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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Rabia Ali

**Respondents:** (1) Cassidy Education Limited  
(2) Gainsborough Primary School  
(3) EPayroll Services Limited t/a ePayMe Payroll Solutions

**Heard at:** East London Hearing Centre

**On:** 23 February 2018

**Before:** Employment Judge M Hallen, Sitting alone

**Representation:**

**Claimant:** Ms S Sleeman (Counsel)

**1<sup>st</sup> Respondent:** Not represented and not in attendance

**2<sup>nd</sup> Respondent:** Ms D Strain (Head Teacher)

**3<sup>rd</sup> Respondent:** Ms L Walsh (Representative of the Company)

## RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was an agency worker as defined by the Agency Workers Regulations 2010 (“The Regulations”). There was a breach of the Claimant’s right to basic working and employment conditions as prescribed by Regulation 5 of the Regulations. The Claimant is entitled to compensation in the sum of £2,929.50 (that sum being expressed as gross without such deductions as required to meet tax and national insurance liabilities). Having regard to the extent of each Respondent’s responsibility for the infringement to which the complaint relates, it is just and equitable that the whole of the compensation should be paid by the Second Respondent namely Gainsborough Primary School.

## REASONS

### Background and Issues

1 The Claimant lodged a Claim Form with the Tribunal on 25 October 2017 against the First and Second Respondent. She later on application joined the Third Respondent

to her claim. The Claimant in her Claim Form stated that she was an agency worker supplied by the First Respondent to the Second Respondent as a supply teacher commencing service on 5 September 2016 working five days per week. The Claimant stated that she should have been paid a salary at the salary level of M6 and had notified the Second Respondent on 31 May 2017 of this fact. She stated that in breach of the Regulations she was paid at a lower rate than she should have been pursuant to the National Teachers Pay and Conditions document. The First Respondent has taken no part in the defence of the Claimant's claim. The Second Respondent resisted the application stating that the Claimant had been paid fairly and the Third Respondent resisted the claim stating that it was the First Respondent's payroll administrator and was liable only for the payment of the Claimant's wages.

2 The issues for the Tribunal were defined at the outset and were agreed between the parties as follows:-

- 2.1 Was the Claimant an agency worker as defined in Regulation 3 of the Agency Worker Regulations 2010?
- 2.2 Does the Claimant meet the qualifying criteria under Regulation 7 of the Regulations?
- 2.3 If so, from what date was the Claimant qualified?
- 2.4 Is the Claimant entitled to the basic working and employment conditions including pay rate as comparable employees pursuant to Regulation 5 of the Regulations?
- 2.5 If yes, against whom should judgment be given bearing in mind the requirements of Regulation 14?

3 The Tribunal had in front of it an agreed bundle of documents. In addition, the Claimant produced her own written witness statement along with a statement of Anisa Nessa, a fellow supply teacher which was presented in written format only. The Tribunal read the statement but placed little regard to it as the witness did not attend to give evidence. The First Respondent made no appearance at the hearing and did not present a Response Form. The Second Respondent presented two witness statements from Mr Mark Painter, the School Business Manager and from Ms Deborah Strain, the Head Teacher. Finally, the Third Respondent gave evidence by way of Ms Laura Walsh, a company representative and presented a short statement. All witnesses read from their witness statements and were subject to questioning from each of the parties and from the Tribunal. In addition, all of the parties following completion of evidence gave short closing submissions and the Claimant referred to the Employment Tribunal judgment in respect of Ms G Stevens v North Holt High School and Tech 2 Limited Case Number: 3200621/2014.

### **The Facts**

4 The Claimant is a qualified teacher and has been teaching since 2008. In the past, she was employed by Manor Infant School in 2015 where she worked for three years followed by employment in Goresbrook School in 2016 where she worked from 2 January

2016 until 31 July 2016. During this period, she progressed up the pay scale obtaining the Pay Grade M6 on the main pay scale applicable to teachers in the Newham Local Education Authority catchment area. The relevant pay scales were at pages 219 – 220 of the bundle of documents. Subsequent to the Claimant's employment with the Second Respondent she has recently been working as a teacher at William Torbitt Primary School who also employed her at pay grade M6 as per the National Teachers Pay and Conditions document.

