

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100805/2017 Held at Glasgow on 29 and 30 January 2018

5 Employment Judge Shona MacLean

Ms Nicola Docherty

Claimant
In Person

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Scottish Ministers

Respondent
Represented by:
Ms E Smith
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that under Section 120 of the Equality Act 2010 the Tribunal does not have jurisdiction to hear the claimant's
20 complaint of discrimination, which is dismissed.

REASONS

Introduction

1. The claimant sent a claim form to the Tribunal's office on 23 May 2017. She stated that she was a contract worker in terms of Section 41 of the Equality Act 2010 (the EqA). The claimant said she was engaged in providing
25 services to the respondent for Pink Lotus Limited (Pink), a company of which she is a director. She complained that the respondent discriminated against her under Section 18 of the EqA when her engagement was terminated because of her pregnancy.
- 30 2. In the response the respondent stated that around 2015 it contracted with Parity Professionals Limited (Parity) for Parity to supply temporary workers to the respondent. Around August 2016 the respondent placed an order with Parity to provide a Project Management Office (PMO) Analyst. The respondent accepted the offer from Parity to provide a Project Management

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Office (PMO) Analyst by Pink. Pink utilised the claimant to fulfil the order. The respondent denied that the engagement was terminated because of the claimant's protected characteristic of pregnancy.

3. At a case management preliminary hearing this preliminary hearing was arranged to determine if the Tribunal has jurisdiction to hear the complaint in terms of Section 120 of the EqA.
4. The issues that the Tribunal had to determine were as follow:
 - a. Was the claimant employed by Pink, or any other person for the purposes of Section 41(5) and Section 83(2)(a) of the EqA?
 - b. Has the claimant satisfied all the conditions required to bring a claim under section 41 of the EqA?
5. At the Preliminary Hearing the claimant appeared and gave evidence on her own account. The parties each produced a set of productions to which the Tribunal was referred.
6. In relation to the issues that had to be determined the Tribunal found that the following facts had been established or agreed.

Findings in Fact

7. On 11 June 2008 Pink Lotus Productions Limited was incorporated. It changed its name to Pink Lotus Limited (Pink) on 24 April 2012.
8. The claimant is the sole director and sole shareholder of Pink. The company documents place no restriction on her powers as director or shareholder. The claimant is not subordinate to Pink. There is no organ of the Pink that exercises control over her.
9. There is no written employment contract between the claimant and Pink. Pink has not provided the claimant with a written statement of particulars of employment under Section 1(1) of the Employment Rights Act 1996. There was no written memorandum or minutes of a director's meeting setting out the terms of the contract between the claimant and Pink. There was no company documentation referring to the claimant as an employee of Pink.

10. The claimant can market her services and apply for other work. Pink is not obliged to provide the claimant with regular work. If Pink does not have an assignment for the claimant, she nonetheless receives a monthly payment from Pink.
- 5 11. While working on an assignment for Pink the claimant does not work set hours. She is free to carry out the work in her own way. There was no provision for sick pay, holiday pay, pension scheme or disciplinary procedure. There was no arrangement in place for the claimant to advise Pink's accountant if the claimant is taking annual leave or to receive
10 statutory sick pay or statutory maternity pay.
12. On the 28th day of each month Pink issues a payslip to the claimant and pays her an amount that she decides. At the end of a tax year Pink issues the claimant with a P60 End of Year Certificate. Pink makes other regular monthly payments to the claimant that are not paid through PAYE.
- 15 13. In 2005 the respondent and Parity Professionals Limited (Parity) entered into an interim professional staff services framework agreement about the supply of temporary workers by Parity to the respondent (the Framework Agreement) (production C5).
14. On 25 August 2016 under the Framework Agreement the respondent issued
20 an order to Parity for a Project Management Office (PMO) Analyst.
15. In her capacity as Pink's director the claimant submitted her curriculum vitae (CV) to Parity following which she was interviewed by the respondent.
16. In September 2016 Parity and Pink entered into a contract for the supply of
25 consultancy services (the Supply Contract) (production C6). Under the Supply Contract, Pink agreed to supply to the respondent the services of a consultant, the claimant from 5 October 2016 until 4 September 2017. The claimant signed the Supply Contract in her capacity as a director of Pink. She also signed Schedule 2 of the Supply Contract: Consultant's Declaration in a personal capacity in which she was described as the
30 "Consultant" and Schedule 4: Consultant's Pre-Engagement Questionnaire.

The claimant confirms that Pink has the right to enter into the Supply Contract for the supply of services to the respondent making use of her as a Consultant.

17. In terms of the Supply Contract Pink may provide a replacement consultant provided that the respondent accepted the substitute and the proposed substitute possessed the necessary skills and expertise to perform the services.
18. There was no contract between the respondent, Pink or the claimant in accordance with the Framework Agreement. Under the Supply Contract Parity remunerated Pink for the services it provided.
19. Pink did not provide the claimant with any work between April and September 2016. Pink paid the claimant through PAYE on the 28th day of each month. In April and May, the claimant was paid £916.67. From June onwards Pink paid the claimant £627.17 (production 11).
20. The claimant began her assignment with the respondent on 5 October 2016. She worked 37.5 hours per week between 9am to 5pm. The respondent required the claimant to attend its premises for core days (Tuesdays and Thursdays). The claimant used the respondent's equipment. The claimant received instructions from various managers of the respondent and from time to time was asked to pick up work undertaken by the respondent's employees. The claimant was also asked by the respondent to attend training for an unrelated role.
21. The claimant had to request permission from the respondent to work from home. She had to have leave approved by the respondent. When the claimant was unwell she was told by the respondent to take sick leave.
22. Pink rendered invoices to Parity for the days that the claimant worked. The claimant did not inform Pink's accountant when she did not work because of annual leave or sick absence.
23. Between 28 October 2016 and 28 January 2017 Pink provided the claimant with monthly payslips showing payments of £627.17 per month.

