EMPLOYMENT TRIBUNALS

Claimant: Mr S Patel

Respondent: Specsavers Optical Group Limited

HELD AT: Liverpool **ON:** 2 July 2018

BEFORE: Employment Judge Holbrook

REPRESENTATION:

Claimant: Mr D Ogun, Solicitor
Respondent: Mr A Blake, Counsel

JUDGMENT having been sent to the parties on 2 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. By an ET1 claim form presented to the Tribunal on 9 February 2018, Mr Suleman Patel made claims of unfair dismissal, wrongful dismissal and "victimisation" against two respondents, namely; Skelmersdale Specsavers Limited ("SSL") and Specsavers Optical Group Limited ("SOG").

2. Following receipt of the ET1, the claims against SSL were rejected by the Tribunal because an Employment Judge considered that the ET1 instituted 'relevant proceedings' and that SSL was not the name of the prospective respondent on the ACAS early conciliation certificate to which the relevant early conciliation number related. That name was SOG, and the Employment Judge did not consider that the claimant had made a minor error in relation to a name or address such that it would not be in the interests of justice to reject the claim.

3. A preliminary hearing was subsequently listed to deal with two matters: first, to determine whether Mr Patel had ever been an employee of SOG; and, second, to reconsider the rejection of the claims against SSL and/or to decide whether a third

company, Skelmersdale Visionplus Limited ("SVL") should be added or substituted as a respondent in these proceedings.

4. The preliminary hearing took place on 2 July 2018, when oral and written submissions were made on behalf of both parties. Oral evidence was given by Mr Patel and, for the respondent, by Mr Stephen Moore (SOG's Legal Director for the UK and Republic of Ireland). Written statements of the witness evidence were provided, and these were supported by a substantial bundle of documentary evidence.

FACTS

5. SOG is the principal trading company of the Specsavers Group, which operates about 800 retail optician stores in the UK and the Republic of Ireland. With the exception of a small number of stores which are operated as franchises, all stores in the UK are operated as joint ventures between SOG and individuals who may be ophthalmic opticians, dispensing opticians or retailers. Mr Patel is an optician and, from February 2011 until his dismissal on 21 September 2017, he had operated the Specsavers store in Skelmersdale pursuant to such a joint venture.

6. Under the Specsavers joint venture model, each store is run by either one or two companies (one being a holding company and one being the trading company) specifically set up for that purpose. Each joint venture 'partner' enters into a written contract of employment with the store/trading company (of which he or she is a director). However, he or she is also a shareholder in the holding company, together with SOG, and a separate shareholders' agreement governs their relationship in that regard.

7. In the present case, SSL was the relevant holding company for the purposes of the joint venture involving Mr Patel. It held all the shares in SVL, which was the trading company for the Skelmersdale store. Upon entering into the joint venture, Mr Patel acquired 25% of the shares in SSL. He still owned those shares when he was dismissed in 2017. At that time, the remaining 75% shareholding in SSL was held by SOG. The directors of both SSL and SVL were then Mr Patel, SOG and Mary Perkins (a member of the family which founded the Specsavers Group).

8. Mr Patel applied to become a Specsavers joint venture partner in 2008. The application was made to SOG, which was responsible for the assessment and selection process. However, his involvement with the Skelmersdale store did not begin until 28 February 2011, when he purchased his shareholding in SSL for £45,000. Directors' resolutions of SSL and SVL evidence that, on that date, Mr Patel's appointment as a director of both companies was approved, as was a resolution for SVL to enter into an employment contract with him.

9. On the same day, Mr Patel duly entered into a written 'service contract' with SVL. This contains the kind of provisions about duties and benefits which one would ordinarily expect to find in a contract of employment.

10. At the same time, Mr Patel entered into a shareholders' agreement in respect of SSL. SOG was also a party to that agreement. Under that agreement, the day to day running of the store was entrusted to Mr Patel (and his other joint venture partner at the time), who were also entitled to retain any distributable profits, in addition to salary from employment. However, the agreement provided for the payment of a

management fee to SOG (specified as 6.5% of gross sales in each month). In return for this fee, SOG was to provide a range of services to the business including marketing, banking, payroll, and IT support.

11. It appears that SOG provided additional services – which were not covered by the management fee in the shareholders' agreement – on an ad hoc basis and in return for the payment of additional fees. In particular, the conduct of grievance and disciplinary investigations was not covered by the management fee. However, on two occasions during Mr Patel's involvement with the Skelmersdale store, the SVL board of directors had appointed SOG to investigate, on SVL's behalf, grievance complaints made by members of staff at the store.

