EMPLOYMENT TRIBUNALS

Claimant: Ms C Dakin

Respondents: 1. Evolving Edge Ltd
2. Sarah Brennan

Heard at: Manchester **On:** 17 December 2019
2020
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Miss D Ayres, Solicitor
1st Respondent: Not in attendance
2nd Respondent: In person

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal on reconsideration is that:

1. In respect of allowing the amendment, the original judgment is not varied.

2. In respect of whether the claimant was an employee within the meaning of the Equality Act 2010, the judgment is not varied.

3. In respect of whether the second respondent was an agent of the first respondent, I find that the second respondent was an agent of the first respondent for the purposes of section 109 and 110 of the Equality Act 2010.

REASONS

1. By an email of 30 July 2019, the respondent applied for a reconsideration of the Judgment issued on 16 July 2019.

2. The respondent challenged the findings:

(1) that the claimant was an employee within the meaning of the Equality Act 2010 and a worker for the purposes of an unlawful deduction of wages claim within the Employment Rights Act 1996;

(2) that Mrs Brennan be added as a respondent;

(3) that the claimant be allowed to amend her claim.

3. Following the hearing I requested further submissions from the parties on whether the second respondent came within the definition of employee or agent in order to add her as a party under section 110 of the Equality Act 2020. In the event the respondent had the advantage of seeing the claimant's submission before she composed her own.

The Law

4. Reconsideration of judgments is contained in rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It says that:

"(70) A Tribunal may, either on its own initiative or on the replication of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

(71) Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing within 14 days of the date on which the written record or other written communication of the original decision was sent to the parties, or within 14 days of the date when the written reasons were sent out (if later) and shall set out why reconsideration of the original decision is necessary.

Process

(72) An Employment Judge shall consider any application made under rule 71:

(i) If the Judge considers there is no reasonable prospect of the original decision being varied or revoked the application shall be refused and the Tribunal shall inform the parties of that refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(ii) If the application has not been refused under paragraph (i) the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (i), that a hearing is not

necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further representations.

(iii) Where practicable the consideration under paragraph (i) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it, and any reconsideration under paragraph (ii) shall be made by the Judge or, as the case may be, the full Tribunal which made the original which made the decision. Where that is not practicable the President, Vice President or Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full Tribunal, either shall direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

5. I allowed the respondent's request for a reconsideration particularly in view of their contention that the evidence was misreported and/or misinterpreted.

Respondent's Submissions

6. I set out these in detail. They were amplified in evidence:

(1) The business structure meant the claimant could not meet the criteria for worker or employee status. (I emphasise that the employee status is under the Equality Act 2010 not the Employment Rights Act 1996 as I determined that the claimant was not an employee under the 1996 Act). The respondent argued that the comment at paragraph 60 that "the claimant and SB were paid up to the personal allowance as employees should be, then the intention was that they would receive a profit share over and above this and over time depending on the amount of the profit the company made". The claimant submitted this meant that paying the personal allowance took priority over the profit share but the respondent argued that the profit share agreement in place ensured that each director received 100% of the money for any work they brought in and delivered themselves, with different profit shares if the work was brought in by the other director and then the second director delivered some of it or vice versa. Therefore, it is possible that in some months if one of the directors had brought in no work nor undertaken any work for the other director there would be no money available and therefore there would be no salary paid, and they would still be liable to pay £160 to cover the running costs from their own personal finances. It was argued that if one or both of them had at least £924.64 in their individual pot after overheads and expenses had been paid then that would be taken first as salary and the balance would be paid as profit share. The profit share is set out at page 231 of the bundle.

The claimant's reply was she could not see how this was relevant to the issue of employment under the Equality act 2020

(2) The Judgment relies heavily on the intention to pay a salary which has been viewed without the correct context of the business structure, rendering this misleading. This refers to the same points as above.

(3) The claimant's ability to substitute herself for work is incorrectly documented in the Judgment as this is something that she was free to do in an unlimited capacity. The respondent submitted the business was structured to run as two separate businesses, the claimant being entirely responsible for bringing in work for herself and executing that work. The claimant could ask R2 to help if she wished but ultimately the responsibility was hers. The respondent pointed out that very early on in May 2016 the claimant secured herself work with Swinton Insurance which she delivered without R2; in fact SB did not even know about this work. R2 submitted that either of them was able to use associates to deliver the work they brought in, and R2 would not even know whether she had done this.