24. The claimant informed the respondent that she was pregnant in December 2016. The claimant intended that while she was on maternity leave Pink would provide a replacement consultant subject to the respondent accepting the substitute and the proposed substitute possessing the necessary skills and expertise to perform the service.
25. The assignment was terminated in January 2017. Pink issued the claimant with payslips for £627.17 per month on 28 February 2017 and 28 March 2017. Pink did not provide the claimant with work.
26. The P60 End of Year Certificate for the tax year to 5 April 2017 disclosed that Pink paid the claimant £8,108.04. The claimant paid no income tax on these earnings. She paid £5.40 National Insurance in the tax year to April 2017.
27. The claimant received around £1,500 per month from Pink. The balancing payments were provided in other ways to make the claimant tax efficient. The claimant could choose how much she was paid by way of PAYE.

Observations on Witnesses and Conflict of Evidence

28. The Tribunal considered that claimant was a professional woman who gave her evidence in a straightforward manner. She accepted points put to her in cross-examination.
29. Most of the facts were undisputed. There were areas where the Tribunal considered that the claimant's evidence was either equivocal or unconvincing. The claimant said that there was no written contract between her and Pink. She confirmed that she was not issued with written terms and conditions of employment contract. She accepted that in terms of company law if Pink entered into the contract with her the terms should be set out in a written memorandum or recorded in the minutes of the first director's meeting after making the contract. The claimant accepted that this had not been produced. The claimant also said that when completing the agendas for the case management preliminary hearings she was not sure about losses and therefore included her full loss not only as an employee but also a

director. While the Tribunal acknowledged that the claimant was not legally qualified it was clear from her claim form and the presentation of her case that she understood the issues. She knew that she had to produce documents to support her position. The claimant had taken steps to recover documents held by other parties but had not produced documents that if they existed were in her possession and would support her case. The Tribunal considered it most unlikely that there was a written memorandum or minutes of the contract between the claimant and Pink. The Tribunal formed this view because during the preliminary hearing the claimant did not offer to produce the documents yet afterwards sent an Employer Liability Certificate but no other documents to satisfy the Tribunal of its existence.

30. The claimant presented claims forms in different capacities but calculated losses for both cases as if she and Pink were one and the same. The Tribunal was unconvinced that this due to a lack of understanding by her rather than an indication that when assess loss she considered that she and Pink were one and the same.

The Law

31. Section 41 of the EqA provides that a principal must not discriminate against a contract worker.
32. Section 41(5) provides that a "*principal*" is a person who makes work available for an individual who is (a) employed by another person, and (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it). Section 41(7) provides that a contract worker is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).
33. Section 83 provides that for the purposes of Part 5 (Work) of the EqA "*Employment*" means (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

34. Section 120 of the EqA provides that an employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to (a) a contravention of Part 5 (work).
35. The Equality and Human Rights Commission Code of Practice on Employment (2011) provides in relation to section 41 of the EqA: A contract worker is a person who is supplied to the principal and is employed by another person who is not the principal.... Contract workers can include employees who are seconded to work for another company or organisation and employees of companies who have a contract for services with an employment business (11.6) There is usually a contract directly between the end-user and supplier, but this is not always the case. Provided there is an unbroken chain of contracts between the individual and the end-user of their services, that end-user is a principal for the purposes of the Act and the individual is therefore a contract worker (11.8).
36. Section 1(1) of the Employment Rights Act 1996 (the ERA) provides where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.
37. Sections 227(1) of the Companies Act 2006 (the CA) provides a director's "service contract", in relation to a company, means a contract under which (a) a director of the company undertakes personally to perform services (as director or otherwise) for the company..., or (b) services (as director or otherwise) that a director of the company undertakes personally to perform are made available by a third party to the company, or to a subsidiary of the company.
38. Section 228 of the CA provides A company must keep available for inspection (a) a copy of every director's service contract with the company... or (b) if the contract is not in writing, a written memorandum setting out the terms of the contract.
39. Section 231 of the CA applies where (a) a limited company having only one member enters into a contract with the sole member, (b) the sole member is also a director of the company, and (c) the contract is not entered in the

ordinary course of the company's business. The company must, unless the contract is in writing, ensure that the terms of the contract are either (a) set out in a written memorandum, or (b) recorded in the minutes of the first meeting of the directors of the company following the making of the contract. If a company fails to comply with this section an offence is committed by every officer of the company who is in default.

Submissions

40. Ms Smith and the claimant helpfully provided a copy of their written submissions to which they referred during the Hearing. The following is a summary.