12. On 1 March 2017, the SVL board resolved to appoint SOG to conduct, on behalf of SVL, an investigation into alleged misconduct by Mr Patel. On 5 July 2017, the board resolved that disciplinary proceedings should be instigated against Mr Patel and that SOG should be appointed to conduct the disciplinary process on SVL's behalf. It was also resolved that SVL would bear the costs, charges and expenses incurred by SOG in carrying out these activities.

13. A disciplinary hearing was conducted by SOG's Head of Human Resources, on behalf of SVL. He recommended to the board of SVL that Mr Patel be dismissed for gross misconduct. That recommendation was considered at a meeting of SVL's directors on 21 September 2017 (which Mr Patel attended), and it was resolved to terminate Mr Patel's employment with immediate effect.

14. Within the period of three months following the termination of his employment, Mr Patel contacted ACAS for the purposes of the 'early conciliation' process, which is a mandatory requirement before claims of the kind in question may be presented to an Employment Tribunal. Mr Patel notified ACAS that the prospective respondent to his claims was SOG. He did not notify ACAS that he also intended to make a claim against a second respondent. Accordingly, ACAS issued an early conciliation certificate in due course which named SOG alone as the potential respondent.

EMPLOYMENT STATUS

15. It is agreed that Mr Patel worked under a contract of employment. What is not agreed is the identity of his employer. Mr Patel asserts that he was employed by SOG (or, alternatively, by SOG and SVL jointly). The respondent maintains that Mr Patel was employed by SVL alone. It denies that he was employed by SOG. Indeed, the respondent asserts that no member of staff working within Specsavers' UK stores is employed by SOG.

16. Mr Patel accepts that he was <u>not</u> employed by SSL. He says that SSL was named as a respondent in the ET1 in error and that his intention had been to name SVL (in addition to SOG) as a respondent instead.

17. On behalf of Mr Patel, it was argued that, whilst the service contract entered into between Mr Patel and SVL was not a sham, the actual contract of employment in this case is to be found in the shareholders' agreement he entered into with SOG. It was further argued that, in reality, it was SOG, and not SVL, which exercised control over Mr Patel and, indeed, it was SOG which had originally recruited him. The extent of the services provided to the business by SOG was such that SVL had little or no

independent control over its activities: it did not have its own bank account, for example, and relied on SOG for HR and legal matters. SOG paid Mr Patel's salary and issued his payslips.

18. I do not accept the submissions made on Mr Patel's behalf. Although the corporate structure which was put in place for the purpose of the joint venture creates a degree of complexity, the relationships between the parties were nevertheless clear: Mr Patel was employed by SVL. This was not a case of dual employment – he was not employed by SOG.

19. In coming to this conclusion, I have taken full account of the contractual documentation referred to above. In particular, I note that Mr Patel entered into a written contract of employment with SVL. This was not a sham arrangement. Nor was the service contract inconsistent with, or superseded by, the shareholders' agreement. The service contract dealt with the terms and conditions of Mr Patel's employment with SVL, whereas the shareholders' agreement focussed on the business activities of the store, the provision of (and payments for) corporate services, and entitlements to profits. The shareholders' agreement does not evidence a separate employment relationship between Mr Patel and SOG.

20. It is misleading to say that Mr Patel's salary was paid by SOG. It is correct that SVL did not have its own bank account (its money being held by SOG on its behalf) and that, as a matter of financial mechanics, salary payments were made by SOG's payroll department. However, it is clear that SOG was acting as SVL's agent in this regard and that the money paid to Mr Patel was money belonging to SVL. This is apparent from the fact that partners' salaries (including Mr Patel's) appear as expenditure in SVL's profit and loss statement in its annual accounts. As far as payslips were concerned, whilst these were again processed and issued by SOG's payroll department, they all bore SVL's name.

21. These were services provided by SOG pursuant to the shareholders' agreement in return for the management fee. However, it is also clear that, where additional services were provided by SOG on an ad hoc basis (such as grievance investigations and disciplinary processes), SOG's activities were carried out on SVL's behalf. I note, for example, that letters sent to Mr Patel by SOG during the disciplinary process either stated that they were sent on behalf of SVL or that they were signed by an authorised signatory for SOG, SOG being company secretary of SVL.

22. Mr Patel worked under the control of SVL's board of directors (of which he was a member) and it is clear that the board made key decisions about his employment, including resolutions to enter into a service contract with him and, ultimately, to dismiss him. The fact that the initial selection process which led to Mr Patel's appointment was handled by SOG does not detract from this. SOG was itself a director of SVL and it therefore had a say in the decisions made by the board. Indeed, it appears that, in practice, it had a controlling influence over those decisions because the SOG representative attending board meetings also tended to represent the other director, Mary Perkins. Nevertheless, those decisions were still the decisions of SVL and it was that company which exercised control over Mr Patel as its employee.