The claimant's reply was that predominantly once the business was up and running work had to be undertaken personally and there were very few examples of this not occurring (maybe three at most), in at least one case the substitute was agreed.

(4) The profit share agreement on page 231 stated:

(i) A and B both bring in client and both deliver work. A – 50%, B – 50%.

(ii) A brings in client and both A + B do work. A = 60%, B = 40%.

(iii) A brings in client and does all the work: A = 100%.

(iv) A brings in client and B does all the work: A gets 20%, B gets 80%.

(v) A and B both bring in the client and A does the work: A = 80%, B = 20%.

(vi) A brings in client and A co-delivers with or uses associate: A = 100% but pays associate out of that.

(vii) A brings in client and B co-delivers with associate: A = 20%, B = 80%. B pays associate out of the 80%.

This was evidence that associates could be used to deliver work brought in by either director

Claimants reply A limited ability to substitute did not detract from the main premise of the business which was to deliver work personally

(5) The respondent submitted that the facts in relation to paragraph 56 were incorrect in that the FCN client was brought in by R2 and that was why

there was a discussion about using associates in delivering this work, and R2 needed to agree to any associates being used for that piece of work, otherwise R2 submitted the claimant did not need to have her agreement to use associates**.**

Claimant's reply: Same as above

(6) The claimant did not need to turn up for work if she did not wish to, which a worker would have to, and the employer did not provide any work for her as would be the case with workers. The respondent submitted that workers would not be able to choose when to work and to choose not to work as R2 submitted the claimant and R2 were allowed to do; neither was there any obligation on the claimant to involve R2 in any of the work she brought in.

Claimant's reply: more relevant to employee status under the Employment Rights Act 1996.

(7) The claimant was able to take on work for other people, which workers are not able to do. The respondent submitted that the Judgment referred to occasions where the claimant did take on associate work but finds this was infrequent. They submitted the claimant's inability to secure associate work for herself should not be confused with whether she had the right to take it on: "As early as 24 April 2016 as evidenced in the bundle I suggested she contacted a trainer from another company, Mike, to ask if she could do some associate work, to which the claimant replied that she had already asked him for associate work and that he said he would give it to her when he had it, and that she had done this without discussion with R2. If "Mike" had been able to provide her with frequent associate work there is no question she would regularly have done it". The respondent said the conversation on 20 July quoted at paragraph 64 of the Judgment arose because the respondent was concerned that the claimant may sign up R1 to not undertaking any work with any of the companies she did work for as an associate, and that consequently she could set herself up in direct competition, securing work with these clients but leaving R1 and therefore R2 unable to work with any of them. R2 was seeking to avoid this at this stage.

Claimant's reply: relevant to worker status not employment status under the Equality Act 2020.

(8) The claimant was not entitled to minimum wage or holiday pay, which workers clearly are.

Claimant's reply: this is tautological as the fact that someone is not paid the minimum wage etc may only be a function of the incorrect labelling of their status by the putative respondent.

(9) The actual employer was the claimant's own clients, which is not true of workers. The respondent submitted that if the claimant did not secure work for herself from her own clients she simply would not get paid.

Claimant's reply: once the work was obtained it was in effect the limited company's work and the claimant was obliged to undertake it personally

(10) The claimant had significant control of the business and could use that to her benefit, which creates an unfair situation for bringing this claim. R2 seems to be arguing here that the claimant could have protected herself as a fellow director against the matters she now complaints of.

(11) Allowing the amendment is completely unjust due to potential bias occurring and the respondent being treated unfairly.

(i) At the first hearing I had asked the claimant to prepare and send to the respondent's details of what she was claiming was sex discrimination, and then the claimant could be cross examined regarding the amendments. I advised on the questions that might be asked, such as why it had taken the claimant so long to request the amendments. A document was sent over but the respondent believed the claimant had not evidenced the discrimination, and the respondents said they had no further opportunity to cross examine the claimant on the amendments as planned. The claimant then, through her barrister, declined to give any further evidence as she had found it too stressful on previous occasions. Accordingly, it was left that the matter would be covered in written submissions. The respondent complaints about this.

