the minimum remuneration as defined within the contract of employment in relation to those 2 weeks. It was agreed by the parties that the minimum remuneration to which the claimant would have been entitled was £289.71 per week, being 37 hours at work at the National Minimum Wage rate is £7.83. The claimant is therefore entitled to be paid £579.42 in respect of this period.

17. Although the claimant was provided with some work at the respondent’s premises to work directly for the respondent on 14 September 2018, in my judgment this was not an “assignment” as envisaged by the Agency Workers Regulations 2010 or the contract of employment. It is clear from the claimant’s contract of employment that he was employed to perform assignments for clients and not directly for the respondent. In reality, there was no assignment available during the week ending 14

September 2018, and the claimant had not unreasonably refused an assignment during that week. It was not a genuine “assignment” working directly for the respondent for 8 hours on 14 September 2018 because the claimant was not working under the supervision and direction of a hirer. It follows that the obligation to pay the claimant between assignments applies during the week ending 14 September 2018. The claimant is therefore entitled to a payment of £285.71 in respect of that week.

18. In summary, therefore, the respondent is ordered to pay the claimant the sum of £869.13.

Employment Judge Britton
(RESERVED)

22 July 2019