The Respondent

41. The claimant is not an employee of Pink, nor of any other person, for the purposes of section 83(2) of the EqA. There was neither a contract of employment nor a contract to do work personally for the purposes of section 83(2) between the claimant and Pink or between the claimant and any other person and the claimant therefore does not have jurisdiction to bring her claim under section 41 of the EqA.

42. The claim form stipulates section 41 of the EqA as the statutory basis for the claimant's claim against the respondent and she must have jurisdiction under that section to competently bring her claim. Section 41 of the EqA makes it unlawful for a principal who makes work available to contract workers to discriminate against, harass or victimise them. In order to have jurisdiction to bring a claim under section 41, there must have been a principal and a contract worker (each as defined by section 41) at the time of the alleged discrimination, harassment or victimisation.

43. The Tribunal was referred to Section 41(5) and 41(7) which set out the criteria for there to be a principal and contract worker for section 41. Section 41(5) sets out three criteria that each require to be met in order for there to be a principal. If one of the criteria is not met, there can be no principal for the purposes of section 41 and consequently no contract worker. The

respondent submitted that the claimant failed to meet the criteria in Section 41(5)(a), that she be employed by another person.

44. The Tribunal was referred to: Section 83 of the EqA; Section 120 of the EqA and the Equality and Human Rights Commission Equality Act 2010
5 Statutory Code of Practice paragraphs 11.6 and 11.8 (in relation to section 41 of the EqA).
45. The legal framework requires that the claimant must show that she was employed by another person, within the meaning of Section 83 of the EqA to fulfil all the requirements of Section 41 and have jurisdiction to bring a claim
10 under that section in terms of Section 120 of the EqA. The claim form states (at paragraph 5 of the paper apart) that the claimant was employed by Pink and she has maintained that position to date.
46. The Tribunal was also referred to Section 1 of the Employment Rights Act 1996 (the ERA); Sections 227, 228 and 231 of the Companies Act 2006
15 (the CA).
47. Section 83(2)(a) of the EqA requires that there must be a contract in existence, whether of employment, apprenticeship or one personally to do work and there must be employment under that contract (see *Jivraj v Hashwani* [2011] IRLR 827_at 833, per Lord Clarke at paragraph 36).
- 20 48. There requires to be an unbroken chain of contracts between the individual and the end user to establish the existence of a contract worker and principal for the purposes of Section 41 (per EHRC Statutory Code of Practice at 11.8).
- 25 49. The respondent was the end user of the claimant's services; there was a contract between the respondent and Parity; there was a contract between Parity and Pink; but the respondent submitted that the claimant has failed to show that there was a contract between her and Pink that satisfies section 83(2)(a) and therefore there is not an unbroken chain of contracts between the claimant and the respondent as end user. The claimant does not satisfy

the requirements to bring a claim against the respondent under Section 41 of the EqA.

50. The claimant seeks to rely on the judgments of the EAT and Court of Appeal in *MHC Consulting Services Limited v Tansell EAT/1373/98 and [2000] ICR* 789. These judgments do not advance the claimant's argument that she satisfies the requirements of section 41 of the EqA. There, the EAT noted the definition of employment for the purposes of the then discrimination legislation, which is the same as in section 83(2) of the EqA, and confirmed (at paragraph 8) that the essence of an employment relationship under the then legislation was that there should be a contractual relationship between the employer and the employee. The Employment Tribunal had found as a fact that the claimant there had a contract of employment with the company in which he was shareholder and director (EAT judgment paragraphs 1 and 8). That finding in fact was not appealed and the issue considered by the EAT and the Court of Appeal was the requirement for an unbroken chain of contracts to exist for contract workers to obtain protection under the then discrimination legislation. The principles set forth in that case about unbroken chains of contracts have been codified into section 41(5)(b) of the EqA and are not under dispute in this case.

51. The claimant's position is that Pink is her employer for the purposes of section 83 of the EqA. The claimant has confirmed that there is no written contract between her and Pink. The claimant has asserted that she is an employee of Pink and that there is an implied contract. Where there is no written contract, it is not enough for the claimant merely to assert that she had an employment contract, it is necessary for her to prove that what she actually did showed that she had such a contract (see *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] ICR 1183 per Rimer LJ at 1190 paragraph 19).

52. In the absence of a written contract, the provision by the employer of a written statement of particulars of employment under section 1(1) of ERA will provide rebuttable evidence of the terms agreed between the employer and employee. No such written statement has been provided by the

claimant in respect of her purported contract of employment with Pink. Absent any written documentation, as in this case, it is possible for a contract to be evidenced by demonstrating conduct between the parties but evidence must be provided and it is for the Tribunal to interpret the bargain made by the parties: it will not make their bargain for them (see Harvey on Industrial Relations and Employment Law” Division All: Contract of Employment: 2. A [22]). The respondent’s primary position is that the claimant has failed to produce sufficient evidence to demonstrate the creation of a contract of employment between her and Pink.

53. The claimant is the sole shareholder and sole director of Pink. The fact that a person is a director of a company does not automatically make that person an employee. Being a director is categorised as ‘holding office’ and directors as such are neither employees of the company nor employed by the company (see Palmer’s Company Law, Volume 2, Part 8, 8.108).