5 The Claimant was contacted by the First Respondent, Cassidy Education Limited, an employment agency on or around 2 September 2016 and spoke to a recruitment consultant employed by the First Respondent called Ray Buckman. At this stage she did not know who her employer was as the First Respondent assigned her to Gainsborough Primary School and any contact she had regarding her contract was through the First Respondent who sent her an email which was at page 83 of the bundle of documents. This email confirmed the Claimant's position and her start date being 5 September 2016 as well as her hours of work and her pay rate being £165 per day. The Claimant confirmed that this was the only formal piece of correspondence the Claimant received from the First Respondent in respect of her conditions of employment. In addition, the Claimant confirmed that she completed an online contract of employment which was at pages 57 – 72 of the bundle of documents and was with the Third Respondent. In evidence, the Third Respondent accepted that the contract of employment was between it and the Claimant and referenced a number of essential requirements that are contained in all contracts of employment including pay, holiday, sickness and injury, hours of work, pensions, disciplinary and grievance procedures, termination of employment and health and safety. In addition, the Third Respondent confirmed that at page 67 the questions asked of the Claimant were correct and specifically that the Claimant was doing the same job as other teachers employed at the Second Respondent. Despite the extensive nature of the obligations taken on by the Third Respondent in the contract of employment, it transpired that the Third Respondent was effectively only the payroll administrator for the First Respondent. Furthermore, it also transpired that the Third Respondent made little enquiry of either the First or Second Respondent about obtaining relevant information in respect of basic hours and employment conditions in force at the hirer, namely the Second Respondent. Nevertheless, it was clear that the Second Respondent was during the relevant time of the Claimant's assignment with it, aware of its obligations in respect of pay under the National Teachers Pay and Conditions document and specifically the requisite scales at which each of its teachers should be paid. In addition, as shown in the email communication contained at pages 84 – 88 of the bundle of documents between the Claimant and the Second Respondent's Head Teacher, Ms Deborah Strain, there was communication between the Claimant and Ms Strain commencing on 25 May 2017 relating to the pay scale upon which the Claimant should have been put on. At page 84, the Claimant enquired of Ms Strain *"can I please request you to confirm, in writing, that if I was hired by the school, what pay scale would you have put me on. Recalling from my telephone interview, you confirmed that you would have put me on M6. If you can do that for me asap it will be highly appreciated."* During the subsequent correspondence between the parties and culminating at page 88 of the bundle of documents, Ms Strain confirmed that the Claimant would have been paid on the M6 scale. She says *"Although you have been employed as long term supplied, your experience and evidence of previous employment..... mean you would have been paid on M6"*.

6 The Claimant started her assignment at the Second Respondent on Monday 5 September 2016 working 5 days per week. It was the Claimant's understanding that her

assignment at the school was supposed to be made permanent as soon as possible. The Claimant stated and the Tribunal accepted that the Head Teacher, Deborah Strain verbally promised the Claimant on a number of occasions during her assignment to keep her on as a direct employee of the school which she promised would be “very soon.” It was not until the Head Teacher called the Claimant into a meeting in early May 2017, when she told the Claimant that she would not be kept on after 31 August 2017. The Claimant was naturally disappointed about this and due to having to secure alternative positions she ended her assignment on a short notice on 28 May 2017 as set out in her email to Ms Strain at page 93 of the bundle of documents.

7 The Claimant gave evidence and it was accepted by the Tribunal that during her assignment with the Second Respondent she undertook tasks commensurate with teachers at the M6 pay scale namely planning lessons, marking school work, having contact with parents and attending all Continuing Professional Development of the school. This was beyond the usual supply teachers duties which the Claimant willingly undertook as she had been promised by the Head Teacher that she would be taken on as a permanent employee by the Second Respondent.

8 The Claimant obtained 12 weeks continuous service being the qualifying period under the Regulations in the week commencing 5 December 2016. At that time, she was paid by the Third Respondent at the rate of £165 per day. At that time the Claimant accepted this pay as she was not aware of the Agency Workers Regulations and specifically that after 12 weeks continuous service she was entitled to the same terms and conditions as an equivalent permanent staff member employed by the Second Respondent. She continued to be paid at the rate of £165 until her assignment ended with the Second Respondent on 28 May 2017.

