Appeal No. UKEAT/0286/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 13 September 2019

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR S PATEL — APPELLANT

SPECSAVERS OPTICAL GROUP LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DELE OGUN (Solicitor) Instructed by: Akin Palmer LLP 3 Angel Gate 326 City Road London EC1V 2PT
For the Respondent	MR ANDREW BLAKE (Of Counsel) Instructed by: Eversheds Sutherland (International) LLP Water Court 116-118 Canal Street Nottingham NG1 7HF

SUMMARY

CONTRACT OF EMPLOYMENT – Whether established

JURISDICTIONAL POINTS – Worker, employee or neither

PRACTICE AND PROCEDURE – Amendment

PRACTICE AND PROCEDURE – Application/claim

On the specific grounds of appeal put forward by the Appellant (the Claimant before the ET), the ET had not erred in refusing the application by the Claimant to add a second respondent to the claim when he did not have an ACAS Early Conciliation Certificate in respect of the proposed Second Respondent. The Claimant's request to amend the grounds of appeal on the day of the hearing to widen the grounds of appeal was refused: paragraphs 3.5 and 3.12 of the PD applied and **Khudados v Leggate** [2005] IRLR 540 followed.

The Claimant had not established that the Tribunal's written reasons had deviated from the oral extempore judgment and in any event as per **The Partners of Haxby Practice v Collen** [2012] UKEAT/0120/12/DM (Underhill P), and **Ministry of Justice v Blackford** [2018] IRLR 688 (Lady Wise), the written reasons prevailed over the oral reasons.

The Tribunal did not err in concluding that the Claimant had a contract of employment only with the proposed Second Respondent and that he did not have dual employment contract with two different employers (the First Respondent and proposed Second Respondent) for the same job and work. There was no reason to deviate from the principle that one person cannot have two employers in respect of the same employment on the facts of this case. The line of authorities from **Laugher v Pointer** (1826) 5 B & C 547 to **Cairns v Visteon UK Ltd** [2007] ICR 616 followed.

HER HONOUR JUDGE STACEY

1. Two linked issues arise for determination in this substantive appeal today. The first is whether the Employment Tribunal ("the ET") erred in its finding that the Claimant was not employed by two employers simultaneously: the dual-employment point. The second is whether the Tribunal erred in refusing to allow the Claimant to amend his claim to add a second Respondent. The Decision under appeal is the Judgment of Employment Judge Holbrook sitting in the Liverpool region on 2 July 2018 at a Preliminary Hearing, with Reasons sent to the parties on 16 August 2018. I shall continue to refer to the Appellant as the Claimant and the Respondent as the Respondent, although, since there are three potential Respondents within the Specsavers group, all of whom are represented by Mr Blake, in order to avoid confusion, I shall mainly refer to them by name.

2. Kerr J gave permission for the appeal to proceed to a full hearing on both grounds put forward by the Claimant which Kerr J summarised as (1) that it was arguable that the Employment Judge erred by ruling against dual employment and/or (2) in shutting out the claim by refusing to allow an appropriate amendment to substitute a different Respondent. He noted that the former question is one of mixed fact and law and the latter depends on whether the discretion to refuse to allow an amendment was properly exercised.

Amendment application

3. The precise formulation of the second ground of appeal is important. It was formulated as a perversity appeal challenging the Tribunal's finding of fact that the Claimant had told ACAS that he wished to bring his claim against two Respondents and a challenge that the oral reasons for the Tribunal's decision differed to those in the written judgment, as the Claimant's

recollection was that in its extempore judgment the Tribunal accepted that he had told ACAS about having two employers.

4. Today the Claimant has sought to add a further limb to ground 2, which was not presaged in the original grounds for which permission had been given and for which the Respondent was unprepared. He sought to widen the appeal to challenge the refusal to consider the exercise of the Tribunal's discretion to grant permission to amend the claim more generally by reference to the full width of its powers under Rule 34 of the **ET Rules of Procedure**. From what I understood to be the proposed further ground from the discussion with Mr Ogun, I did not rule out the possibility of allowing an amendment that could, in due course be considered under the Rule 3 procedure on the papers, but needed first to see the proposed draft amendment in writing. When the proposed further ground of appeal was committed to writing and produced over the short adjournment, I considered the matter further in greater detail. The proposed additional ground was as follows:

