EMPLOYMENT TRIBUNALS

Claimant: Miss E Ekpo

Respondents: 1. Harvey Nichols Group Limited
2. Shiseido UK Limited

Heard at: Manchester **On:** 16 March 2020

Before: Employment Judge Rhodri McDonald

REPRESENTATION:

Claimant: Miss Ferrario (Counsel)
1st Respondent: Ms J Wilson-Theaker
2nd Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a contract worker for the purposes of section 41(7) of the Equality Act 2010 and the first respondent was her principal for the purposes of section 41(5) of that Act.

2. Mr Borrikinni was not the agent of the first respondent for the purposes of section 109(2) of the Equality Act 2010 and the first respondent is not liable for his actions under that section of the Act.

REASONS

Introduction

1. The claimant case is that she was sexually harassed and victimised in breach of s.26 and s.27 of the Equality Act 2010 ("the 2010 Act"). The case is complicated by the fact that the alleged incidents happened when the claimant was working in the

Harvey Nichols store in Manchester ("the Store"). The Store is operated by the first respondent but the claimant was at the relevant time employed by the second respondent. To further complicate matters, the alleged perpetrator of many of the alleged incidents was Mr Samuel Borrikinni ("Mr Borrikinni"). Mr Borrikinni worked as a security guard at the Store but was employed by Olympian Security Services Limited ("Olympian") rather than either of the respondents.

2. Those complications meant that it was not clear whether the claimant could bring a claim against the first Respondent under the 2010 Act. It was also not clear whether the first Respondent was potentially liable for any breaches of the 2010 Act by Mr Borrikinni. Because of that, at the previous preliminary held on 14 October 2019 Employment Judge Phil Allen ordered that a preliminary hearing should be held to decide:

(1) Whether the claimant was an employee or a contract worker of the first respondent?

(2) Whether Mr Borrikinni was an employee, contract worker or agent of the respondent or an employee of an agent of the first respondent?

3. As I explain below, the issues to be decided were refined and clarified during the hearing. Having heard evidence and oral submissions from each party's counsel I reserved my decision.

4. Unfortunately, this judgment has been delayed by a combination of my absences from the Tribunal and the impact of the current pandemic. I apologise to the parties for that delay.

5. It was agreed at the preliminary hearing that setting the date for a case management preliminary hearing would need to await the outcome of my decision. A date for that case management hearing now needs to be set. A case management order will be sent to the parties asking them to confirm their availability for such a hearing.

Preliminary Matters

6. I dealt with one preliminary matter. On 17 December 2019 the claimant's representative wrote to the Tribunal indicating that she wished to add Harvey Nichols Regional Stores Limited as a respondent to proceedings because it employed individuals named in her claim. She wished to retain Harvey Nichols Group Limited as a party to proceedings. It was not possible to deal with that issue on the day. It was agreed that it would be helpful to clarify why the claimant said Harvey Nichols Group Limited should be retained as part of proceedings. I ordered that within 14 days the claimant should confirm that the claimant accepted that Harvey Nichols Regional Stores Limited was the correct first respondent to proceedings. If the claimant also wished to retain Harvey Nichols Group Limited as a respondent she should write to the Tribunal and to the first respondent setting out the reasons why that was the case.

The Issues to be decided

7. During the hearing the issues to be decided narrowed in two ways:

    1. It was accepted by the claimant that she was not an employee of the first respondent. The only issue I needed to decide in relation to her, therefore, was whether she was a contract worker (and the first respondent her principal) for the purposes of section 41 of the 2010 Act.

    2. When it came to Mr Borrikinni, it was agreed that he was not an employee of the first respondent. It was also agreed that even were he a contract worker, that would not necessarily make the first respondent liable for his actions. As a non-employee, the only basis on which the first respondent could be liable for his actions was if he was its agent for the purposes of section 109(2) of the 2010 Act.

8. The following agreed List of Issues was produced by Miss Ferrario and agreed by Ms Wilson-Theaker.

    (1) Was the claimant a contract worker of the first respondent?

