Appeal No. UKEAT/0590/11/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 13 April 2012

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR D J JENKINS OBE

MR S YEBOAH

LONDON BOROUGH OF CAMDEN — APPELLANT

(1) MS C PEGG
(2) RANDSTAD CARE LTD
(3) HAYS SPECIALIST RECRUITMENT LTD T/A CAMDEN AGENCY FOR TEMPORARY SUPPLY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING – ALL PARTIES

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APPEARANCES

For the Appellant	MR S CHEETHAM (of Counsel) Instructed by: London Borough of Camden Legal Services Town Hall Judd Street London WC1H 9LP
For the First Respondent	MS S FRASER BUTLIN (of Counsel) Instructed by: Equality & Human Rights Commission Arndale House The Arndale Centre Manchester M4 3AQ
For the Second Respondent	MR S MOON (Representative) Management Support Services 83 High Street Great Barford Bedford MK44 3LF
For the Third Respondent	MISS C PALMER (of Counsel) Instructed by: Hays Plc Legal Department 250 Euston Road London NW1 2PG

SUMMARY

JURISDICTIONAL POINTS

Worker, employee or neither

Agency relationships

C was supplied by R2 (an employment agency) through R3 (another employment agency) to R1 (a local authority) for whom she worked as a Senior School Travel Planning Officer, fully integrated in R1's organisation. C's contract with R2 was described as a contract for services; it did not require her to take any assignment but placed obligations on her to work once she had accepted an assignment. The Tribunal found that R2 was C's employer within the extended definition in section 68(1) of the **Disability Discrimination Act 1995**, that C was a contract worker and R1 her principal within the meaning of section 4B(9) of the 1995 Act.

It was argued that because C was not under an obligation to take the assignment with R1 she was not under an obligation to do work personally and not an employee within the extended definition in section 68(1). Reliance was placed on **Mingeley v Pinnock t/a Amber Cars** [2004] ICR 727.

Held: The Tribunal was correct. **Mingeley** distinguished. It was sufficient that C's obligation to R2 to work personally arose when she accepted the assignment with R1.

HIS HONOUR JUDGE DAVID RICHARDSON

1. In this appeal the London Borough of Camden ("Camden") challenges a judgment of the Employment Tribunal (Employment Judge Snelson presiding) dated 23 May 2011. The judgment concerned a claim brought by Ms Corrie Pegg. The Tribunal held that during the period relevant to the claim Ms Pegg was

(1) employed by Randstad Care Limited trading as Beresford Blake Thomas Limited ("BBT") within the meaning of section 68(1) of the **Disability Discrimination Act 1995**, and

(2) supplied by BBT to work for Camden as a contract worker in circumstances where Camden was the "principal" within the meaning of section 4B(9) of the 1995 Act.

2. There was a further party to the proceedings, Hays Specialist Recruitment Limited trading as Camden Agency for Temporary Supply ("CATS"). The claim against CATS was dismissed, the Tribunal holding that there was no contract between the Claimant and CATS.

3. The preliminary hearing has been listed to see whether the appeal raises a point of law with reasonable prospects of success. Liberty was given for all parties to attend and make submissions. We have therefore heard submissions on behalf of by Mr Cheetham for Camden and Ms Palmer for CATS. We received skeleton arguments from, but did not need to call on, Ms Fraser Butlin for Ms Pegg and Mr Moon for BBT.

The background facts

4. In the summer of 2008 Camden perceived the need to recruit a temporary School Travel Planning Officer. Its first port of call was CATS, with whom it had an agreement for the

provision of temporary workers. CATS, however, had no suitable candidate available to them. CATS in turn had a contractual relationship with BBT entitled "Third Party Agency Agreement for the Provision of Temporary Workers". CATS approached BBT.

5. Ms Pegg is a specialist in the transport field and particularly in school travel planning. She was on the books of BBT. BBT put her forward. She was interviewed by Camden and offered the role of Senior School Travel Planning Officer. She took the role. She worked for Camden from 29 September 2008. In the summer of 2009 her psychiatric health deteriorated. Her assignment was terminated on 4 August 2009. It is Ms Pegg's case that she was a disabled person and that she has been subjected to disability discrimination.

6. While she worked for Camden Ms Pegg was under contract to BBT and was paid by BBT. Her contract was subject to standard terms and conditions entitled "Contract for Services between BBT and Temporary Workers PAYE". We cannot improve on, and gratefully adopt, the description of these terms and conditions set out in paragraph 16 of the Employment Tribunal's judgment.