> **"2.5 In exercising its discretion under Rule 34 the Tribunal was obliged to take account of the fact that the Claimant had substantially complied with the requirement for early conciliation in his matter having regard to the close corporate relationship between SOG and SSL/SVL in accordance with the EAT decision of Mr Justice Langstaff in Drake International Systems Ltd v Blue Arrow."**

5. Starting with the procedural aspects, paragraph 3.5 of the **PD 2018** makes clear that the grounds of appeal relied on must be clearly identified and set out. By paragraph 3.12 of the PD no party has the right to amend any Notice of Appeal without the prior permission of the EAT. Any application for permission to amend must be made as soon as practicable and must be accompanied by a draft of the amended Notice of Appeal which makes clear the precise amendments for which permission is sought. **PD 13.6** sets out the formalities concerning the format and layout required to clearly identify the proposed amendments.

6. The leading case on the principles to be applied when considering an amendment application is **Khudados v Leggate** [2005] IRLR 540. Applying the **Khudados** factors, the application before me comes very late in the day at the outset of the Full Appeal Hearing. The application has not been made as soon as reasonably practicable and is therefore in breach of para 3.12 of the **PD**.

7. Mr Ogun acknowledged that he had known the arguments he now intended to advance all along and indeed, had deployed them at the ET, but he mistakenly considered that the grounds of appeal encompassed what he now says he would like to argue. It was an honest, but not an acceptable explanation, as the original specific grounds of appeal do not begin to cover the ground now sought to be advanced. I rejected his argument that the wording of Kerr J in permitting the appeal to proceed to a full hearing on a paper sift in the authority to proceed document effectively widened the grounds of appeal. The argument is misplaced. The grounds of appeal are those put forward by the Claimant and Kerr J's observations merely note that the Claimant seeks to challenge the amendment ruling. It does not substitute or alter the wording of the grounds of appeal that the Claimant has formulated.

8. Thirdly, there will be a significant delay. Assuming the amended ground passes the sift procedure, it will require time for the Respondent to respond to the appeal and a further hearing will be necessary, by which time the matter will be more stale than it currently is. Success for the Claimant would mean that the Employment Tribunal would be asked to consider again the merits of the Claimant's amendment application to add SVL as a Respondent. If that application was successful, given that there was no dispute that SVL was the (or one of) the Claimant's employer, the substantive merits of his unfair and wrongful dismissal claims and **Equality Act** claim would then need to be considered. On a conservative estimate it could add

a year to the proceedings if the amendment application were to be granted. There will be prejudice to the Respondent because if the appeal is ultimately successful, it is likely that a number of relevant witnesses will have left the organisation who may well not have done if this had been raised as soon as reasonably practicable in accordance with the **Practice Direction**.

9. The public interest of the EAT efficiently conducting its business is not well served by piecemeal hearings and if this had been properly pleaded in the first place, we would have been able to deal with everything today.

10. What allowed me initially to conclude that I should give Mr Ogun an opportunity to put forward a draft amendment for consideration in accordance with **PD** paragraph 3.12 and 16, was my concern that an amended ground of appeal could have genuine prospects of success. Having read the proposed amendment that Mr Ogun seeks to make, I am less confident that that is the case. What is now sought to be challenged is a suggestion that the Tribunal did not take account of the fact that the Claimant had substantially complied with the requirements of early conciliation. However, it is apparent from the Tribunal's decision that the Employment Judge spent considerable time considering and evaluating the extent of the Claimant's compliance with early conciliation and it would be hard to see how their analysis of that factor went beyond the limits of the Tribunal's wide powers of case management in relation to that specific consideration. The wider arguments about the exercise of the discretion under Rule 34 are not encompassed in the proposed amendment. The proposed amended grounds do not seek to argue a failure to consider other rule 34 factors such as are set out in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 or **Selkent Bus Co Ltd v Moore** [1996] ICR 836 contrary to my anticipation before seeing the proposed amendment in writing. Having seen the proposed

draft I therefore conclude that the Claimant is not being deprived of a fairly arguable ground of appeal as it does not give the appeal a reasonable prospect of success at a final hearing.