        1.1 Is the first respondent a Principal in accordance with section 41(5) of the 2010 Act?

        1.2 If yes, is the claimant a contract worker in accordance with section 41(7) of the 2010 Act?

        1.3 To establish herself as a contract worker does the claimant need to show that she carried out work for the first respondent?

        1.4 If yes, does she satisfy this test on the facts?

        1.5 To establish herself as a contract worker, does the claimant need to show a degree of influence or control by the first respondent?

        1.6 If yes, does she satisfy this test on the facts?

    (2) Was Mr Borrikinni an agent of the first respondent?

        2.1 Was Mr Borrikinni a worker supplied by Olympian Security to work temporarily for and under the direction of the first respondent?

        2.2 If yes, who controlled his day-to-day responsibilities, was it William Fisher?

        2.3 Was Mr Borrikinni carrying out on a day-to-day basis acts on behalf of the Principal in line with the common law definition of “agent”?

9. During submissions, both counsel agreed that the issue of agency was not an “all or nothing” question. Mr Borrikinni might be an agent of the first respondent in

relation to some of his alleged actions but not others. Given that, issue 2.3 should be read as meaning:

> "Was Mr Borrikinni carrying out on a day-to-day basis acts on behalf of the Principal in line with the common law definition of "agent" and if so, what was the scope of his authority?

Relevant Law

10. Section 41 of the 2010 Act provides that:

> "A Principal must not discriminate against a contract worker by subjecting that worker to a detriment."

11. Section 41(5) defines a "principal" as a person who makes work available for an individual who is:

> "(a) employed by another person, and
>
> (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it)."

12. Section 41(6) of the 2010 Act explains that contract work is work such as is mentioned in section 41(5).

13. "Contract worker" is defined in section 41(7):

> "A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)."

14. The two leading cases on contract workers are **Harrods Ltd v Remick and other cases [1998] ICR 156, CA** and **Leeds City Council v Woodhouse [2010] IRLR 625, CA**. **Leeds** includes an useful review of other relevant cases including the Northern Ireland Court of Appeal case of **Jones v Friends Provident Life Office [2004] IRLR 783, NICA**. Both **Harrods** and **Leeds** are Court of Appeal cases decided under the contract worker provisions in the Race Relations Act 1976 ("the 1976 Act"), one of the pieces of discrimination legislation replaced by the 2010 Act.

15. In **Harrods** the Court of Appeal identified two key questions in deciding whether a case fell within the contract worker provisions in s.7 of the 1976 Act:

- Is the work done by the alleged contract worker work done "for" the alleged principal?
- Is the alleged contract worker someone who their employer supplies under a contract made with the alleged principal?

16. When it comes to the first question, the decision in each case will be fact sensitive. However, the case-law provides some guidance on relevant factors:

- It is not necessary to show the alleged principal had managerial control (i.e. that it stands in the shoes of the actual employer) in relation to the worker (**Harrods**).

- The fact that the alleged principal had control and influence over the workers will support the claim they are contract workers (**Harrods**) but it will not always be necessary for control and influence to be demonstrated (**Leeds**).

- The closeness of the relationship between the alleged contract worker's employer and the alleged principal will be relevant. In **Leeds** the extreme closeness between the claimant's employer (an ALMO) and the Council led the Tribunal to find that work was done "for" the Council.

- It is doubtful that it will be enough for the alleged contract worker to show that the work they did inured to the benefit of the alleged principal (**Jones**).

- The fact that the alleged principal has a right to approve who does the work (and to withdraw that approval) will support a claim of contract worker status (**Harrods**).

- The fact that the worker is indistinguishable to the public eye from the alleged principal's employees (e.g. because the worker has to wear the same uniform) will support a claim of contract worker status (**Harrods**).

17. When it comes to the second question, the primary or dominant purpose of the contract between the employer and a principal does not have to be the supply of workers – the contract worker provisions are not limited to employment agency type cases (**Harrods**).