> **"16. The agreement between the Claimant and BBT, on BBT's standard terms (p63), defines a "Temporary Worker" as an individual supplied to "the Client" by BBT, "under a contract for services", to carry out an "Assignment". "Assignment" is defined as the period during which a Temporary Worker undertakes an "Engagement". In turn "Engagement" is defined as meaning the engagement, employment or use, directly or indirectly, of the Temporary Worker by the Client by which the former receives monies or reward for services performed for the latter. By Clause 2.1 it is provided that:**
>
> > **'These terms constitute a contract for services between [BBT] and the [Temporary Worker] and they govern all Assignments undertaken by the Temporary Worker. However, no contract shall exist between [BBT] and the Temporary Worker between Assignments.'**
>
> **The point that no contract shall exist between Assignments is repeated at clause 3.2. Clause 4.1 obliges BBT to pay the Temporary Worker for work done, regardless of whether they have received payment (in respect of his or her services) from the Client. Clauses 5.1 to 5.8 contain provisions concerning statutory leave. Clause 5.3 requires the Temporary Worker wishing to take paid leave to notify BBT, giving notice of at least twice the period of the leave intended to be taken. BBT reserves the right to give a counter-notice, "to postpone or reduce the amount of leave that the Temporary Worker wishes to take…" The agreement acknowledges that the Temporary Worker "may" be eligible for statutory sick pay, subject to meeting "relevant statutory criteria" (Clause 6.1). Under the heading "Conduct of Assignments", the following provisions appear:**

> **'8.1 The Temporary Worker is not obliged to accept any Assignment offered by [BBT] but if she/he does so, during every Assignment and afterwards where appropriate she/he will:**
>
> **8.1.1 Co-operate with the Client's reasonable instructions and accept the direction, supervision and control of any responsible person in the Client's organisation;**
>
> **8.1.2 Observe any relevant rules and regulations of the Client's establishment (including normal hours of work, equipment usage and data protection policies, etc) to which attention has been drawn or which the Temporary Worker might reasonable be expected to ascertain;**
>
> **8.1.3 Take all reasonable steps to safeguard his or her own health and safety and that of any other person who may be present or be affected by his or her actions on the Assignment and comply with the Health and Safety policies and procedures of the Client;**
>
> **8.1.4 Not engage in any conduct detrimental to the interests of the Client and immediately advise [BBT] of any potential conflict of interest;**
>
> **8.1.5 Not at any time to divulge confidential information to any person, nor use [such information] for his or her own or any other person's benefit;**
>
> **8.1.6 Comply with all relevant laws and regulations in the conduct of any Assignment including, without limitation, those relating to anti-discrimination, confidentiality and intellectual property.'**
>
> **By clause 8.3, it is provided that if the Temporary Worker is unable for any reason to attend work during the course of an Assignment she/he should inform the client and/or [BBT] within one hour of the commencement of the Assignment or shift. By clause 9.1, BBT or "the Client" may terminate the Temporary Worker's Assignment at any time without prior notice or liability. Clause 9.2 gives to the Temporary Worker the same right of termination."**

7. As the Tribunal found, the Claimant was fully integrated with other members of staff at Camden as part of a team which included both employees and other agency staff. She frequently represented Camden at meetings and conducted presentations and courses on Camden's behalf. She made contracts on behalf of Camden. She sat on an interview panel to recruit a member of the School Travel Team. It was not challenged that to the outside world she was held out as being fully integrated into Camden's organisation. She was expected to attend for work and to request leave like any other member of staff. It was not open to her to choose her hours. There was no question of her being able to send a substitute.

The statutory provisions

8. By section 68(1) of the 1995 Act, "employment" was defined as:

"..employment under a contract of service or of apprenticeship or a contract personally to do any work ...."

9. Section 4B of the 1995 Act rendered it unlawful for a "principal", in relation to "contract work" to discriminate against a person who was a "disabled contract worker" or to subject such a worker to harassment: see section 4B(1) and (2). Section 4B(9) provided the following definitions:

"(9) In this section—

- **'principal' means a person ('A') who makes work available for doing by individuals who are employed by another person who supplies them under a contract made with A;**
- **'contract work' means work so made available; and**
- **'contract worker' means any individual who is supplied to the principal under such a contract."**

10. These provisions closely followed provisions in other discrimination legislation. They – like the other legislation – have now been repealed and replaced by provisions in the **Equality Act 2010**: see especially sections 83(2) and 41(5)-(7).

The Tribunal's reasons

11. The Tribunal's conclusions may be summarised as follows.

(a) There was a contract between BBT and Ms Pegg – under which Ms Pegg, once she had accepted the assignment to work for Camden, was subject to obligations such as those set out in clause 8.1 of the terms and conditions.

(b) This contract was a contract for services, not a contract of service – but it was a contract under which Ms Pegg was personally to do work, and therefore employment within the extended definition set out in section 68(1). Accordingly Ms Pegg was employed by BBT within the meaning of section 68(1).

(c) Ms Pegg was supplied to Camden under a contract made with BBT (the fact that there was an intermediary (CATS) did not affect this conclusion – see **Abbey Life v Tansell** [2000] IRLR 387).

(d) Camden made work available for Ms Pegg; and was therefore a principal within section 4B(9) of the 1995 Act.