11. I therefore refuse the application for permission to amend the Notice of Appeal.

12. This is my ruling on the extant grounds.

Background and Tribunal Decision

13. Following his summary dismissal on 21 September 2017, the Claimant initiated early conciliation through ACAS in respect of the Respondent, Specsavers Optical Group Limited ("SOG") and duly obtained an appropriate early conciliation certificate ("ECC") naming SOG after conciliation had been unsuccessful. On 9 February 2018, the Claimant submitted a Tribunal claim form naming both SOG and Skelmersdale Specsavers Limited ("SSL") as Respondents for unfair and wrongful dismissal under the **Employment Rights Act 1996** ("**ERA"**) and also, a claim of victimisation under Section 27(1)(b) of the **Equality Act 2010** ("the EQA"). The victimisation claim is somewhat problematic, as no protected act within the meaning of subsection two of Section 27(2) of the **EQA 2010** is identified in the ET1, but that is an issue yet to be explored by the Tribunal, as I understand it.

14. The claim against SSL was dismissed on the papers by a Judge because of the Claimant's failure to name it as a prospective Respondent in the early conciliation procedure. The Claimant exercised his right to ask for a reconsideration of that Decision and in due course a Preliminary Hearing was listed to consider three matters. Firstly to consider if the Claimant had ever been an employee of SOG, secondly to reconsider the rejection of the claims against SSL and thirdly to decide whether a third respondent, Skelmersdale Visionplus Limited (SVL)

should be added or substituted as a respondent in the proceedings. The second issue, the Tribunal's refusal to accept the claim in respect of SSL is no longer an issue today as the Claimant accepts that SSL was not and has never been his employer. However, he says that he mistakenly cited SSL instead of its wholly-owned subsidiary, SVL, as one of his employers on the ET1 form and that he was employed by both SOG and SVL at the same time.

15. The two matters remaining therefore are the Tribunal's Judgment that the Claimant was not an employee of SOG and their refusal to allow him to add or substitute SVL as a Respondent in the Tribunal proceeding, both of which are challenged in this appeal on the grounds set out in the existing grounds of appeal.

The Background Findings of the Tribunal

16. SOG is the principal trading company of Specsavers Group which operates about 800 retail opticians' stores in the UK. In Skelmersdale and most of its other stores, the store is operated as a joint venture 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. Under the Specsavers joint-venture model, the store was run by two companies, one being a holding a company (SSL in this case) and one being the trading company (SVL in this case) which is wholly owned by the holding company. Each were specifically set up for that purpose.

17. Each individual such as Mr Patel, the Claimant in this case, who successfully applies to be a joint-venture partner ("JVP") to run a Specsavers store, enters into a written contract of employment with the store trading company (SVL in this case) of which he or she is a Director.

A The JVP or JVPs (there may be more than one) is or are also shareholder(s) in the holding company (SSL in this case) as is SOG. A separate shareholders' agreement is entered into which governs the relationship between the JVPs and SOG vis-à-vis the holding company and its trading subsidiary. In this case, SSL was the relevant holding company for the purposes of the joint venture involving the Claimant in this case. It held all the shares in SVL which was the trading company for the Skelmersdale store. At the beginning, there was a second JVP who has since left and who is irrelevant for the purposes of this appeal.

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18. Upon entering into the joint venture, Mr Patel acquired 25% of the shares in SSL which he retained until his dismissed in 2017. By 2017, all the remaining 75% shares were held by SOG (SOG having acquired the shareholding of the departing original co JVP with Mr Patel). By 2017, the Directors of both SSL and SVL were the Claimant, SOG as a Corporate Director and Mary Perkins, a member of the family who founded the Specsavers Group.

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19. On completion of the joint venture on 28 February 2011, Directors' resolutions of SSL and SVL were passed, appointing the Claimant as a Director of both companies. SVL passed a resolution to enter into an employment contract with him. The Tribunal found that the written service contract between the Claimant and SVL contains all the kinds of provisions about duties and benefits which one would ordinarily expect to find in a contract of employment. At the same time, the Claimant entered into a shareholders' agreement with SSL (the Shareholders' Agreement) as did the fellow JVP who has since departed and is no longer a JVP or shareholder or employee of either SSL or SVL. SOG was also a party to the Shareholders' Agreement as already stated above. Under the Shareholders' Agreement, the day-to-day running of the store was entrusted to Mr Patel and the other JVP who were entitled to retain any distributable profits in addition to salary from their employment. The agreement provided for the payment of a

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management fee to SOG of 6.5% of gross sales in each month in return for which SOG would provide a range of services to the business, including marketing, banking, payroll and IT support. Other services, such as the conduct of grievance and disciplinary investigations, were also provided to SVL by SOG on an *ad hoc* basis for additional payment. There were a number of those during the course of Mr Patel's involvement with the Skelmersdale store when the SVL board of Directors appointed SOG to investigate grievance complaints made by members of staff at the store, on SVL's behalf.