54. Whether a shareholder or director of a company is also an employee of that company is a question of fact for the tribunal before which such issue arises (see *Neufeld* at 1213 at paragraph 81). It should first be considered whether a putative contract is a genuine contract or a sham. If not, there is a second question whether it is properly to be characterised as a contract of employment rather than some other form of contract such as a contract for services (see *Neufeld* at 1199 paragraph 42C and 1213 paragraph 81B; *Nesbitt v Secretary of State for Trade & Industry* [2007] IRLR 847; *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635; *Protectacoat Firthglow Ltd v Szilagyi* [2009] ICR 835; *Train v DTE Business Advisory Services and Rosen* UKEAT/0201/08/LA,

55. Applying the above case law principles to the this case, the claimant’s total control over Pink’s acting and her treatment of Pink as her alter ego are important factors. This was evidenced in documentation by the claimant’s Agendas for a Preliminary Hearing in this case and the connected case of 4100786/2017: *Pink v Parity* (the Pink/Parity claim). The Agendas detail the same calculation of loss for the remainder of the contract term that was not

fulfilled for both cases; despite the fact that the claimant as an individual is the claimant in this case and Pink is the claimant in the Pink/Parity claim.

56. The productions show that the claimant does not differentiate between herself and Pink in practice: in explaining mitigation of loss apparently taken
5 by Pink the claimant refers to job searches made by her as an individual and refers to the fact that no benefits have been claimed. Another example is the inclusion of VAT in the claimant's calculation of personal loss when it is Pink that could claim VAT, not the claimant.

57. The contract of employment that the claimant alleges exists between her
10 and Pink does not exist and is a sham. The issues examined in these submissions below also contribute to the respondent's submission that there was no intention to create an employment contract between Pink and the claimant. Therefore any purported contract is a sham.

58. The respondent submitted that the Tribunal should pierce the corporate
15 veil to establish what was the true relationship, not to attach any liability to the claimant as there are no allegations of wrongdoing, but to establish what the true relationship is, which is part of the Tribunal's functions in examining whether the claimant is an employee of Pink. The respondent also submitted that the reality of the situation between the claimant and Pink is
20 that the claimant is in business in her own account and uses Pink purely as a payment mechanism for beneficial tax purposes, in which case the claimant's position that she has a contract of employment with Pink is a sham and must fail.

59. If the Tribunal does not agree, returning to the requirement for there to be
25 employment under a contract for section 83(2)(a) of the EqA to be satisfied once it has been considered whether a putative contract is a genuine contract or a sham and it has been held not to be a sham, an individual in the claimant's position as sole shareholder and director must evidence that they have a contract with the company that is a contract of employment
30 rather than some other form of contract such as a contract for services.

60. Determining employment status is approached by examining a range of factors in each particular case (see *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515C). The three areas identified in *Ready Mixed Concrete* are the central factors in determining whether an employment relationship exists between parties. Although all factors must be considered, the respondent's position was that some were more important than others: control, mutuality of obligation and personal service and these all need to be evidenced by the claimant, as a minimum, if she is to succeed in her position that there is a contract of employment between her and Pink.
61. MacKenna J in *Ready Mixed Concrete* said at 515F: "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."
62. In the context of the claimant being a shareholder, the Court in *Neufeld* held, per 1203-1204 at paragraph 54 and 55: "relevance of the putative employee's control of the company is likely to be in the context of the consideration of whether (a) the contract he is asserting was a sham rather than a genuine employment contract (for the obvious reason that he will have been pulling the strings that will have purportedly created it) or (b) if intended to be genuine, its terms and the way in which it was intended to be performed (that is, in essence, the services to be rendered and the remuneration to be paid) were compatible with its being classed as a contract of employment. Where a written contract is concerned, the question of whether it is a contract of employment or not will turn, subject to any evidence that it is a sham, essentially on its terms and matters of general law: see Chitty on Contracts, 30th ed (2008), vol II, para 39-010. Where, however, the contract is not in writing, it will of course need to be proved by other means, and, given the greater informality likely to obtain in "one-man" companies, the fact and extent of the alleged employee's control of the company may be a factor for consideration."

63. The claimant's total control of Pink is a factor to be considered and rather than the purported employer (Pink) deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done those decisions are taken by the claimant, the purported employee. That is incompatible with there being any control by Pink over the claimant. The respondent's position was that the control element of a contract of employment is not met in this case. If any person had any control over what the claimant was required to do, it was not Pink but rather the end user of the services provided by the claimant, such as the respondent.
64. Mutuality of obligation is an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. For mutuality of obligation to exist, parties must be under some obligation towards each other. The fact that there might be an absence of mutuality of obligation between assignments may be relevant to the nature of the relationship during the assignment (see *Windle v Secretary of State for Justice [2016] ICR 721*).
65. There is no obligation on Pink to provide regular work to the claimant. If Pink does not have an active assignment to provide services to end users, there are no obligations between Pink and the claimant. The claimant has been applying for jobs with other employers and marketing her services freely and if she had been successful in obtaining a new role she would have no obligation to perform work for Pink.
66. The claimant calculated her loss for the purposes of her claim. She claims loss from the day that she stopped providing services to the respondent and states that she cannot know how long it would take to secure another contract. That suggests that Pink has not been able to remedy such loss since then and, consequently, that Pink has not offered any work to the claimant since then. If there was a genuine contract of employment between Pink and the claimant and there was no work to be offered to the claimant, should it not have been a redundancy scenario with resulting redundancy payments being made to the claimant?