12. In reaching these conclusions the Tribunal referred to and rejected several arguments put forward on behalf of Camden and BBT; it is not necessary to rehearse them all. We will turn immediately to deal with the argument which is still maintained on appeal.

The appeal

13. On behalf of Camden Mr Cheetham argues that Ms Pegg was not party to a contract "personally to do any work", because she was not bound to accept any assignment. He submits that it is not sufficient for the purposes of section 68(1) that Ms Pegg was subject to an obligation personally to do work if she chose to accept an assignment.

14. He founds his argument principally on a decision of the Court of Appeal – **Mingeley v Pinnock and anr (Trading as Amber Cars)** [2004] ICR 727. This case was concerned with the definition of "employment" in the **Race Relations Act 1976** which belongs, we would accept, to the same family of definitions as section 68(1) of the 1995 Act.

15. In that case the applicant was a taxi driver who owned his own vehicle and paid the respondents, the operators of a taxi service, £75 per week for a radio and access to their computer system, which allocated calls from customers to a fleet of drivers. Though under his contract with the respondents the applicant could not work for any other operator and was

required to wear the respondents' uniform and adhere to the respondents' scale of charges, he was not obliged to work any particular hours, or at all, and he kept all the fare money. The applicant made a complaint to the employment tribunal that the respondents had discriminated against him on grounds of his race. The tribunal held that it had no jurisdiction to hear the complaint because the applicant was not in the employment of the respondents for the purposes of the **Race Relations Act 1976**, as he was not obliged "personally to execute any work or labour" within the meaning of "employment" in section 78(1) of the Act. Maurice Kay LJ said:

> **"In my judgment, on the plain words of section 78 of the 1976 Act and the authorities to which I have referred, the employment tribunal was correct to conclude that, in order to bring himself within section 78, Mr Mingeley had to establish that his contract with Amber Cars placed him under an obligation "personally to execute any work or labour". As the tribunal found, there was no evidence that he was ever under such an obligation. He was free to work or not to work at his own whim or fancy. His obligation was to pay Amber Cars £75 per week and, if he chose to work, then to do so within the requirements of the arrangement. However, the absence from the contract of an obligation to work places him beyond the reach of section 78."**

16. Mr Cheetham argues that there is a parallel between **Mingeley** and that of Ms Pegg. Under her contract with BBT she was not obliged to accept any assignment. It is true that she accepted a long-term assignment with Camden and was subject to an obligation to BBT to work once she had accepted that assignment; but, he submits, this is no different to Mr Mingeley's case – for once he accepted a fare he was bound to fulfil it in accordance with the terms of his contract with Amber Cars.

17. We have no hesitation in rejecting Mr Cheetham's argument. We consider that **Mingeley** is plainly distinguishable. The taxi driver in **Mingeley** paid a weekly sum to have access to customers through a telephone system operated by Amber Cars; but he did not undertake any obligation to Amber Cars to fulfil any fare. He neither paid Amber Cars nor received money from Amber Cars in respect of any fare. Whether he accepted a fare was a matter for him initially; and if he accepted a fare his contract was with his customer, who paid him. Thus Buxton LJ said:

> **"It was agreed in argument, and indeed found by the tribunal, that Mr Mingeley's only contractual obligation to Amber Cars was to pay the £75 weekly fee for access to Amber Cars' computer system. He does nothing else contractually for Amber Cars: and therefore, on the plain meaning of the words, his contract with them cannot be a contract personally to execute any work or labour."**

18. In this case the contractual arrangements were altogether different. Once Ms Pegg accepted the assignment with Camden she owed express contractual duties to BBT which required her to do the work personally (and BBT paid her). That, to our minds, is sufficient to bring her within section 68. We see no warrant in the wording of the section for excluding her from its provision merely because she was not bound to accept the assignment. The critical point is that when she accepted the assignment she owed a contractual duty to BBT to do the work personally.

19. We would add that the arrangements under which Ms Pegg came to work for Camden are common arrangements, and we have no doubt that Parliament intended the protection for contract workers to apply to such workers. Mr Cheetham told us that the point in this case was of importance to Camden; we think the answer is plain and can be shortly stated as we have done at this preliminary hearing.

20. Mr Cheetham also addressed us to the effect that the absence of a power of substitution was of little or no weight in determining whether an employee such as Ms Pegg was under an obligation to do work personally. We do not need to consider that point, because it is plain beyond argument, whether or not the absence of a power of substitution is taken into account, that Ms Pegg was under an obligation to do work personally.

21. For these reasons we dismiss the appeal and uphold the judgment of the Tribunal. We should add the following. Firstly, BBT did not today challenge the judgment of the Tribunal.

Secondly, there was a cross appeal on behalf of Ms Pegg, which was to protect her position and enable her to advance alternative arguments in case the appeal was allowed. Since we are dismissing the appeal we need say no more about the cross appeal, which will be dismissed.

22. As we leave this case we would pay tribute to the excellence of the Employment Tribunal's judgment which was a model of clarity and good reasoning.