20. In the spring of 2017, SVL resolved to appoint SOG to conduct an investigation into alleged misconduct by Mr Patel on behalf of SVL. On 5 July 2017, SVL board resolved that disciplinary proceedings should be instigated against Mr Patel and that SOG be appointed to conduct the disciplinary process, once again on SVL's behalf. A disciplinary hearing was conducted by the Head of Human Resources at SOG, once again, on behalf of SVL who recommended to the board that Mr Patel be dismissed for gross misconduct. The recommendation was considered at a meeting of SVL Directors on 21 September 2017, which Mr Patel attended, when it was resolved to terminate his employment with immediate effect.

21. Within the period of three months following his termination, Mr Patel contacted ACAS pursuant to the early conciliation procedures in Section 18A of the **Employment Tribunals Act 1996** and notified ACAS that the prospective Respondent to his claim was SOG. The Tribunal found that he did not notify ACAS that he also intended to make a claim against a second Respondent. After the attempts at conciliation were unsuccessful, ACAS duly issued an ECC naming SOG alone as the potential Respondent. The Tribunal found that Mr Patel always intended to name two Respondents in the ET claim, but he only informed ACAS about one during the early conciliation process. He had in fact intended to name SVL as a second

Respondent, but when he submitted his claim form in February 2018 within the applicable time limits the Claimant mistakenly named SSL as a second Respondent, which the Tribunal accepted was a clerical error.

The Tribunal's Findings on Employment

22. Having made the findings summarised above, the Tribunal considered the Claimant's employment status in paragraphs 15 to 23 of its Decision. The Respondent contended that the Claimant was employed by SVL as his sole employer, whilst the Claimant argued that he was employed by SOG, or, in the alternative, by SOG and SVL jointly. No-one was suggesting that he was employed by SSL. The Tribunal found that he was employed by SVL as his sole employer. Its reasoning was as follows:

> **"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.**
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> **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 focused 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.**
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> **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 the 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.**
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> **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.**
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> **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 attended board meetings also tended to represent the other director, Mary Perkins. Nevertheless, those decisions were still the decisions of SVL and it was the company which exercised control over Mr Patel as its employee.**
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> **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 Limited ("SVL")". I am satisfied that this was indeed the correct representation of the position: SVL was Mr Patel's employer."**

23. The Claimant considers the Tribunal to have erred in law by rejecting the dual employment argument, but he no longer maintains his previous primary argument that he was solely employed by SOG.

Amendment/substitution application

24. The second ground of appeal concerns the Tribunal's refusal to grant the Claimant's amendment or substitution application as per the grounds of appeal before me. For the reasons explained above, I will only consider the specific challenge set out in the grounds of appeal of whether there is an error in the Tribunal's finding that the Claimant had not informed ACAS of the proposed second Respondent and whether the written Reasons departed from the reasons given orally so as to amount to an error of law.

25. The Tribunal's relevant findings of fact are set out in the summary above and in paragraphs 28-32 of its Judgment the Tribunal set out its conclusions:

> **"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.**
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> **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.**
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> **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[1]. 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 refused 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."

Ground 2: Amendment/substitution

26. Dealing with the second ground first, the Claimant's recollection was that the Employment Judge said in his oral extempore reasons that he had accepted the Claimant's evidence that he had been misled by the advice of an ACAS officer. However, the written Reasons stated the Judge had not accepted the Claimant's evidence in that regard. It was common ground that the Claimant was granted permission to be recalled to give evidence specifically on his dealings with ACAS during the course of the hearing.

27. In the preparatory stages of this appeal the Employment Judge was asked for assistance. Given the passage of time and quite understandably, he had no memory of what he had said in

1 "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."

his extempore judgment, but he helpfully produced the written notes he had made of the evidence and the notes he prepared from which to deliver his extempore reasons. Unfortunately, the recording of the oral extempore reasons was no longer available for technical reasons and it was not therefore now possible to obtain a transcript.