(ii) The respondent objected to a comment in the Judgment that a number of matters were referred to in the respondent's submissions which had not been canvassed in cross examination of the claimant.

(iii) The respondent also complained that counsel for the claimant was given an extension for deadline to the responses beyond that originally agreed at the hearing and then missed that deadline, which meant they could read all the respondent's responses before submitting their final responses which was unfair. Whilst the respondent objected the Employment Judge allowed those responses.

Claimant's reply: if there was any unfairness this is resolved by this reconsideration.

(iv) Further, the amendment application was made in time so there was no need for live evidence from the claimant as live evidence would usually be about why the amendment application was not put in until past the deadline where the application is out of time. Accordingly, if that evidence is not required the matter is simply to be determined by submissions**.**

(12) Facts relating to cross examination and accepted as evidence are incorrect within the Judgment:

(i) Paragraph 12 of the Judgment is factually incorrect. It states that the claimant, Mr Jonathan Dakin, and Donna Neely, were not cross examined by the respondent but their evidence was accepted. The respondents say that they stated although they would not cross examine they did not accept their evidence.

Claimant's reply: the evidence given by both these individuals was not relevant or determinative of any of the matters now at issue.

(13) Adding Sarah Brennan as a response is unjust and inequitable:

(i) The second respondent submitted that she had been added even though the cross examination of the claimant regarding the amendments had not taken place and that the claimant had not provided all the information ordered in relation to the amendments.

(ii) In addition the respondent stated that the claimant was seeking to destroy R2's reputation, accusing R2 of financial fraud and stating that there were 18 unfounded allegations in the claimant's witness statement. R2 regards this as defamation, which could be devastating for her career.

(iii) She averred that if she had known she was a respondent from the beginning she would have sought legal representation.

(iv) R1 had now been dissolved and was never in a position to obtain legal advice.

Claimant's reply**:** the matters raised are irrelevant to whether second respondent should be joined or not.

Claimant's Submissions

7. The claimant mainly relied on the original submissions to the original hearing. In respect of the issue of whether the claimant was an employee within the meaning of the Equality Act 2010 the section under "Employment" relating to whether the claimant was working under a contract personally to do work under section 83 of the Equality Act 2020 included the following submissions:

(1) That the claimant was described on R1's website as a "member of the team" and it was made clear she would personally deliver work on behalf of the company.

(2) The claimant was expected to undertake any work personally. This was clear from various text messages and the claimant's witness statements. The text messages evidenced that the parties could not simply delegate or allow a substitute to undertake their work. The fact that prior to February 2016 the claimant was permitted to undertake work for a client and was allowed to retain some of the money is misleading given that the work was undertaken through the respondent, billed through the respondent, received from respondent, the claimant was paid that money

because of exceptional circumstances, namely she was without other income during that period whereas R2 was still receiving an income from her previous employment.

(3) There was nothing in the evidence to suggest the claimant was entitled to delegate her work or even turn it down. The claimant was obligated to work when offered work. She did not have the right to offer a substitute not has this ever been alleged by SB. Under cross examination SB agreed that she and the claimant always personally undertook the work on behalf of the respondent.

Re amendment to include a complaint of sex discrimination

(4) Details of the application are included in the case management agenda and additionally in the email to the EAT dated 18 May 2018. The claimant's original claim includes an allegation of discrimination. The particulars are set out after paragraph 57. In summary the submissions then went on to set out nine allegations between 29 August 2016 and October 2017. The claimant sought an amendment to include a claim under section 13 of direct sex discrimination in the event that the events pleaded were deemed not to come within the protected period for a section 18 claim.

(5) The amendment did not plead any additional facts that were not in the original claim and merely involving the attaching of a new label to an existing set of facts. There was no prejudice to the claimant and the application was lodged on 25 January 2018 within the primary time limit in any event.

Adding R2

(6) The claimant's early conciliation certificate was in the name of the company, then the claimant lodged proceedings where she indicated she wished to include SB as a respondent. The Tribunal accepted a claim against the company only. Since then the claimant underwent early conciliation against SB.