18. In **Jones** the Northern Ireland Court of Appeal thought it desirable for the provisions to be construed broadly so as to protect a wide range of workers employed to perform work for someone other than their nominal employers, but this should be subject to two conditions. First, it is implicit in the philosophy underlying the provisions that the principal must be in a position to discriminate against the contract worker. The principal must therefore be able to influence or control the conditions under which the employee works. Secondly, it is also inherent in the concept of supplying workers under a contract that it is contemplated by the employer and the principal that the former will provide the services of employees in the course of performance of the contract.

19. The Equality and Human Rights Commission's Statutory Code of Practice on Employment ("the EHRC Code") provides guidance on the meaning of "principal" and "contract worker":

> "11.5 A 'principal', also known as an 'end-user', is a person who makes work available for an individual who is employed by another person and supplied by that other person under a contract to which the

principal is a party (whether or not that other person is a party to it). The contract does not have to be in writing."

"11.6 A contract worker is a person who is supplied to the principal and is employed by another person who is not the principal. The worker must work wholly or partly for the principal, even if they also work for their employer, but they do not need to be under the managerial power or control of the principal. Contract workers can include employees who are seconded to work for another company or organisation and employees of companies who have a contract for services with an employment business."

20. It gives the following example (which I accept is just that rather than anything more binding on me):

> "A worker is employed by a perfume concession based in a department store, where the store profited from any sales he made and imposed rules on the way he should behave. In these circumstances, the worker could be a contract worker. The concession would be his employer and the store would be the principal. However, this would not apply if the store simply offered floor space to the concession, the concession paid a fixed fee to the store for the right to sell its own goods in its own way and for its own profit, and concession staff in no way worked for the store."

21. Both counsel made oral submissions about how the case-law applied to the facts of this case. I refer to those submissions where relevant in the "Discussion and Conclusion" section below. However, Ms Wilson-Theaker also submitted that the differences between the wording of section 41 of the 2010 Act and section 7 of the 1976 Act were significant. It is more convenient to deal with that submission here.

22. Ms Wilson-Theaker pointed out that in the 1976 Act the reference is to "<u>any</u> work for a person ('the principal') which is available for doing by individuals ('contract workers') who are employed…by another person". In contrast, section 41(5) of the 2010 Act defines the principal as "a person who makes work available for a person who is employed by another person". Her submission was that leaving out "any" before "work" appeared to narrow the definition of a principal. Her submission was that in this case, the person who made "work" available to the claimant was her employer, the second respondent.

23. I have considered whether the omission of "any" does have the significance which Ms Wilson-Theaker suggests. I have concluded that it does not. I was not referred by counsel to any cases in which the Employment Appeal Tribunal or higher courts have considered the wording of section 41 of the 2010 Act. However, I note that the explanatory notes to section 41 say that that provision "is designed to replicate the effect of previous legislation, while codifying case law to make it clear that there does not need to be a direct contractual relationship between the employer and the principal for the protection to apply (paragraph 148 of the explanatory notes to the 2010 Act).

24. I also note that in the Employment Appeal Tribunal case of **Adebowale v Isban UK Limited & Others [2015] UKEAT/0068/15/LA** which does deal to some

extent with contract worker issues the EAT did not suggest that section 41 had in any way narrowed the concept of contract work compared to section 7 of the 1976 Act. In that case the EAT referred to **Harrods** and **Leeds** in terms which suggested that they were still good law and commented that "section 41 is intended in at least one respect to cast the net wider than section 7 of the 1976 Act".

25. Taking all that into account, I reject the submission made by Ms Wilson-Theaker that the omission of "any" narrows the concept of "principal" between the 1976 Act and the 2010 Act. That conclusion also seems to me to be consistent with the view expressed in **Harrods** and **Leeds** that the concept of contract work should not be interpreted narrowly given the purpose of the anti-discrimination legislation.

26. I conclude, therefore, that in deciding whether the claimant was a contract worker and the first respondent her principal, the test I should apply is the same as that applied in **Harrods** and **Leeds**.

