MIN. for LABOUR v PMPA

1985- 674 SS

V143

THE HIGH COURT

BETWEEN

THE MINISTER FOR LABOUR

Complainant

and

P.M.P.A. INSURANCE COMPANY LIMITED (UNDER ADMINISTRATION)

Defendant

Judgment of Mr. Justice Barron delivered the 16th day of APRIL 1986.

These proceedings arise out of a prosecution brought by the Complainant against the Defendant alleging certain breaches of the provisions of the Holidays (Employees) Act 1973. The prosecution was brought against the Defendant as the employer of one Philomena McNulty ("the employee"). The facts are set out fully in the Case Stated. The employee worked for the Defendant at the material times as a temporary typist. Temporary typists were engaged by the Defendant under the terms of an agreement in writing dated the 24th September 1979 and made between it and Alfred Marks Bureau (Ireland) Limited ("the Bureau"). This agreement contained, inter alia, the following terms in relation to the employment of temporary workers supplied by them to the Defendant under the terms of the agreement:-

"7 The client shall pay the hourly charges of the bureau for all hours actually worked by the temporary worker. Travelling, hotel or other expenses as may be agreed shall be itemised on the Bureau's invoice in addition to these charges. These charges will be those in force at the time of the assignment and may be varied from time to time with immediate effect. Details of charges are available on application and are calculated on an hourly basis at rates varying according to the number of hours required in any one week.

9 The Bureau is the employer of each temporary worker and is responsible for payment of wages and deductions and payment of all statutory contributions in respect of national insurance and all appropriate taxes.

11 The supervision, direction and control of a temporary worker assigned to a client is the responsibility of the client for the duration of the assignment."

Temporary typists so recruited by the Defendant had previously entered into an agreement with the Bureau by signing a document in the following terms:-

"In applying for temporary, holiday relief or casual work I fully understand that I will be paid on an hourly basis for the actual hours I work in a client's premises. I also understand that the hourly rate of pay offered and paid to me by Alfred Marks Bureau includes and (sic) additional sum (never more than 11%) to cover holiday pay, including entitlements, if any, as required under the law."

Such a document had been signed by the employee on the 24th of September 1979. She commenced work with the Defendant on the

25th of February 1981.

The Defendant also had working for it other typists who were permanant. The means by which such typists were engaged were substantially different from that involving the recruitment of temporary typists and all permanant typists received and accepted a formal letter of appointment. This did not apply to any temporary typist.

The question raised by the Case Stated is as follows:-

"1 Was Philomena McNulty an employee within the meaning of the Holidays (Employees) Act 1973 of the P.M.P.A. between the 25th February 1981 and 7th October 1983?"

The meaning of the word "employer" is defined under the Act by reference to the word "employ". The word "employ" is defined by that Act in section 1, subsection (1) as meaning "employ under a contract of service (whether the contract is expressed or implied or is oral or in writing) or a contract of apprenticeship and cognate words shall be construed accordingly".

The primary issue in the present case is accordingly to determine whether or not a contract existed between the Defendant and the employee. Only if such a contract existed, would it be necessary to consider whether or not it was a contract of service. For there to be a contract there must be an agreement between the parties under which rights and duties enforceable inter se have been created. Where, as here, there are three parties, it is necessary to look to the relationship of each of them to the other or others. Undoubtedly the employee worked under the control of the Defendant. As a temporary typist it would probably not have been possible to

distinguish the duties performed by her and the manner which they were allocated to her from the duties performed by and allocated to the permanent typists employed by the Defendant. The primary question is not however whether she did the same work or was subject to the same control as permanent typists, but what rights and duties each had in respect of that work.

I am satisfied that the rights and duties of the Defendant and the employee respectively sprang from the two contracts to which I have already referred. So far as the Defendant was concerned its rights and duties in relation to the employee were enforceable solely under its agreement with the Bureau and against the Bureau. So far as the employee was concerned her rights and duties equally were enforceable solely under the terms of her agreement with the Bureau and against the Bureau. In such a contractual situation I see no room for any implied contractual relationship between the Defendant and the employee.

A number of authorities were cited to me by Counsel either to establish or to disprove that the employee was employed by the Defendant. In all such authorities save one, the contractual relationship between the parties was agreed, the issue being whether or not such relationship created the obligation contended for on behalf of the Plaintiff in such case. However, here,it is, in the first instance, the contractual relationship itself which must be established.

In Construction Industry Training Board .v. Labour Force Ltd. 1970 3 All. E.R. 220 the relationship between the parties was in issue. The Respondents were engaged in supplying labour to the construction industry in the same way as the

Bureau supplied temporary typists to the Defendant in the present case. Under the terms of the agreement made between the contractors to whom workmen were supplied and the Respondents the workmen were paid by the Respondents remuneration based upon the number of hours worked as notified to them by the contractors. The length of the employment was a matter for the contractors who had the right to terminate it on notice, or in the event of misconduct, without notice. Payments under the holiday with pay scheme, National Insurance Stamps and P.A.Y.E. were the responsibility of the Respondents. When assigned to a particular job the workman inter alia signed a declaration that he was engaged by the Respondents under terms and conditions contained in the declaration.

The Plaintiff Board had statutory powers to impose levies on employers in the construction industry who paid their employees under contracts of service. The Board took the view that the Respondent company was in this legal position and imposed a levy on it. The Respondents successfully appealed against this imposition to an industrial tribunal, and this decision was not disturbed on appeal.

Relating this decision to the circumstances of the present case, it is essentially a determination that the Bureau does not employ those on its books under contracts of service. The Court went on to consider the true nature of that relationship, but as the equivalent issue is not before me, I do not propose to express any opinion on such dicta. In the course of its determination of the issues before it the industrial tribunal found that there was no contractual relationship between the contractors and the workmen either directly or through the agency of the Respondents.

These findings were approved on the appeal.

As I have already indicated, I do not regard the facts as establishing any contract express or implied between the Defendant and the employee. In this view I am supported by the English decision to which I have referred. In the circumstances the answer to the question raised by the Case Stated is no.

Leon J. Barron
16/4/86