(7) The application was lodged to add SB on 18 January 2018 within the primary limitation period.

(8) No additional evidence was required.

(9) There is no evidential prejudice to SB: SB will have to give evidence in any event.

(10) There was significant prejudice to the claimant as R1 is now dissolved.

(11) SB is at the heart of the claimant's allegations.

Additional oral submissions from the claimant

(12) Whether the profit share came before paying the personal allowance is of no practical difference.

(13) The claimant received payslips and salary. Business expenses were paid. Holidays were advised to the other director. There is evidence that they had to agree holidays. There was not an unfettered right to do associate work. (Page 806)

(14) Everything was invoiced through R1. No instances of substitution recorded.

(15) In any event the right to substitute is not a complete answer to contract for personal services claim.

(16) Regarding the amendment, SB was the perpetrator in many of the Pregnancy/Sex Discrimination Act claims.

(17) Regarding adding the respondent, reiterating that there would be considerable prejudice to the claimant if R2 was not a part. The claimant had always meant to have R2 as a party.

Respondent's Response

8. The respondent stated:

(1) It was never the case that holidays had to be agreed.

(2) Salary was not paid until all expenses were paid, but there would not necessarily be any salary.

(3) The claimant arranged SMP herself.

(4) Regarding R2 asking for a sick note, this is because R2 was completely unaware that the claimant was ill.

(5) MATB1 form was never provided.

(6) There was evidence on pages 609 and 806 that the claimant was seeking associate work after she had resigned (queried this as she did not resign until later). R2 was supportive of the claimant taking associate work: it was simply the case that there was not any.

(7) R2 would not know whether the claimant had substituted anybody for any work she undertook as the claimant would pay this out of her own profit share.

Submissions on Section 110 Equality Act 2010

Claimant's Submissions

9. The claimant agreed that there was insufficient evidence to conclude without a further hearing that SB was an employee for the purposes of section 110 but they submitted that she clearly was an agent for the purposes of the section. As a

Director she was authorised to act for the first respondent in everything she did. Further the claimant maintained that Kemeh (in full below) was authority for saying that that the definition of agent is broader in discrimination law. (However, I do not think this is correct)

Respondent's Submissions

10. The respondent submitted that on the agency point as the claimant had full control of the company she could not be discriminated against by the company and SB could not be an agent as she would be an agent of the claimant in those circumstances. The claimant quite properly referred to Yearwood and Kemeh (in full below)

11. The respondent also made submissions regarding whether SB was an employee (although the claimant did not argue this) that also encompassed further submissions on whether the claimant was an employee for the purposes of the Equality Act 2010.

12. Further, in those submissions the respondent says that "I agree with her that I did have the authority to make decisions for myself and on behalf of the company…" (However, whilst I point this out submissions are not evidence)

Law and Conclusions

Adding an additional respondent

13. Where an employer or principal is liable for the discriminatory acts of employees and agents under section 109 of the Equality Act, the employer and agents may themselves be personally liable under section 110 of the Equality Act. Section 110 makes it clear that an employee or agent who commits an act of discrimination is personally liable. This is a change from the previous Discrimination Acts where the employee or agent was liable for knowingly aiding the employer to do an unlawful act. The employee or agent does not necessarily have to know that the act was unlawful, but it is still necessary that the employer or principal be vicariously liable under section 109 of the Equality Act.

14. Section 110 of the Equality Act 2010 says as follows:

> "(1) A person (A) contravenes this section if –
>
> (a) A is an employee or agent;
>
> (b) A does something which, buy virtue of section 109(1) or (2) is treated as having been done by A's employer or principal as the case may be; and
>
> (c) The doing of that thing by A amounts to a contravention of this Act by the employer or principal as the case may be.
>
> (2) It does not matter whether in any proceedings the employer is found not to have contravened this Act by virtue of section 109(4)."

15. Section 109 says:

> "(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> (2) Anything done by an agent for a principal with the authority of the principal must be treated as done by the principal.
>
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
>
> (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment, it is a defence to show that B took all reasonable steps to prevent A –
>
> (a) from doing that thing; or
>
> (b) from doing anything of that description."