Liability for the acts of an agent under s.109(2) of the 2010 Act

27. The liability of employers and Principals is dealt with in section 109 of the 2010 Act. It was not suggested in this case that Mr Borrikinni was an employee of the first respondent. It was suggested he was an agent. In relation to that, the 2010 Act provides:

> "(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
>
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

28. The leading case on the meaning of "agent" in section 109(2) of the 2010 Act is **Ministry of Defence v Kemeh [2014] ICR 625**. In that case the Court of Appeal said that a broader rather than a narrower statutory meaning should be adopted where two constructions were equally plausible and the broader meaning better achieved the statutory purpose. However, it rejected the submission that this meant that it was appropriate to describe as an agent someone who was employed by a contractor simply on the grounds that they performed work for the benefit of a third party employer. Instead, the scope of the agency concept in section 32 of the 1976 Act (the predecessor of section 109(2)) must at least reflect the essence of the legal concept of agency. Lewison LJ said that the terms "agency" and "authority" must be "interpreted in accordance with ordinary legal parlance". The essence of the concept is that it is necessary to show that a person (the agent) is acting on behalf of another (the principal) with that principal's authority. The legal concept does not necessarily involve an obligation to affect the legal relations with third parties (paragraph 39 of **Kemeh**).

29. The fact that someone is employed by A would not automatically prevent him from being an agent of B. That can be the case even in relation to the same transaction. However, particularly in relation to a "same transaction" case, there would need to be very cogent evidence to show that the duties the employee was

obliged to do as the employee of A were also performed as an agent of B (**Kemeh**, para 43).

30. In **Unite the Union v Nailard [2019] ICR 28**, the Court of Appeal discussed the scope of the liability of a principal for the acts of an agent. It held that the effect of the language of section 109(2) was to render a principal liable for the acts of his or her agents done in the course of the performance of their authorised functions. It accepted that that might well extend the scope of liability beyond what would apply at common law. In **Nailard**, that meant that the principal was liable for the agent's acts within their authorised agency whether those acts were in relation to third parties or in relation to the principal's own employees.

Evidence and Findings of Fact

31. I heard evidence from the claimant and from Mrs Kirsten Rutherford (the first respondent's Finance and Operations Manager). Both had provided written statements. The claimant was cross examined by Ms Wilson-Theaker for the respondent and Mrs Rutherford was cross examined by Ms Ferrario for the claimant. Both witnesses answered questions from the Employment Judge. Ms Wilson-Theaker accepted that Mrs Rutherford could not give direct evidence about events before April 2007 which is when she joined the first respondent.

32. There was an agreed bundle of documents consisting of pages 1-268. References in this judgment to page numbers are to page numbers in that bundle.

33. The parties had also supplied CCTV footage of an incident on 1 February 2019. That was provided on a USB stick. At the start of the hearing it was agreed that it was not necessary for me to view that footage in order to decide the questions that I was deciding at the preliminary hearing. To avoid the possibility of the USB stick going adrift between now and the final hearing, I returned the USB stick to Ms Wilson-Theaker.

34. I have set out my findings of fact under the following headings:

- The relationship between the first and second respondent;
- The claimant's recruitment and work at the Store;
- The relationship between the first respondent and Olympian;
- Mr Borrikinni's work at the Store.

<u>The relationship between the first and second respondent</u>

35. At the relevant time the claimant worked as the Counter Manager for the Laura Mercier concession counter ("the Counter") within the Store. The Counter is one of many brand counters and concessions within the Store.

36. The Laura Mercier stock sold by the Counter is owned by the first respondent. It buys the stock in bulk from the second respondent which delivers it to the first respondent's distribution centre. The first respondent's delivery vehicles then deliver

the Laura Mercier stock to any of its stores with a Laura Mercier counter. Operating in this way means the first respondent controls the stock, achieves greater profit margins on that stock and also controls whether the stock is included in store-wide promotions like Black Friday.

37. Because the first respondent owns the stock, the proceeds of the sale of any goods from the Counter belong to it. Any cash taken on the counter are bagged and put into the first respondent's cash store at the end of the day.