67. The respondent's submitted that there was no mutuality of obligation between Pink and the claimant when there is no active assignment for services to be provided by Pink and this assignment by assignment basis indicated a lack of subordination and the independence of the claimant; the element of mutuality of obligation for a contract of employment to exist between Pink and the claimant was therefore not fulfilled and there can be no contract of employment as alleged. Instead, the fact that no remuneration is made when no services are provided is indicative of the claimant being an independent provider of services to third parties who uses Pink as the vehicle through which to provide those services.
68. The obligation to render personal service to an employer is of crucial importance. If someone is entitled to provide a substitute to do the work, this will point away from an employment relationship, negating an obligation to perform work personally and is inconsistent with employee status (see *Express & Echo Publications Ltd v Tanton* [1999] ICR 693).
69. The claimant's evidence was that she would have intended to provide a substitute to perform the required services for the respondent for a period of time during the period for which there was a contract between Pink and Parity to provide services to the respondent. The claimant had made the same statement for Pink. The Supply Contract allowed for Pink to provide a substitute for the claimant if the respondent accepted the substitute and the substitute possessed the necessary skills and expertise to perform the required services. As it happened, the Framework Agreement was terminated before the provision of a substitute happened. Therefore the claimant was apparently able to provide a substitute to perform her services and had intended to do so, although circumstances prevented that from happening. For that reason, there was no requirement for the claimant to perform her services personally and the relationship between the claimant and Pink is not that of employee and employer.
70. In addition to the above three central elements of an employment contract, other factors can be relevant in construing the true nature of a purported contract (see *Launahurst Limited v Larner* [2010] EWCA Civ 334). The

respondent submits that a similar approach should be taken in this case and that the totality of the facts put forward by the claimant should result in the finding that the claimant is not an employee but an independent provider of services.

5 71. It was also relevant to consider how the claimant was portrayed to third parties. There is no official or contractual documentation that describes the claimant as an employee of Pink. Publicly available documents on Companies House show that the claimant is a director, and shareholder of Pink. The contract between Parity and Pink refers to the claimant as a
10 “Consultant” of Pink. The claimant he has referred to herself as a “consultant” of Pink in documents relating to the Pink/Parity claim. This leads to the conclusion that the claimant is not, in fact, an employee of Pink.

72. Given the categories of loss claimed by the claimant and Pink the claimant herself the financial risk of the business of Pink and personally suffers loss
15 when Pink does not have active assignments. This points towards the claimant being in business on her own account.

73. The respondent submitted that the claimant had not evidenced that any of the three essential factors for a contract of employment to exist apply between her and Pink. A contract of service could have been negotiated but
20 the claimant has not shown that this was done as between her and Pink. This, considered in conjunction with the other relevant factors leads to the conclusion that there is not a contract of employment between the claimant and Pink and there was no such contract at the time of the alleged discrimination referred to in the Claimant’s claim against the Respondent.

25 74. Although the claimant has not sought to assert thus far that she has anything but a contract of employment with Pink, for completeness the respondent addressed the tests for the wider category of employment provided for in section 83(2)(a). The respondent’s position was that the claimant has not demonstrated that she meets even the wider meaning of
30 employment provided for in section 83(2)(a) of the EqA.

75. Section 83(2)(a) of the EqA provides for a wider definition of “employed” in addition to under a contract of employment and includes a contract to do work personally. The broad scope of this, however, does not negate the requirements to show subordination, personal service and mutuality of obligation, as with a contract of employment. The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense (*Windle* per Underhill LJ at 731 paragraph 24).
76. The Tribunal was also referred to *Allonby v Accrington & Rossendale College And Others* [2004] 1 C.M.L.R. 35; *Jivraj v Hashwani* [2011] IRLR 827; *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2015] IRLR 50.
77. An individual seeking to establish that they are employed under a contract to do work personally for the purposes of section 83(2)(a) of the EqA must still be able to evidence control, mutuality of obligation and personal service and show that they are in a relationship of subordination with and are under the direction of the person who they say is their employer for the purposes of section 83(2)(a). The claimant has failed to evidence control, mutuality of obligation and personal service in her purported relationship with Pink for the reasons set out above. The claimant has not shown that there was any subordination of her to Pink in any way and she was not under the direction of Pink. The Claimant has therefore failed to establish that she was employed by Pink under a contract that meets the requirements of section 83(2)(a) of the 2010 Act.
78. It is appropriate to consider the claimant’s status as sole director and shareholder of Pink. Some of the cases on this issue, and indeed Issue 3, relate to the consideration of whether an individual was an employee for the purposes of the definitions set out in section 230 of the ERA. That definition is similar to but not the same as the definition in section 83(2)(a) of the EqA. However in *Windle* the Court of Appeal (at 725 at paragraph 10) considered the test of “employment under a contract personally to do work” under the EqA and decided that it was closer to the test of “employment under a

contract of employment” under the ERA definition than might previously have been thought. The respondent’s submission was that case law on section 230 of the ERA on this issue applies to considering whether a company director or shareholder is in employment under section 83(2)(a) of the EqA.