16. Under rule 34 of the Tribunal Rules, Employment Tribunals have a wide discretion to add, substitute or remove parties to proceedings. In conjunction with rule 29, this applies at any stage of the proceedings. The same principles apply to an amendment to add a party as would to any other sort of amendment, therefore the principles set out in **Selkent Bus Company Limited v Moore** will apply. One of the issues to be considered is whether the application to amend or add a party is out of time. In **Cocking v Sandhurst Stationers Limited & Another** the claimant sought leave to amend his ET1 to join the parent company to the proceedings. The amendment was sought after the time limit for presenting an unfair dismissal complaint against the parent company had expired and the Tribunal refused leave. On appeal the NIRC (the relevant court at the time) held that the protection that the respondent gained from time limits depends not on when they first become parties but on when the ET1 is first presented. In this case the ET1 naming the wrong respondent had been submitted within the time limits and the Tribunal therefore had jurisdiction to amend the claim form. In many of the general principles which the NIRC then proceeded to set out it held that in these circumstances the amendment should have been allowed.

17. In **Gillick v BP Chemicals [1993] EAT** four months after issuing her claim against the first respondent the claimant sought to have BP Limited joined as a second respondent. The Tribunal held that the claimant's complaints against BP Limited were time barred and declined to follow **Cocking** on the grounds that that case where the original and new respondent had a corporate relationship. On appeal the EAT forcefully rejected the Tribunal's qualification to the approach downing **Cocking**. There was no time limit applicable where it was proposed to add a respondent in circumstances in which the ET1 had been lodged timeously. The presence or absence of a connection between the respondents is relevant if at all only as a matter to be taken into account by the Tribunal when exercising its discretion to allow the proposed amendment. Indeed, a new respondent can be added even after a decision on the merits has been reached. Rule 29 allows a party to be added at any time.

18. It has been agreed that the issue of whether the second respondent was an employee cannot be addressed given that this was never addressed in evidence. However, the question of agency then arises, as section 110 refers to "employee or agent". In this question case the question is: was SB acting as agent of the first respondent in respect of the matters complained of? The definition of an agent is, "a person who is authorised to act for (the agent's principal) through employment by contract or apparent authority". In this case SB was a director of the company.

19. There is quite limited authority on this, but I will refer to two cases: one is **Bungay & another v Saini & others EAT [2010]**. This concerned alleged discriminatory acts by members of a management committee who ran a centre called All Saints Haque Centre. The EAT upheld the Tribunal decision to make these individuals personally liable and stated:

> "All that was needed to be shown to make the respondents liable for the discriminatory acts was that they were authorised to manage the centre as part of their authority as directors. On that basis the ET was entitled to conclude they were acting as its agents even though they performed their duties in a discriminatory manner. The respondents were joint and severally liable as they had contributed to the same damage to the claimants."

20. In is not necessary in an agency case for the principal to authorise a discriminatory act: it is sufficient that the discriminatory act took place within the broad authority the agent already had. This was established in **Kemeh v The Ministry of Defence [2014]** Court of Appeal where Lord Justice Elias stated:

> "Read literally subsection 2 might suggest that the principal must authorise the act of discrimination itself before liability arises but I agree with the EAT in **Lana v Positive Action in Training (Housing) Limited [2001]** that this would virtually render provision a dead letter. In my judgment Parliament must have intended the principal would be liable whenever the agent discriminates in the course of carrying out the functions he is authorised to do. It is a moot point whether the common law would in any event impose liability in these circumstances.
>
> The scope of the principal's liability for an agency at common law is not entirely clear, although it seems likely he will be liable for certain tortious acts of the agents such as misrepresentation, provided they are sufficiently closely related to the agent's actual or apparent authority.
>
> …The principal can be liable even though he has not authorised the act of discrimination itself. It follows the act itself may be, and no doubt usually will be, without the principal's knowledge or approval."

21. Section 109(3) of the Equality Act 2010 expressly provides the principal will be liable irrespective of whether he knew or approved of the act of discrimination.

22. More specifically on the agency point the issue in Kemeh was whether the common law line of authority on agency applied to statutory torts in the discrimination statute which had now become the Equality Act 2010. In Kemeh an employee of the MoD wished to bring a claim against an employee (A) of a

subcontractor and in that situation, it was found there was no agency as A could not have been said to have been authorised to act in any way for the MoD.

