



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs L Bogdanoviene

v

**1. Fusion Funkymen Limited
2. Ms Muna Meah**

Heard at: Watford

On: 13 and 14 March 2019

Before: Employment Judge Smail

Members: Mrs J Smith
Mrs G Binks MBE

Appearances:

For the Claimant: In person

For the Respondents: Miss S Wookey, Counsel

JUDGMENT having been sent to the parties on 22 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form dated 19 April 2018, the claimant claimed unfair dismissal, age discrimination, a redundancy payment, notice pay, holiday pay and other unspecified payments. She brought the claims against Mr Ajay Meah and Ms Muna Meah, his sister.
2. At a preliminary hearing on 19 July 2018, Employment Judge Wyeth removed Mr Meah as a respondent and substituted Fusion Funkymen Limited, the Company of which Mr Meah was a Director. That Company became the First Respondent and Ms Meah, the Second Respondent. An application to add Fusion Hair Design Limited was refused.

The employer at termination

3. It remains a preliminary issue in this case as to who was the claimant's employer at the date of her termination of employment on 8 April 2018. It is common ground that the claimant was employed by the Second Respondent personally, trading as Fusion, as a Hairstylist, between 13 September 2004 and 1 October 2015. Thereafter the Second Respondent maintains that the employment was transferred by way of a transfer of an undertaking to the First Respondent. It does seem that the Second Respondent, together with her brother, Mr Ajay Meah, attempted to reorganise the business in the form of Limited Companies. It is the

claimant's case that, as far as she understood it, she always worked under the direction of Ms Meah and she leaves it to the tribunal to make sense of who the employer was although it is her primary case that Ms Meah was her employer.

4. The Hair Salon traded, and still does, from 246 Streatfield Road, Kenton, Harrow. An Accountant, Pravin Hirani and Co, was consulted. The idea apparently, was to have the barber side to the business incorporated as Fusion Funkymen Limited and the female side to the business, the hair and beauty, incorporated as Fusion Hair Design Limited. The claimant was allocated to the barber side of the business and it is right that predominantly she cut men's hair throughout her career although on occasions cut female hair also.
5. One of the reasons for the incorporation of the business was an attempt to regularise it. There is clear evidence of a practice, certainly when the Second Respondent was trading as Fusion in her own name, of part-payments being made by bank transfer and part-payments in cash with an under-declaration of the hours worked by the claimant with the consequence that tax and National Insurance was underpaid with earnings being under declared. The claimant, it seems, protested against this including to HMRC, and so we find was not implicated herself in any illegality. There remains however, a disturbing picture about how this business was conducted about which we understand HMRC is aware. The apparent malpractice however is irrelevant to our purposes today. We are to assess who is liable for amounts which are undoubtedly owed to the claimant.
6. In terms of regularisation, the claimant does however accept that her payments were all in order at the latest from January 2018.
7. As late as 8 March 2018, the claimant received an instruction from the Second Respondent on a template which had the heading Fusion, which of course, was the Second Respondent's trading name prior to the apparent incorporation of the business. That is one piece of evidence suggesting the Second Respondent remained the employer in a personal capacity after 1 October 2015. However, that one piece of evidence is outweighed by a substantial body of documentary evidence showing the contrary. There is a contract of employment which, we accept from the claimant, was backdated to 1 October 2015. Backdated some months, possibly even in excess of a year afterwards. The claimant did however sign it and it is clear from the terms of the contract that the employer was Fusion Funkymen Limited.
8. There is a second contract of employment with reduced hours, signed on 1 January 2018, certainly within a week of that, again showing clearly that Fusion Funkymen Limited was the employer. Further, the claimant accepts that from around October 2015, she was receiving electronic bank payments into her account from a source described as Fusion Funkymen Limited. We have seen three P60s, one for the year ending 2016, one for the tax year ending 2017, and one for the tax year ending 2018, all which show Fusion Funkymen as the employer. We have seen pay slips over the relevant period, again showing Fusion Funkymen Limited as the employer. Further, and significantly, after termination of her employment, although

HMRC appear to be aware of the problem prior thereto, the claimant applied for a Minimum Wage Shortfall to be addressed by HMRC and was successful in that regard. The HMRC determination was on the basis that there had been a transfer of the business from the Second Respondent to the First Respondent in October 2015 and that there had been a shortfall of £3,492.86 gross, which was paid on behalf of the first respondent in a net amount. The basis of the award however was that the claimant had been employed by the First Respondent from October 2015 and the claimant accepted the payment on that basis.