28. The Judge's notes of evidence and his notes for the extempore judgment do not support the Claimant's argument. Starting with the notes of evidence, the Judge explains that he had been unable to take a note of everything the Claimant said when he had been recalled to give evidence on the point, but his notes do not give any indication that the Claimant mentioned two prospective employers to ACAS. It supports the suggestion that the Claimant was unclear as to the exact identity of his employer but the question of duality or plurality of employers is totally absent. His evidence was that the ACAS adviser suggested he look at his dismissal letter to see who it was from both the Respondent's solicitors and the Employment Judge record his evidence that ACAS suggested he put SOG as his employer. The Respondent's note record him stating that the ACAS officer told him that if he named it incorrectly he would not be able to appeal. He was also asked about the legal advice he was receiving at that time. His evidence was that he was receiving legal advice in respect of his dismissal but not about the early conciliation procedure. The Claimant, as I understand it, did not take notes of that part of the proceedings.

29. There is also, I note, no mention of dual employment in the Claimant's witness statement prepared by him for the purposes of the Preliminary Hearing which only discusses SOG as his employer. The skeleton argument prepared by the Claimant's solicitors does not mention dual employment either, only inviting the tribunal to find under an **Autoclenz v Belcher** [2011] UKSC 41 analysis that SOG was in fact his employer.

30. The Employment Judge's and the Respondent's notes of the extempore judgment do not support the Claimant's contention that the written Reasons deviate materially from the oral reasons on the substitution/amendment point. Both record the Employment Judge stating that lack of an ECC is not normally fatal, and that the Claimant had intended to name two separate Respondents and that the judge accepted the SSL reference should have been to SVL. Nevertheless, it was also apparent that the Claimant did not comply with the requirements of ACAS for the first Respondent (SVL). This was not a case where the individual identified the wrong respondent, he clearly intended to claim against SOG and obtained an ECC in respect of them. On the reconsideration point the Judge therefore concluded that the initial Judge had been correct to dismiss proceedings against SSL. The Judge then posed the question: Should I substitute SVL? To which he answered his question in the negative since it would be inequitable for this to happen when it had been the Claimant's own mistake.

31. From the information before me, I therefore do not conclude that the Claimant has established that there was a material variation from the oral extempore to the written Reasons for the Tribunal's decision so as to affect the Tribunal Decision or amount to an error of law. The first point to note that there is no suggestion that the overall outcome was different – the Claimant's amendment application was refused in both the oral and written judgment and both sets of reasons and there was no inconsistency in that respect. Written Reasons were produced within a reasonable time when matters were still fresh in the Judge's mind which makes it unlikely that he said the exact opposite in his oral extempore reasons to the reasons set out in writing. Although the Employment Judge has no specific recollection now, there is nothing in the contemporaneous evidence available (the Employment Judge's notes of the evidence and the notes for his extempore judgment, the Respondent's notes of the hearing and the Claimant's written proof of evidence) to support the submission that he told ACAS that he had it in mind to

bring his claim against two different corporate entities. Crucially, the Employment Judge's own notes prepared for the purposes of the extempore judgment do not support the Claimant's contention. Since the Respondent's contemporaneous notes of the oral judgment are very similar indeed to the Judge's notes it would seem that the Judge stuck to his script.

32. However, in any event, it would be very surprising for a Tribunal to make a finding that a Claimant had been misled by ACAS without the Tribunal having first given ACAS an opportunity to give evidence or make observations on the point. Normal practice would be, and natural justice would dictate, that ACAS would have an opportunity to give evidence, disclose any relevant notes and make submissions if the Employment Judge considered it arguable that ACAS had been at fault in a way which might affect whether to overlook apparent non-compliance with the early conciliation process.

33. I note too the general rule that the written Reasons of a Tribunal prevail over the oral: see the case of **The Partners of Haxby Practice v Collen** [2012] UKEAT/0120/12/DM, paragraphs 15 to 17 of Underhill P, as he then was, as cited and approved by Lady Wise more recently in **Ministry of Justice v Blackford** [2018] IRLR 688. Nothing on the facts of this case displaces that presumption.

34. I therefore reject the second ground of appeal. There is no error disclosed in the Tribunal's written Reasons in which it found that the Claimant had only informed ACAS of there being one Respondent during the early conciliation process. ACAS had therefore been correct to issue just one ECC on the basis of the information Mr Patel provided to them.