38. The relationship between the first respondent and the second respondent is governed by a commercial agreement (p.112-113). It requires the second respondent to employ suitably qualified staff for the Counter. The agreement makes it clear that any counter staff (referred to in that agreement as "Brand Staff") remain employed by the second respondent. Of relevance to the questions that I need to decide, the agreement places the following requirements on the second respondent:

- All Brand Staff must have store approval from the first respondent or its HR department before they are permitted to work in a store. That store approval is at the discretion of the first respondent and it reserves the right to temporarily or permanently revoke the store approval in respect of any member of Brand Staff (clause c).

- The second respondent is required to immediately inform the first respondent when a member of Brand Staff ceases to be employed by the Brand (d).

- Laura Mercier managers should be fully aware of and comply with the first respondent's Brand Managers Policy, and ensure that Brand Staff comply with that policy (e).

- The second respondent has to ensure that Brand Staff comply with reasonable standards of safety and comply with the first respondent's health and safety procedures and report any unsafe working conditions or practices immediately to the first respondent's management. It is required to provide training for its staff in relation to health and safety, and the first respondent will provide additional health and safety training to staff to the extent they are required to do so in order to comply with their obligations under the Health and Safety at Work Act (f).

- The second respondent is required to provide to the first respondent any information that it may reasonably require relating to any member of Brand Staff (subject to data protection legislation) (g).

- The second respondent has to arrange for a periodic supervision of the Counter by the second respondent's management (h).

- The second respondent has to ensure that all Brand Staff sign at the time of their induction with the first respondent an acknowledgement they are fully aware of their employment status and that they remain

employees of the second respondent whilst working "for the second respondent within the premises of the first respondent".

The claimant's recruitment and work at the Store

39. The claimant was employed initially as a Sales Assistant having applied to work at the Store in response to an advertisement posted by Harvey Nichols. She was interviewed by Mark Lindean (the first respondent's Beauty Department Supervisor) and then by Rachel Gledhill (the first respondent's Beauty Department Manager/Head of Beauty). She gave unchallenged evidence that she was then told that she would be recommended to sell Laura Mercier or Shuemura products within the Harvey Nichols store. The claimant was then interviewed by Gina Gardner who was an Area Sales Manager for a company called Gurwitch UK Limited. The business of Gurwitch UK Limited subsequently transferred from that company to the second respondent.

40. The claimant's written contract of employment (p.92a-92o) was with the second respondent. It confirms her position as Counter Manager (clause 3.1 on p.92(c)) and her place of work as the Store (clause 4.1 on p.92(c)). Clause 4.1 provides that the second respondent "reserves the right to require you to move to a different base in the United Kingdom".

41. I accept Mrs Rutherford's evidence that in practice the first respondent did not revoke store approval but it is clear that it had the power to do so and that store approval was needed before an employee could work at the Store. Mrs Rutherford confirmed that the first respondent did sometimes suspend store approval where, for example, an employee of a concessionary company was under investigation.

42. I find that clause 4.1 of the claimant's contract of employment meant that if the first respondent withdrew store approval for the claimant the second respondent would in theory be able to move her to another store. I do not, therefore, accept the suggestion by the claimant that removal of store approval would automatically lead to a concessionary employee being dismissed. The claimant had suggested this is what had happened in practice to her predecessor as counter manager but when cross examined about this she confirmed that she did not actually know what specifically had happened.

43. I find that the second respondent did provide the claimant with training, both managerial training and all employee training. The claimant's evidence, which I accept, was that the managerial training was about upcoming products, sales targets and other procedural matters. The "all staff" training for the second respondent was about the products which they were selling. The claimant agreed with Ms Wilson-Theaker that this was important to the second respondent to ensure that there was consistency of approach in selling the cosmetics involved. I also find that the claimant herself provided some training to employees of the second respondent who worked on the Counter. However, I do also find that the claimant received some training from the first respondent. This was particularly by way of an initial induction which the claimant accepted was primarily about security and health and safety. That is consistent with clause f of the contract between the first and second respondents.