23. Finally in this regard, I note that in particularising his claims in the ET1, Mr Patel stated "The Claimant was employed as a dispensing optician by Skelmersdale

Visionplus Ltd ("SVL")". I am satisfied that this was indeed the correct representation of the position: SVL was Mr Patel's employer.

ADDITION OR SUBSTITUTION OF RESPONDENT

24. The question which then arises is whether SVL should be substituted as the respondent in these proceedings in place of SOG. Rule 34 of the Tribunal's procedural rules confers a broad power to add, substitute or remove parties. However, whilst the discretion conferred by rule 34 does not require that, before substituting SVL as respondent, I must be satisfied that an early conciliation certificate has been obtained in respect of that company, it is nevertheless appropriate for me to have regard to the circumstances described in paragraph 14 above in deciding how that discretion should be exercised.

25. Section 18A(1) of the Employment Tribunals Act 1996 provides that, before a prospective claimant presents 'relevant proceedings' (which expression includes the claims in this case) in relation to any matter to the Tribunal, he must provide to ACAS prescribed information, in the prescribed manner, about that matter. This triggers ACAS' duty to endeavour to promote a settlement of the matter between the parties and, if it is unable to do so, to issue an early conciliation certificate. A prospective claimant may not institute relevant proceedings without such a certificate (see section 18A(8) of the 1996 Act).

26. Early Conciliation Rules of Procedure are to be found in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. Rules 1 – 3 make it clear that, to satisfy the requirement for early conciliation, a prospective claimant must inform ACAS (either by using a form or by telephone) of his own name and address and also that of the prospective respondent. If there is more than one prospective respondent, the prospective claimant must present a separate form in respect of each respondent or, if contacting ACAS by telephone, must name each prospective respondent (rule 4).

27. In the present case, I understand that Mr Patel contacted ACAS by telephone. He informed ACAS that the name of the prospective respondent was SOG and ACAS duly inserted this information on to an early conciliation form in accordance with the Rules. Mr Patel now says that he did this because the ACAS officer he spoke to advised him to name the company which had sent him the letter terminating his employment. That letter was sent by SOG on 21 September 2017 (although it was in fact sent on behalf of SVL and was signed in the manner described at paragraph 21 above).

28. Mr Patel did not inform ACAS that he intended to make claims against more than one respondent. However, the ET1 he presented to the Tribunal in February 2018 named both SOG and SSL as respondents. I accept that a clerical error was made in naming SSL as a respondent, and that it had been Mr Patel's intention to name SVL instead.

29. What is clear, however, is that Mr Patel always intended to name two respondents in the ET1 but that he only informed ACAS about one during the early conciliation process. It is also clear that the clerical error mentioned above played no part in this omission: had the error not been made, Mr Patel would still have failed to inform ACAS that there was a second prospective respondent.

30. In reality, Mr Patel does not seek a reconsideration of the Tribunal's original rejection of the claims against SSL (he accepts that SSL is not an appropriate respondent in these proceedings). Nevertheless, it is relevant to note that I consider the Employment Judge was correct to reject those claims for the reasons stated in paragraph 2 above. Mr Patel had failed to comply with the Early Conciliation Rules of Procedure and, for this reason, he was unable to produce an early conciliation certificate naming SSL as a prospective respondent. It is important to note that this was not the result of a minor error in relation to a name or address: it is not the case, for example, that Mr Patel had confused SSL with SOG, naming the latter when, in fact, he had intended to name the former. It had always been Mr Patel's intention to name SOG as an additional respondent in these proceedings.

31. It was argued on Mr Patel's behalf that he had been misled by the advice of the ACAS officer and that, in any event, he had "substantially" complied with the early conciliation procedure because, in reality, SOG was pulling the strings and neither SSL nor SVL would have been capable of participating independently in a conciliation process. I do not accept these arguments. The relevant procedural requirements are quite simple and they are not onerous. A prospective claimant must comply with them fully before instituting relevant proceedings.

32. Had I found SSL to have been Mr Patel's employer, I would still have confirmed the rejection of his claims against that company for the reasons stated above. I therefore consider it appropriate to refuse to add or substitute SVL as a respondent to the claims in exercise of the discretion under rule 34: to do otherwise would be to put Mr Patel in a more favourable position than he would have been in had he not made the error in naming SSL, rather than SVL, as a respondent in the ET1. That would seem a non-sensical and unjust outcome in these circumstances.

DISPOSAL

33. In view of the fact that Mr Patel was not employed by SOG, that company is not an appropriate respondent to any of the claims made in these proceedings and, given that I have declined to add or substitute any other respondent, it follows that those claims fail and are accordingly dismissed.

_____

Employment Judge Holbrook

_____

Date 30 July 2018

REASONS SENT TO THE PARTIES ON

16 August 2018

FOR THE TRIBUNAL OFFICE