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79. The Tribunal was referred to *Secretary of State for Trade & Industry v Bottrill* [1999] ICR 592; *Farleigh v Secretary of State for Trade & Industry* EAT/1282/99; *Danosa v LKB Lizings SIA* [2011] 2 CMLR 2.

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80. The claimant is the only director of Pink and is in reality answerable only to herself. The Articles of Association of Pink do not restrict the claimant’s voting as director in any way. The claimant is the sole individual with control in Pink and Pink does not exercise control over the claimant. The respondent submits that the claimant is in business on her own account trading under the protection of a limited company and is not an employee of Pink.

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81. The claimant produced payslips and a P60 for the tax year 2016/2017 that purport to show that the claimant was paid sums of money from Pink through the PAYE system.

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82. The Tribunal was referred to *Fleming v Secretary of State for Trade & Industry* 1998 SC 8; *O’Kelly v Trusthouse Forte Plc* 1984 QB 90. The respondent submitted that the fact that the claimant received sums of money through the PAYE system is a neutral factor and is wholly insufficient on its own to evidence the existence of an employment relationship between her and Pink.

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83. The Tribunal was referred to *Abrams v EAD Solicitors LLP Case 2402068/2014*. The payslips produced by the claimant show that she paid only £5.40 in National Insurance in one year and no income tax during that period. As in *Abrams*, the claimant could decide how much and in what form to receive payment for the services she provided to end-users and she set them consciously at a low level purely for the purposes of beneficial taxation treatment. The payslips show that the claimant purportedly received around

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£627 per month from Pink most months during the tax year 2016/2017, receiving £898 on a couple of months. In her Agenda for a Preliminary Hearing, however, the Claimant stated that the minimum amount she would need to support herself was £1500 per month. The respondent submitted
5 that the claimant chose to receive further amounts from Pink in other ways than by PAYE to provide the financial support she required in a tax efficient manner.

84. The respondent submits that the claimant is able to choose how much to pay herself by way of PAYE and other methods at any given time and such
10 choices point away from the payments being made to the claimant as an employee, as in *Abrams*. The Tribunal should take a similar approach as the Tribunal did in *Abrams* and consider the tax treatment of the claimant, and the reasons for that, as relevant factors in determining the question of whether the claimant is employed for the purposes of section 83(2)(a) of the
15 EqA.

85. The respondent raised question of the claimant's true relationship with Pink in its response submitted on 20 June 2017. The claimant failed to address or provide details of her relationship with Pink even though she claimed in her claim form that she was an employee of Pink and identified that there is
20 a requirement for an unbroken chain of contracts to exist to obtain protection under section 41 of the EqA.

86. At the Preliminary Hearing on 21 July 2017, the claimant was ordered to furnish specification of the contractual relationship between her and Pink as sufficient to place her within the scope of section 41 of the EqA for the
25 purposes of her complaint. In response to that, the claimant only produced the documents at tab 2, 4 and 8 of the respondent's productions that showed only the director and shareholder status of the claimant and four heavily redacted payslips. This Preliminary Hearing was therefore the claimant's third opportunity to evidence that the relationship between her
30 and Pink is one of employment. She has failed to produce any persuasive evidence that she is employed by Pink within the meaning of section 83 of the EqA.

87. If the claimant was employed by Pink, she would have been able to produce compelling documentation or evidence, such as: company accounts of Pink showing all payments received by Pink for services provided by the claimant to end users and all payments made to the claimant in both her purported capacity as employee and as director and as shareholder; evidence of holidays taken and receipt of holiday pay; and receipt of maternity pay or maternity allowance for the period of maternity leave taken by the claimant as an employee. If the claimant was an employee of Pink, she should have been able to evidence the key factors of an employment relationship with Pink Lotus but she has failed to do so.
88. The Tribunal was referred to Sections 227 and 228 of the CA which, impose a duty upon companies where the company enters into contracts with its directors (see Palmer's Company Law, Volume 2, Part 8 8.1108-1110). Section 231 of the CA imposes a further duty where a limited company enters into a contract with its sole member who is also a director of the company. In that case, as with the claimant and Pink, unless the contract is in writing the company must ensure that the terms of the contract are set out in a written memorandum or recorded in the minutes of the meeting of directors following the making of the contract. Failure to comply with this duty is an offence by every officer in default.
89. The claimant has failed to produce a written contract or a written memorandum of the terms of her purported contract with Pink in terms of section 227, 228 and 231 of the CA. As the sole office holder of Pink and therefore responsible for the compliance of Pink with companies legislation, if there was a contract of employment or a contract to do work personally between the claimant and Pink, the claimant should have been able to produce such documentation as required by these provisions and her failure to do so is highly relevant.
90. The claimant's position is that her claim is brought under section 41 of the EqA and that she is employed by Pink for the purposes of section 83(2) of the EqA. Although the claimant has not sought to assert thus far that she is employed by anyone other than Pink, the respondent addressed the

possibility of the claimant being employed by someone other than Pink for the purposes of section 41 of the EqA for completeness. The respondent's position was that the claimant has not demonstrated that she is employed by anyone within the meaning of section 83(2) of the EqA.