9. The claimant's termination letter dated 8 April 2018, was in the name of Fusion Funkymen Limited as were other termination documents issued that date. The apparent reason was redundancy and we have seen accounts of the First Respondent showing a small but persistent loss. We have seen associated documents from the accountant and from Companies House to the effect that the Company ceased trading and there was a proposal to strike it off.
10. We have had some regard to the position after the termination of the letter specially to see if there was a chance that there was a transfer back to the Second Respondent, who is a named party of course to the proceedings. We were entertaining the possibility that perhaps in some way, this dismissal was connected with a transfer back to the Second Respondent. There is no evidence to that effect however. There is some evidence that Fusion Hair Design Limited has picked up some of the male hair styling. We are unclear whether that can be described as a transfer of undertaking. In any event, the issue is not before us and Fusion Hair Design Limited is not a party to the proceedings.
11. On the balance of probability, and given the weight of the evidence as at 8 April 2018, the claimant was employed by the First Respondent and had been so from 1 October 2015.
12. We should say that we understand the claimant's upset at having been dismissed in the manner she was. She was summarily dismissed on her doorstep on a Sunday. This was against the background of 14 years' service during which she had to challenge, on occasions, unlawful tax practices by her employer and we sympathise with the claimant in respect of the manner of her dismissal. We will calculate what it is worth, the amounts owed to her and we will put in a judgment by the First Respondent for notice pay, redundancy pay and holiday pay and any other payment shortfalls.
13. What remains, and we will now turn our attention to that, is the extent to which there is a claim for age discrimination which can be maintained directly against the Second Respondent.
14. So, as against the First Respondent, Fusion Funkymen Limited, there will be a judgment for a redundancy payment, notice payment and holiday pay. It may not add anything to compensation but, plainly, the dismissal was unfair because there was no consultation. But, if you are getting a redundancy payment you do not also get a basic award. There is no doubt that the dismissal by the First Respondent was unfair.

15. We now turn to the question as to whether there was any age discrimination by the Second Respondent.

Age Discrimination?

16. By section 13 of the Equality Act 2010 a person discriminates against another if because of a protected characteristic, in this case age, he or she treats the employee less favourably than he or she would treat others. Burden of proof is important in discrimination cases. By section 136 of the 2010 Act, if the claimant adduces facts from which discrimination could be inferred, the Tribunal must find discrimination unless the employer shows age played no role whatsoever.
17. The claimant argues that the Second Respondent, acting on behalf of the First Respondent and individually liable, selected the claimant for redundancy because of her age. She says, as we know, in January 2018 the claimant reduced her hours to 30 and we have seen a contract recording that. On behalf of the Second Respondent it is pointed out that if there was a contract recording that, then perhaps one might infer that it had been agreed and not objected to by the Second Respondent. Be that as it may, the claimant says that she had to reduce her hours because she was getting tired. She was beginning to feel her age; at that point she was 53. So, she invites us to find that she was selected for redundancy for the reason of her age. And, of course, we need to look at the treatment of comparators to see if we can infer that age played a role from different treatment given to others. We are told that, and find on the balance of probability, that two other apparent employees of the First Respondent were also dismissed on 8 April 2018. Mr Gurmeet Singh, known as Frank, and Stacey Shrubbs, were dismissed on that day as was the Second Respondent from her employment with the First Respondent, although she continued as the owner of the First Respondent in her salon.
18. It is right also, and it is common ground, that Mr Singh and Stacey Shrubbs, continued to work in the salon after the terminations and this is pointed to by the claimant as showing less favourable treatment. She was dismissed she says, and the others continued to work.
19. The Second Respondent explained this by informing us that Mr Singh incorporated his own company at around this time to trade as a hairdresser himself. His birth name is Gurmeet Singh, but he is known as Frank, and he incorporated a company call I-Franx Limited. That company was said to have paid £250 monthly rent to the Second Respondent, or her company, by way of rent for a chair in the salon which Mr Singh would use to earn money from haircuts. Mr Singh would pay the rent and he would then take all proceeds from the haircuts he performed. It is said he got no money from the Second Respondent or her company. He kept the proceeds and all he did was pay the rent. Ms Shrubbs used the chair on his behalf when he was not working at the chair so that the chair was used all week round.
20. The state of the evidence before lunch was that this rental arrangement was asserted in the witness statement of the Second Respondent. We, the tribunal wanted to see corroboration and we ordered that if there was any corroboration it be produced for 2 pm, this was at 12:15pm.