23. . It relied on **Yearwood vs Metropolitan Police Commissioner 2004 EAT**. In Yearwood the proceedings concerned police officers who committed allegedly discriminatory acts in the course of exercising disciplinary and investigative functions. However, they acted under two sets of statutory regulations which made it clear that they were exercising their powers personally. This was specifically to remove the function from the ambit of the chief constable. It was found that as the chief constable could not do the act himself he could not delegate the act. Where a complaint of a similar nature was made against a civilian employee however the regulations did not apply and therefore it was agreed in that situation there could be an agency relationship.

24. The common law definition of agency refers to a situation where one person, an agent, may directly affect the relations of another person, the principal as regards yet other persons, called third parties, by acts which the agent is said to have authority to perform on his behalf and which when done in some respects are treated as the principal's acts (the description is from Yearwood). At the heart of it is the principal's willingness to have their legal position changed by actions of an agent. In Kemeh Yearwood was explained as not an agency situation because the chief constable was not the source of their (the officers) authority, neither was there any implied authority.

25. It agreed that the common law definition of agency should apply. The EAT in Kemeh had drawn a parallel with Jones vs Tower Boot CA 1997 where the common law definition of vicarious liability was rejected and instead it was said a common-sense approach should be taken. The CA rejected a submission to the same effect from Mr Kemeh's counsel and said that the common law definition should stand although it was recognised that there is no agreement about the precise definition of agent as to whether in particular they have to be able to affect the principal's legal relations with third parties. The CA in Kemeh accepted this was generally a moot point but not one which affected the case before them. The crux of the matter was did A's contract with the subcontractor give her any authority to act as the MoD's agent. The CA decided it did not as it would have to have constituted authorisation by the MoD on A to act on its behalf vis-a-vis the MoD's own employees. However, a factor taken into account in Kemeh was that A was an employee of the subcontractor and whilst it was not always the case that a person such as A could not be an employee of one entity and an agent of another it was generally not the case.

26. In respect of the role of directors in a company, it is universally accepted that directors are effectively agents of the company, appointed by the shareholders to manage its day-to-day affairs, albeit in this case the shareholders and the directors were the same. The basic rule is that directors should act together as a Board, but the Board may also delegate certain powers to individual directors or to a committee of the Board, however in this case because the directors were only two and they were the shareholders the situation was much more simplistic.

27. The general duties under the Company Act to provide directors are:

- to act within the powers of the company's constitution;

- to promote the success of the company;
- to exercise independent judgment;
- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interest;
- to not accept benefits from third parties;
- to declare interest in proposed or existing transactions.

28. A director is able to enter into a contract with a third party or with individuals it wishes to have as employees or consultants: the normal day-to-day work involved in a company.

29. Indeed, as a company is a legal entity not a person it has to have individuals to act on its behalf. In many cases there will be employees such as a chief financial officer or a legal counsel. However, in this case there were only two directors and only they were available to perform any actions the company needed or wanted to undertake.

30. There was considerable evidence regarding the director taking on responsibility for various items such as printers etc, and taking action in order to arrange that the company had bank accounts, internet accounts, etc.

31. Accordingly, either of the directors could act in order to set up and control a bank account or arrange an email account, for example, and insofar as the claimant's claims fall within everyday actions of the company SB will have been acting as an agent of the company.

32. Without the final list of the matters that the claimant relies on it has not been possible to ascertain whether any of those specific matters would clearly fall out with the ambit of a director acting as agent of the company, and therefore I am stating the overall principle and whether any of the specific incidents fall outside the ambit of SB's role as a director/agent of the company could be determined at a final hearing or at a further preliminary hearing.

<u>Re Amendment to include section 13 Equality Act 2010 direct discrimination claim</u>

33. At a case management discussion on 29 January 2018 Employment Judge Franey identified the following issue: pregnancy discrimination (section 18 Equality Act 2010). He referred to the relevant part of section 4 of the claimant's response to the agenda form for the preliminary hearing. 16 issues were referred to. By the time of my Judgment I recorded that the amendment applied to nine issues, which are set out in paragraph 4 on pages 2 and 3 of my original decision. Most of these concern the second respondent's actual actions, but today I did ask the claimant's representative to clarify whether any of those fall away now. All of the nine matters recorded are included in the agenda matters, which were described as pregnancy discrimination (a reference to section 18). Accordingly, in seeking the amendment it was a re-labelling exercise.