5 91. The only other person by whom the claimant could be employed by so that she could competently bring her claim under section 41 of the EqA, and its requirement for an unbroken chain of contracts, is Parity. The respondent submitted that the claimant was not employed by Parity during the period
10 when the claimant's services were provided to the respondent. There is no written contract of employment between the claimant and Parity. In the absence of that the claimant would need to prove that what she did showed there was such a contract and she has failed to do so: there is no evidence of control by Parity over the claimant as there is no evidence that Parity in any way decided the thing to be done, the way in which it shall be done, the
15 means to be employed in doing it, the time when and the place where it shall be done; there is no evidence of any mutuality of obligation between the claimant and Parity; there is no evidence of any requirement of personal service by Parity over the claimant, and indeed the right of substitution is made explicit in the Parity/Pink Lotus contract; and there is no evidence of
20 any subordination to Parity by the claimant in any way and no evidence that she was under the direction of Parity. There is therefore no evidence of a contract of employment or of a contract to do work personally within the meaning of section 83(2) of the EqA between the claimant and Parity.

25 92. If the Claimant attempted to argue that she was an employee of the respondent, such a claim would require to be brought under section 39 of the EqA. Such a claim has not been pled by the claimant to date and would be time-barred and should not be admitted.

30 93. The Tribunal was invited to find that the Claimant is not employed by Pink, or any other person, for the purposes of section 41(5) and section 83(2)(a) of the EqA; the Claimant has not satisfied all the conditions to bring a claim under section 41 of the EqA; the Tribunal has no jurisdiction to hear the

claimant's complaint in terms of section 120 of the EqA; and the claim should be dismissed.

The Claimant

- 5 94. The claimant submitted that the issue of whether the Tribunal had jurisdiction under Section 120 of the EqA to consider the claim can be settled by answering the following questions:
- a. Was the respondent the "principal"?
 - b. Was the claimant an employee of Pink?
 - c. Did the respondent treat the claimant like an employee?
- 10 95. The claimant said that the facts closely follow *Tansell v Abbey Life (2000)*: Mr Tansell, a computer consultant, was employed by his company Intelligents Limited, that contracted with MHC Consultants to supply the services of Mr Tansell to Abbey Life.
- 15 96. In this case the claimant, a Project Management Office Analyst, was employed by her company Pink that contracted with Parity to supply her services to the respondent.
- 20 97. In *Tansell* the Court of Appeal upheld the EAT judgment that Mr Tansell was to be regarded as a contract worker for Abbey Life and so the discrimination legislation applied as between Mr Tansell and Abbey Life.
98. Applying this decision to this case, the Pregnancy and Maternity provisions of the EqA would apply as between the claimant as an employee of Pink and the respondent. The claimant relied on *Tansell* that was brought under the Disability Discrimination Act 1995 which is now incorporated in the EqA.
- 25 99. The Tribunal was referred to Section 41(5) of the EqA. In this case the respondent as "principal", made work available for the claimant who was (a) employed by another person (Pink) and (b) supplied by that other person in furtherance of a contract to which the respondent was a party (the Framework Agreement).

100. There existed an unbroken chain of contracts between the claimant and the respondent and therefore the respondent as the "end user" were by definition, the "principal". The answer to the first question was, "yes".
101. The claimant's contract with Pink is implied. Pink pays her a regular salary for her work as a PMO Analyst, which, is taxable under the PAYE rules and N.I. Contributions are also paid when they are due. This applies whether she is actively engaged in an assignment or not. Pay slips for a full financial year have been provided and by cross referencing these with her CV it can be seen that Pink continued to pay her even when she was not actively engaged on a contract.
102. The respondent argues that Pink existed only for reasons of tax efficiency. However, it was mentioned in the evidence that another reason for working in this way is for the limited liability that it offers. It also would not be possible for the claimant to secure this type of work without a limited company set up. In addition, the company pays a substantial amount of corporation tax and VAT. This simply would not happen in a company that existed only for tax efficiency. Since commencing contract work the claimant has been employed exclusively by Pink.
103. The respondent made much of the productions not being as expected. However, at the Preliminary Hearing in question, the claimant specifically asked which documents she required to see and she was not forthcoming. Employment Judge D'Inverno supported her position by saying it was not for the respondent to the claimant how to present her case. Under these circumstances, the claimant has done her best to produce the relevant documentation.
104. The respondent submitted that it believed the claimant's contract with Pink was a sham contract. For a contract to be a sham would require the intent to deceive or defraud, which is obviously not the case here.
105. The claimant said that the answer to the second question was, "yes".
106. The respondent's agents interviewed the claimant in her capacity as a PMO

Analyst. The Supply Contract was offered on the strength of this interview, naming the claimant specifically as the individual to carry out the work.

- 5 107. While contracted to work for the respondent the claimant could not choose what hours to work or on which days to work. She could not choose which work to do or the manner in which it was to be done Any leave she wished to take required approval through a specific process outlined by the PMO Manager and any days she wished to work from home also required approval.
- 10 108. The right to substitution was not unfettered. The Framework Agreement did not allow for unfettered substitution and Parity said “the client has terminated their contract with us for services provided by your limited company, we subsequently terminated our contract with Pink Lotus Ltd under clause 3.3 of your contract (PPL/CFE52973) in response” indicating that the substitution clause in the Supply Contract was a sham to disguise
15 what turned out to be an employment contract.
- 20 109. The claimant was fully integrated into the organisation with an entry in the telephone listing and a Scottish Government email address. She was supplied with a security pass giving her the same access as permanent employees and was supplied with a Scottish Government laptop that she was required to use. After the claimant informed her line manager and the PMO Director of her pregnancy, the degree of control they exercised over her duties increased substantially. They began to micro-manage her tasks. They queried leave that had already been authorised even though, as a
25 contractor for services, it should have been unnecessary for her to have leave approved. They also allocated work to her that had previously been done by a full time employee of the respondent and was unrelated to the role she was contracted to provide, without any change to her contract terms. All of the foregoing is contrary to what is expected in a genuine contract for service.
- 30 110. The respondent has provided much case law mostly pre-dating the EqA, that the claimant did not consider it unreasonable to think that those who drafted the EqA were mindful of this case law and carefully chose their

words to reflect it.