9 The School Teacher’s Pay and Conditions document 2016 was in the bundle of documents at pages 133- 218. These were the national and relevant terms and conditions of employment for teachers which was recognised by the Second Respondent. Paragraph 43.1 stated that teachers employed on a day-to-day or short note basis must have their pay calculated in accordance with the provision of the document and calculated on a full working year consisting of 195 days. The Claimant stated and it was accepted by the Tribunal that once she had completed her 12 weeks qualifying period as required by the Regulations, as of the week commencing 5 December 2016 she should have been paid at the M6 pay scale which was set out at page 219 of the bundle of documents. The Claimant gave evidence that this should have been at the top of the scale namely at the rate of £38,241.00 per annum and the Tribunal accepted this based upon her qualification and experience. Therefore, based upon the Claimant’s calculations, after the qualifying period she should have been paid a daily rate of £196 calculated as  $£38,241.00 \div 195$  days for the academic year of 2016. As a consequence her daily rate should have been £196 gross instead of the rate of £165 gross which she was actually paid by the Third Respondent on behalf of the First Respondent.

10 The Claimant only found out about the Regulations when she approached her trade union after the termination of her employment and consequently with their assistance, she bought these proceedings.

11 During the course of these proceedings, the Second Respondent confirmed that it hired the Claimant on the strength of her CV which was provided to it by the First

Respondent as well as a telephone interview conducted by the Second Respondent's Head Teacher. The Second Respondent paid a total fee to the First Respondent of £205 a day albeit the Second Respondent did not know the actual rate of pay that the First or Third Respondent paid to the Claimant. Nevertheless, the Tribunal was satisfied on the evidence it heard that the Second Respondent was aware of the Claimant's skills and experience and also the rate of pay (scale M6) which an equivalent teacher employed directly by the school would have been paid. In addition, the Second Respondent was aware that the Claimant had sufficient skills and experience to be paid at this rate as set out at page 88 of the bundle of documents which was the letter referred to earlier written by the Head Teacher confirming the Claimant's pay scale as M6. The Second Respondent's witnesses confirmed that there had been little contact between the school and the First and Third Respondents in relation to the terms and conditions of employment for the Claimant. Nevertheless, this did not absolve the Second Respondent of its duties in respect of pay for the Claimant under the School Teacher's Pay and Conditions document 2016 which the Second Respondent confirmed it recognised.

### **Law**

12 The Agency Worker Regulations 2010 defines "agency worker", "temporary work agency" and "hirer". "Agency Worker" means an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and has a contract with the temporary work agency which has contracted employment with the agency, or to perform work for it. "Hirer" means a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied to work temporarily for and under the supervision and direction of that person. "Temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit and whether or not carrying on such activity in conjunction with others, of supplying individuals to work temporarily for and under the supervision and direction of hirers.

13 Under Regulation 5, and subject to Regulation 7 (which requires a qualification period for 12 weeks), an agency worker is entitled to the same basic employment conditions (that is to say, the relevant terms and conditions, including pay and bonuses, that are ordinarily included in the contracts of the hirers employees) as they will be entitled to for doing the same job had they been recruited by the hirer at the time when their qualifying period commenced other than by using the services of a temporary work agency.

14 Under Regulation 18, an agency worker may present a complaint to an Employment Tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by various Regulations including Regulation 5. Regulation 14 provides that a temporary work agency and/or hirer shall be liable for any breach of Regulation 5, to the extent that it is responsible for that breach.

15 Where an Employment Tribunal finds that a complaint presented to it under this Regulation is well-founded, it shall take such of the following steps as it considers just and equitable:-

- (a) make a declaration as to the right of the complainant in relation to the matters to which the complaint relates;

- (b) order the Respondent to pay compensation to the complainant;
- (c) recommend that the Respondent take, within a specified period, action appearing to the Tribunal to be reasonable, in all the circumstances of the case, for the purposes of the obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

16 Where a Tribunal orders compensation and there is more than one Respondent, the amount of compensation payable by each or any Respondent shall be as such as may be found by the Tribunal to be just and equitable having regard to the extent of each Respondent's responsibility for the infringement to which the complaint relates.

### **Conclusions**

17 At the Tribunal hearing, the First Respondent, Cassidy Education Limited did not appear and was not represented and nor did it lodge a Response Form. It was clear from the documentation at page 83 of the bundle of documents that the First Respondent was responsible for introducing the Claimant to the Second Respondent. It was also clear that upon instruction, the Claimant's union attempted to contact the First Respondent but with little success. Nevertheless, the Claimant successfully added the Third Respondent to the claim. The Third Respondent attended the Tribunal hearing and gave evidence which was accepted by the Tribunal that it was the agency which employed the Claimant under a contract of employment which was at pages 57 – 72. It was clear from this contract of employment that the Third Respondent was a temporary work agency as defined by Regulation 4 of the Regulations namely it was a person engaged in the economic activity, public or private, whether or not operating for a profit, and whether or not carrying on such activity in conjunction with others, of –

- “(a) supplying individuals to work temporarily for and under the supervision of a hirer; or
- (a) paying for, or receiving or forwarding payment for the services of individuals who are supplied to work temporarily for and under the supervision of hirers.”