21. The Second Respondent indeed managed to produce bank statements in the name of her own business account showing £250 being paid on a monthly basis into her account from I-Franx. The bank statements, obtainable from the bank, would only go back six months but she told us that this arrangement kicked in on or around the termination date and, indeed, had been agreed the day before the termination date with Mr Singh when it was becoming clear that the First Respondent was not profitable.
22. So, to be fair to the Second Respondent, she has managed to adduce evidence supporting the position that Mr Singh was paying her rent.
23. To that end, we do not have a comparable situation from which the claimant can demonstrate less favourable treatment. Her case was that she was selected for redundancy because of her age and Mr Singh was not selected for redundancy nor was Ms Shrubbs. That has been disproved by the Second Respondent.
24. On the balance of probability, Mr Singh was dismissed as was Ms Shrubbs on 8 April 2018. The difference being that Mr Singh incorporated his own company, started to trade as a Hairdresser and rented a chair.
25. So, the claimant does not establish a prima facie case of less favourable treatment based on her case of being dismissed. Mr Singh and Ms Shrubbs were also dismissed. The claimant would not have established a prima facie case of age playing a role, in any event. Mr Singh is 45, Ms Shrubbs is 31. The difference between Mr Singh's age of 45, and the claimant's age of 53, was not a relevant difference in terms of age suggesting that age played no role in any decision. But, as we say, age played no role in the decision to dismiss. Even if the burden transferred on age, the Second Respondent showed age played no role whatsoever.
26. The claim was for a discriminatory dismissal for redundancy and not for the absence of an offer of a chair following redundancy. The claimant did mention in evidence that she was not offered a chair. That of course is not how her case has been argued. Her case has been that the First Respondent, acting by the Second Respondent, committed age discrimination by dismissing her. The case has not been that they committed age discrimination by not offering her a chair for self-employed purposes.
27. Further, it does seem that the relationships around the termination soured. The claimant accepts she did not ask to rent a chair and it does seem that there was an unfortunate altercation shortly after the termination when the claimant attended the salon with view to distributing business cards to clients and the atmosphere was heated to the extent that the Second Respondent had to call the police at least once that day. We understand that the relationships have become difficult. We have expressed earlier our sympathy with the claimant as to the manner in which she was dismissed. But, in terms of establishing a prima facie case of age discrimination, she fails to do that. Her dismissal was unconnected with age. The reason for the dismissal was that there had been a decision to cease the First Respondent's trading. The male hairdressing business was not profitable

and the accounts we have seen corroborate that to the extent that small persistent losses were being sustained, justifying, or giving a basis in evidence for a decision to end the company on the basis of lack of profitability.

28. So, the claim against the Second Respondent directly for age discrimination is unsuccessful. But, as we say, there will be a judgment against the First Respondent for the monies undeniably owed to the claimant and we will turn to the amounts involved. It will then be a matter for the claimant to assess whether those 'monies can be recovered from the First Respondent or whether the Insolvency Service will need to be approached.
29. We understand that the claimant has a solicitor, at least in the background. She would be well advised in consulting that solicitor as to how best to enforce the judgment.

Employment Judge Smail

Date: ...01/06/2019.....

Judgment sent to the parties on

.....26/06/2019.....

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For the Tribunal office