34. The law on amendments was set out in full in my original decision and begins by explaining **Selkent Bus Company v Moore [1996] EAT**, saying that:

> "Whenever the discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

35. The claimant applied for the amendment on 25 January 2018 within the primary time limit as set out in my original Judgment. Accordingly, I have nothing to add in respect of the actual amendment and have heard nothing which suggests there was any reason why the amendment should not be allowed. Of course, there is hardship to R2 but that arises from her being added as a respondent not from the re-labelling of an existing claim within the time limits.

36. Regarding the failure to allow the claimant to be cross examined I had suggested possible questions to be asked of the claimant in respect of the amendment, however this was before I was aware that the amendment application had been made in time. Where an amendment application is made in time there is no real reason for the claimant to give live evidence as to why the amendment was late as it is not late in this situation, and the matter routinely falls to be dealt with just by submissions.

<u>Employee status under the Equality Act 2010</u>

37. The test in the Equality Act 2010 at section 83(2) states that:

> "Employment means:
>
> (a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

38. There is therefore a need to show a contractual relationship, however it need not be in writing.

39. An employee for the purpose the Equality Act can be someone who is in fact self-employed provided that they contract to personally provide work. In this respect the scope of discrimination is substantially wider than unfair dismissal.

40. In **Mirror Group Newspapers Limited v Gunning [1986]** G applied to MGM Limited to take over her father's "agency" contract for the wholesale distribution of Sunday newspapers. When her application was rejected she complained to the Tribunal that MGM Limited's refusal was on account of her being a mother with family commitments and therefore amounted to unlawful sex discrimination. It was held that G's word did not come within the definition of "employment" in what was then the Sex Discrimination Act, as in order to fall within the scope of a contract personally to execute any work or labour the execution of such personal work or labour must be the dominant purpose of the contract. Personal responsibility for carrying out and the efficiency of the work was not in itself sufficient. This has been challenged in **Mingeley v Pennock & Another t/a Amber Cars [2004]**. Here the issue was whether an independent taxi driver who had a contract with the respondent purely for the provision of radio services, could bring a race

discrimination claim.it was decided he could not as he had no contract to perform work personal he just had a contract for the provision of radio services. The dominant purpose of the contract he did have was for the respondent to provide radio services rather than his provision of a personal service.

41. The Supreme Court in **Jivraj v Hashwani [2011]** said that the dominant purpose was not the sole test for determining employment: the relationship between the parties should also be considered. In that case whilst an arbitrator had to perform his role personally he was not under the direction of any of the parties**.**

42. An issue which has emerged from the case law is the question of subordination to the putative employer. It was an issue in Halawi vs WDFG ltd CA (2014) However I find that case so far from this case as not to be helpful, it would be akin to the claimant seeking to say a client was her employer.

43. Indeed, as sole director shareholder s have been found to be employees under the employment rights act 1196 the issue of subordination must be nuanced as there the employee is acting for the company that they themselves wholly own. I considered this point in relation to whether the claimant was an employee under the employment rights act which I rejected for different reasons. In **Bates Van Winklehof vs Clyde and co LLP (2014)** in the context of a partners status to bring a whistleblowing case Lady Hale said that subordination' is not a freestanding and universal characteristic of being a worker' (Worker being the relevant nomenclature in a whistleblowing case).

44. The fact that an individual does not actually perform all of the work personally will not necessarily mean that the dominant purpose test will not be met, so long as the contracting party performs the essential part of the work he or she is free to assign or delegate other aspects of the work to another person. Therefore, a solicitor may delegate some legal work on a case to an assistant and rely on a secretary to carry to carry out ancillary tasks.

45. Contract to personally do work may be an implied one. In **Manku v The British School of Motoring [1982] EAT**, the EAT held that a self-employed driving instructor operating under a franchise agreement would be covered by the statutory definition of employment in what was then the Race Relations Act. The agreement contained no express obligation for the personal execution of the work, but the EAT looking at the substance of the transaction and not its form held that such an obligation could be implied in a substitution clause.