111. Ultimately what really matters is the wording of the statute. This case was brought by way of the provisions of the EqA and therefore it the definition of a worker and a principal that is relevant in this case is that contained in section 41 of the EqA to which the Tribunal was referred. A principal must not, in relation to contract work, harass a contract worker.

112. As Her Honour Judge Stacey put it in Case Number: TUR1/985(2016) on 14 November 2017 in the Central Arbitration Committee : “..it is also to be borne in mind that it is the statute that is to be construed, not the case law”.

113. The Tribunal was invited to find that it had jurisdiction to hear the claim.

Deliberations

114. The Tribunal referred to the claim form. The claimant stated that she was discriminated against while working as a consultant for the respondent. The statutory basis of the claim was under Section 41 of the EqA as the claimant asserted that there was a chain of unbroken contracts: she was employed by Pink; Pink and Parity entered into the Supply Contract whereby the claimant was supplied by Pink to work for the respondent in furtherance of the Framework Agreement between Parity and the respondent.

115. The Tribunal referred to Section 41 of the EqA, which makes it unlawful for a principal who makes work available to contract workers to discriminate, harass or victimise them. To bring a claim under Section 41 of the EqA there must be a principal, and a contract worker as defined in the section.

116. The Tribunal then referred to the definitions. In Section 41(5) of the EqA a “principal” is a person who makes work available for an individual who is (a) employed by another person, and (b) supplied by that person in furtherance to a contract to which the principal is a party (whether or not that other person is an party. In Section 41(7) of the EqA “contract worker” is an individual supplied to a principal in furtherance of a contract as is mentioned in subsection 5(b).

117. Section 83(2) defines employment as employment under a contract of employment, a contract of apprenticeship or a contract a contract personally to do work.
118. It was agreed that there must be employment under a contract whether of employment, apprenticeship or to do work personally. Also there must be an unbroken chain of contracts between the individual and the end user to establish the existence of a principal and contract worker for the purposes of Section 41 of the EqA.
119. It was agreed that the respondent was the end user and there was the Framework Agreement between the respondent and Parity and the Supply Contract between Parity and Pink. What was disputed was the contract between the claimant and Pink, which the Tribunal turned to consider.
120. The claimant was the sole director and shareholder of Pink. She was answerable only to herself and there was no restriction in her voting rights as a director. The claimant was the only person who could provide direction or control. Against this background and considering that the claimant said that there was an implied contract of employment the Tribunal found it peculiar that Pink did not issue the claimant with a written contract of employment nor was she issued with a written statement of terms and conditions of employment. There was no written memorandum or minutes setting out the agreement that Pink employed the claimant.
121. In the Tribunal's view the claimant made all Pink's decisions. She acted as if she and Pink were the same person. She decided what work to apply for; how it was to be done; the manner and the amount that she was to receive payment. The only evidence of any control being exercised over the claimant was by the respondent not Pink.
122. The Tribunal was not satisfied that Pink had an obligation to provide work to the claimant. There were periods between assignments when the claimant was not provided work by Pink. There was no evidence to suggest that she there was any restriction in her providing her serviced to others.

123. The claimant said that she would have provided a substitute to perform her services and that had been her intention. The Tribunal considered that this pointed to there being no requirement to provide her services personally as would be expected as an employee.
- 5 124. The claimant produced pay slips showing that she paid money from Pink through the PAYE system. The Tribunal considered that this was a neutral factor. The Tribunal put more weight on the evidence that the claimant chose how much of her earnings were paid in this way. None of the payslips produced recorded holiday pay, sick pay or statutory sick pay. There was no
10 evidence that the claimant was paid maternity pay or maternity allowance. There was no record produced of any of the claimant's absences and the reasons for them. If such a record was kept the claimant did not inform Pink's accountant of these absences.
125. The Tribunal concluded looking at the evidence as a whole that at the
15 relevant time connected with her claim there was no contract of employment between the claimant and Pink nor was there any contract to do the work personally.
126. The claim was not advanced on the basis that the claimant was employed
20 by anyone other than Pink. In any event the Tribunal agreed with the respondent's submission that there was no evidence of the claimant being employed by any other person for the purposes of Section 41(5) and Section 83(2)(a) of the EqA.
127. The claimant having failed to satisfy all the conditions of bringing a claim
25 under Section 41 of the EqA the Tribunal concluded that it did not have jurisdiction to hear the claimant under Section 120 of the EqA and therefore dismissed the claim.

30 Employment Judge: S MacLean
Date of Judgment: 23 February 2018
Entered in register: 12 March 2018
and copied to parties