Ground 1: Who was or were the Claimant's employer/s?

35. The Claimant claimed both unfair and wrongful dismissal requiring him to establish employee status as defined in section 230(1) **ERA 1996** and also a breach of the **EQA** which defines employment more broadly in section 83(2)(a) as "Employment under a contract of employment, a contract of apprenticeship, or a contract personally to do work." I shall start with the broader definition of employee under **EQA** since if the Claimant cannot establish employment with SOG under that broader definition, he will inevitably fail to establish employment status for the purposes of **ERA 1996**.

36. Mr Ogun had not prepared a written skeleton argument for today's hearing as he and his solicitors considered the grounds of appeal to be sufficiently detailed. The Claimant's arguments were that the Judge's conclusion was inconsistent with the express terms of the Shareholders' Agreement. It was the Claimant's case that he had a dual employment relationship governed by two agreements: the Shareholders' Agreement with SOG and the Service Contract with SVL of which the Shareholders' Agreement was dominant. He relied in particular on clause 3.5 of the Shareholders' Agreement which stated that:

> **"3.5 For the avoidance of doubt the Parties agree that for the Business to succeed, the A Directors [which included the Claimant] will be required to make a full-time contribution of their time to their duties at the Premises, notwithstanding any terms agreed in their service contract or any rights applicable under employment law."**

and 19.3.6 which Mr Ogun described as effectively allowed the Respondent to force through variations to the terms of the Service Contract even though SOG was not a party that contract. To put it in context, clause 19.3.6 formed part of the Bad Leaver provisions which could be triggered resulting in the issue of a Purchase Notice in respect of the Recipient's shares if certain specified variations or modifications to, inter alia, the Service Contract were not agreed to. The variations could only be made at a minimum of 5 yearly intervals and could be no more

extensive than necessary to bring the Service Contract into line with standard terms offered to new participants in other Specsaver Stores.

37. The Claimant submitted that the Shareholders' Agreement contained all of the essential component parts of a contract of employment such as the definition of working hours (clause 1) and place of work (clause 3.1) and which required the Claimant to execute the Service Contract in the Agreed Form on completion of the Shareholders' Agreement. The Shareholders' Agreement constituted and governed the employment relationship between the Claimant and SOG and the Service Contract governed the employment relationship between the Claimant and SVL. The Tribunal had wrongly considered it as a binary choice to choose between either the Service Contract or the Shareholders' Agreement, when, properly interpreted, they were both employment contracts with the Claimant having two employers.

38. The Respondent resisted the appeal and considered the Tribunal Judgment impeccable in fact and law. The Judge had been correct to determine that the Shareholders' Agreement was not a contract of employment. The Shareholders' Agreement divided responsibility as between the A and B shareholders (who were also statutory directors of SSL and SVL) agreed to divide responsibility between them for the day to day operation of the store. The Claimant and his initial co-JVP were delegated responsibility for attending and managing the store on a day to day basis recruiting staff etc for which they shared the profits made by SSL/SVL. SOG was paid a management fee by SSL for various services and would be paid additional fees for additional services, such as grievance and disciplinary investigations, if asked by the Directors of SVL or SSL to do so. The JVPs worked for and were paid by SVL as employees of SVL.

39. The Claimant was not employed by SOG, did not provide services to SOG and was not paid by SOG – there was no wage/work bargain. Any control or direction SOG exercised was done on behalf of SVL, for example as a member of the board of directors of SVL. There was, and could be, no dispute by the Claimant that the Service Contract between him and SVL was genuine and not a sham arrangement.

Discussion and conclusion

40. Unlike in the theatre[2], it is a well-established principle of employment law that in general terms one employee cannot simultaneously have two employers (**Laugher v Pointer** (1826) 5 B & C 547). The reason why the concept of dual employment has such theatrical comedic potential derives from the confusion and farcical consequences that can arise from competing and contradictory instructions being given by two employers to one employee. It was also a seam mined by Laurel and Hardy, so slapstick potential too.

41. In the context of establishing vicarious liability for the negligent act of a workman, depending on the precise facts of the case it is possible for dual vicarious responsibility to arise and be shared as between a general and temporary employer, where for, example, a workman has been loaned or hired from one employer to another and where control is shared between the general and temporary employers (see **Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd** [2006] ICR 327 and **Hawley v Luminar Leisure Ltd** [2006] IRLR 817). The policy consideration for such a development is to ensure that individuals are properly compensated for tortious acts.