18 Furthermore, the Claimant based upon the evidence heard by the Tribunal was an agency worker as defined by Regulation 3 as she was an individual who was supplied by the First or Third Respondent to work temporarily for and under the supervision and direction of a hirer (the Second Respondent). It was also clear that the Claimant had a contract with the temporary work agency (the Third Respondent) which was a contract of employment with that agency. These issues were not disputed by the Second or Third Respondent and it was clear from the contract of employment between the Claimant and the Third Respondent that she was an agency worker as defined and that she was provided by the temporary work agency to the Second Respondent which was the hirer. It was clear from the evidence heard by the Tribunal that as a supply teacher the Claimant commenced her services with the Second Respondent on Monday 5 September 2016 which temporary contract ended on 28 May 2017. Pursuant to Regulation 7, the Claimant qualified for protection in respect of Regulation 5 when she completed 12 weeks continuous service in the week commencing 5 December 2016. As a consequence, from this date until the time the Claimant ended her service with the Second Respondent she

worked for a total of 94.5 days. The Tribunal reviewed the evidence of her Schedule of Loss contained at pages 222 – 223 of the bundle of documents and noted the table that was prepared by her and was not challenged by either the Second or Third Respondent in terms of the dates that she worked and the total days that she worked namely 94.5 days. The difference in the rate the Claimant was paid (£165) and the rate she should have been paid had she been paid correctly at the M6 pay scale of £38,241.00 amounted to a difference of £31 per day. Therefore the total sum due to the Claimant was 94.5 days multiplied by the difference in the daily rate of £31 which came to a total of £2,929.50 gross.

19 The essential issue in this case was the extent to which each Respondent should be respectively liable to the Claimant for the breach of the Agency Worker Regulations and specifically Regulation 5 which requires the Claimant to be paid an equivalent salary to a full-time employee employed by the Second Respondent namely at the pay scale of M6.

20 It was clear to the Tribunal that the Claimant had a contract of employment with the Third Respondent and that the Third Respondent was a temporary work agency as defined. However, despite the fact that the Third Respondent had a detailed contract of employment with the Claimant which placed a number of burdens upon it, it was also clear to the Tribunal upon hearing the evidence of Ms Walsh that all the Third Respondent effectively did was process the payroll on behalf of the First Respondent. For doing this, the First Respondent paid the Third Respondent a fee. It was clear to the Tribunal that neither the First nor the Third Respondent took much or any effort to ascertain relevant information from the Second Respondent about the basic working and employment conditions in force at the hirer and had no awareness of School Teacher's Pay and Conditions document 2016. It was clear to the Tribunal that none of the three Respondents in this case were overly concerned about their liabilities under the Regulations. Nevertheless, as found in the facts section of this judgment, it was clear to the Tribunal that the hirer, namely the Second Respondent, Gainsborough Primary School was aware of all of the relevant information about basic working and employment conditions in force at its workplace at the relevant time. It was also clear to the Tribunal that the Second Respondent was aware of the Claimant's skills, experience and abilities upon reviewing her CV and interviewing her and so was well aware at the time of recruitment that the Claimant was very well qualified and was at the level of the pay scale of M6 under the National Teachers Pay and Conditions document. Nevertheless, knowing this information, the Second Respondent did nothing with it and continued to allow the Claimant to be paid at a lower rate by the Third Respondent. As a consequence, the Tribunal was of the view that the Second Respondent was responsible for the entire deficiency in the Claimant's pay. It is the Tribunal's view that the hirer being in the best position to know the relevant facts and details and terms and conditions of all of its employees should have provided such information to the First and/or Third Respondent to comply with its obligations under the Regulations. This did not happen in this case and there was no justification for this failure. It appeared to the Tribunal that each of the three respective Respondents sought to pass the blame for the failings under the Regulations on to each other without taking individual responsibility. It was the Tribunal's view that the primary responsibility for the provision of such information was with the school and as such, it is the Tribunal's conclusion that the Second Respondent should pay the entire amount of compensation to the Claimant being £2,929.50 after appropriate deduction of tax under PAYE.

Employment Judge Hallen

1 March 2018