46. The question of whether an individual can provide a replacement may prevent a finding that the contract's dominant purpose is to carry out work personally. In **Robinson v High Swan Associates t/a Republic Nightclub & Others [2001] EAT**, the EAT held that the fact that a self-employed DJ could provide a replacement if he was unable to appear himself did not detract from the fact that the dominant purpose of the arrangement was for the DJ himself to provide his musical services. It appears that the ability to provide a replacement was limited in some way i.e. that the individual cannot perform the work personally themselves for some reason, or the replacement must be suitable or approval is required. However, the blanket right to provide a substitute it unlikely to meet the requirement of personal services.

47. Of course, a substitution clause must not be a sham, and the Tribunal should discern the true intentions and expectations of the parties.

48. In respect of whether there was a contract the usual principles apply offer and acceptance, consideration, intention to create legal relations.

49. I note however that I do not have detailed submissions on the contractual point but did not wish to delay the judgment. If the parties wish to provide further submissions on this point they may do so subject to a timetable being agreed.

Conclusion

50. Having heard all the respondent's submissions and references again to the evidence I still find that the claimant was obliged to provide personal service.

51. However, at the first hearing the matter of whether the test was no longer whether the predominant purpose was personal service was not discussed in depth. Consideration of whether there was a contractual obligation to provide a personal service has only recently emerged as a discrete issue and it is not clear how far the conventional tests apply. Certainly, a written contract is not required.

52. Here as the two directors brought in the work and there was an expectation that the work would be personally undertaken mainly by the director who brought it in but sometimes by the other director in full or part, hence the profit share agreement. However, this was relatively quickly abandoned as too complicated and it mainly arose that each director did the work they brought in, apart from one large tranche of work obtained by the second respondent.

53. Going back to first principles a contract arises where there is offer acceptance and consideration on both sides here there was. The company offered the prospect of remuneration, of an increasing profit share, of building the business. The claimant accepted the offer of bringing in work and delivering it in order to attract remuneration, to build the business and prosper. This actually happened it was not a pipedream or an aspiration which never 'took off'. It was not a new start 'tech' company only existing on paper. Sadly, it went wrong but that is not relevant for determining this issue. In respect of legal relations a company framework was set up the claimant had implied contractual and fiduciary responsibilities to the first respondent.

54. Accordingly, I find there was an obligation to undertake work bought in personally. Of course, there is some artifice attached to this as with any limited company, but the work was brought in under the company's umbrella and then there was an obligation to undertake it.

55. If subordination is relevant then I would find the subordination arose out of the requirements to build the business and its reputation by delivering high class training etc.

56. Therefore, I find that the test under section 83(2) is satisfied and do not vary my original judgment.

<u>Worker status for the purposes of Employment Relations Act 1996</u>

I set out the law in the original judgement and do not rehearse it again. The main issue here was whether the fact that the claimant did some associate work, and would have done more if she could meant that she was in effect 'in business on her own account' and therefore not a worker for the purposes of the 1996 Act.

I accept that the claimant at times would have done more associate work if it had been available, at the beginning before the business developed and at times when the first respondent business was quiet. However it is perfectly possible to undertake work in this way and still be a worker for the first respondent. The claimant was in business on her own account for the associate work but that was entirely separate from the situation vis a vis the first respondent where she did meet the criteria of a worker. If she had provided her services to the first respondent on an associate basis and the invoices reflected this the situation would be different but that was not what happened.in addition it would have been possible for the claimant to set up Caroline Dakin Ltd and invoiced direct clients on that basis but have an entirely separate business such as the first respondent to whom she had contractual and fiduciary obligations. Most businesses would not want that because of the potential competition but the first and second respondent did not object in this situation.

Regarding the minimum wage point, ofcourse that is only payable for hours actually worked and it has not been established she did not receive this for hours worked. Further of course it maybe the case that she was not paid the minimum wage and should have been.

Accordingly I do not alter my judgment in this respect either.

Employment Judge Feeney

Date: 18 March 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 April 2020

FOR THE TRIBUNAL OFFICE