[2]"One Servant, Two Masters" or "The servant of Two Masters" Carlo Goldoni 1746 to "One Man, Two Guvnors" Richard Bean, National Theatre starring James Corden 2011

42. As noted in **Cairns v Visteon UK Ltd** [2007] ICR 616 by HHJ Peter Clark, interestingly the line of cases of dual vicarious liability for breach of tortious duties in the employment context such as **Viasystems** are not referred to in the employment contract line of authorities such as **Dacas v Brook Street Bureau (UK) Ltd** [2004] EWCA Civ 217. Judge Clark noted that both Mummery and Sedley LLJ were wary of the concept of a contract of service between a worker and both the employment agency and end user considering it "more problematical" than a contract between the worker and either the end-user, or to imply a contract with the agency. The mischief Sedley and Mummery LLJ were seeking to address in **Dacas** was the possibility of Mrs Dacas having no employer against whom she could enforce her statutory and contractual employment rights, which defied common sense and risked a lacuna in legal protection for employment law rights. Judge Clark continued:

> **"17. However, where it is common ground that she is employed by the agency, and thus is protected under Part 10, [Employment Rights Act], we can see no good policy reason for extending that protection to a second and parallel employer. If the only reason is, as appears to be the argument for the claimant in the present case, that she would have a better prospect of establishing unfair dismissal against the end-user rather than the agency, then we can see no basis for departing from what has been the common understanding from at least the judgement of Littledale J in Laugher v Pointer [5 B & C 547 in 1826]. A servant cannot have two masters. That of course does not prevent him from having different employers on different jobs, or as in the case for example of Land v West Yorkshire Metropolitan County Council [1981] ICR 334, severable parts of the same contract of employment with one employer."**

43. In **Cairns** Judge Peter Clark went on to explore some of the practical complications that would flow from a finding of dual employment given the structure of **ERA 1996**. Which employer would be responsible for conducting the disciplinary hearing? In a redundancy situation upon whom would the consultation obligations fall? How would any unfair dismissal compensation be apportioned as between dual employers? Not insurmountable he concluded, but all requiring further consideration.

44. In the context of an **EQA** claim, the provisions concerning ancillary prohibited conduct and the aiding and abetting provisions in Part 8 would also address potential gaps or lacunae in

liability in appropriate cases by application of the one employer only principal. The Claimant did not seek to argue that SOG was a secondary party under Part 8 however.

45. Both in its interpretation of the law, and the facts before it, the Tribunal in this case was perfectly entitled to conclude that there was no dual employment relationship and there is no error of law in its conclusions. The Shareholders' Agreement is exactly that: it regulates the rights and responsibilities as between the three shareholders - the Claimant, the other JVP and SOG on the one hand and the limited company whose shares they own (SSL) on the other. We know that the Claimant had a non-sham Service Contract with SVL which was the wholly-owned subsidiary of SSL. He was not also employed in parallel by SOG by dint of the Shareholders' Agreement.

46. The Claimant has sought to identify one or two references in the Shareholders' Agreement that pertain to work but that does not make the Shareholders' Agreement a contract of employment. For example, the reference in clause 3.5 to devoting their full-time attention to the job does not amount to a wage/work bargain and is not therefore an obligation personally to perform work for SOG. It was a reinforcement of his obligation personally to provide his services to SVL. The Tribunal's findings of fact also were clear that the reality on the ground, the factual matrix as referred to **Autoclenz v Belcher,** did not depart from the written Shareholders' Agreement or the Service Contract. For all intents and purposes, the Claimant was an employee of SVL alone. The reference to the contribution of Capital A Directors in the Shareholders' Agreement is a reference to the director's duties. It does not thereby become a service contract.

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47. There is no wage-work bargain in the Shareholders' Agreement. The Shareholders' Agreement does not deal with all the matters required of and expected to be found in a contract of employment. It is not a contract personally to do work and the Tribunal's Decision cannot be criticised in this regard.

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48. I therefore dismiss the Claimant's appeal against the finding that he was not an employee of SOG as defined in either section 230(1) **ERA 1996** or section 83(2)(a) **EQA 2010.**

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