44. In terms of control of the claimant's day-to-day work on the Counter, I find that the second respondent was responsible for product lines and setting out Counter guidelines. However, I do find that the first respondent also had an influence on the claimant's day-to-day work at the Counter. In particular, any store wide promotions decided on by the first respondent would potentially involve the Counter. The example given by the claimant was of a Mother's Day promotion. In such cases, I accept the claimant's evidence that the Counter would have some promotional materials provided by the first respondent while the claimant would provide some materials for the counter herself, e.g. flowers for the Mother's Day promotion.

45. When it came to dress code, the claimant's evidence was that when she was inducted she was told that the first respondent had a strict policy of having no open toed shoes and no bare arms. She was cross examined about this and it was put to her that the current dress code in the bundle (page 100) said nothing about either of these prohibitions. The claimant was a credible and reliable witness and as there was no-one else to give evidence about what had happened at the claimant's induction, I accept her evidence and accept that at that point she was told that there were those restrictions on dress. In any event, it is clear from the concession staff handbook (page 100) that whatever the specifics of the dress code, the first respondent does exercise a degree of control over the standards of dress of concession staff. On page 100 there is a section called "The Harvey Nichols Dress Code". This says that although not employed by Harvey Nichols, "you are part of the customer experience when customers enter the store. You are therefore a representative of Harvey Nichols, our business and our product. Your appearance and grooming are vitally important in reflecting he Harvey Nichols brand image".

46. The page then sets out key guidelines such as "skirts should be knee length", "knitwear should be fine gauge and business like", and says (under the heading "Breaches of the Harvey Nichols Dress Code"), "if a Harvey Nichols manager does not consider you to be dressed appropriately they will discuss this with your employer through your concession manager. If they are not in the store this will be discussed directly with you and in private. If deemed necessary you may be asked to return home to change and this will be reported to your manager".

47. The claimant in her evidence confirmed that there was an occasion when one of the first respondent's managers had raised with the claimant the fact that one of the second respondent's employees working on the Counter was not appropriately dressed. I accept the evidence that the concession staff did not have to wear Harvey Nichols uniforms – and in fact that some of the concessions had their own uniforms. However, it is clear from page 100 of the concession staff handbook that the first respondent did have a measure of influence and control over what the claimant and her colleagues could wear (and could not wear) at work.

48. When it came to conduct matters other than the dress code matters referred to above, I find that the first respondent did in practice deal with and resolve minor conduct issues involving concessions staff which arose on the shop floor. The claimant's example was of a customer complaint about the claimant telling the customer's child not to pick up a lipstick. Her evidence, which I accept, was that that had been dealt with by one of the first respondent's managers without reference to the second respondent. Mrs Rutherford confirmed in her evidence that she and the

first respondent's senior managers were regularly on patrol on the Store's shop floor and therefore would resolve minor matters as and when they arose. There was no suggestion, however, that the first respondent would ever take disciplinary action against the second respondent's employees. I find that if there were matters serious enough to potentially require disciplinary action what would have happened would be that the second respondent would have been informed.

49. In terms of handling grievances, the claimant suggested that the first respondent had been involved in dealing with a grievance which she had raised in relation to Mr Borrikinni. Mrs Rutherford's evidence was that it had only got involved because the dispute in that case was between an employee of the second respondent and an employee of another third party company, i.e. Olympian. The only reason the first respondent dealt with matters in practice in terms of obtaining information was that it was the organisation which was actually in contact with the individuals concerned. I accept that evidence and find that if the claimant had a grievance she would have raised it with the second respondent rather than the first respondent.

50. I accept the claimant's evidence that she undertook refunds or exchanges for the first respondent which were not necessarily of products bought and sold at the Counter. This would be, for example, when there was no member of staff on an adjoining counter when the customer wanted the refund or exchange processed.

51. The claimant also gave evidence that she did a number of what she called "promotional gigs" for the first respondent. Those gigs involved both in-Store and external events. Mrs Rutherford in her evidence accepted that although the second respondent would be contacted by the first respondent to ask whether they wanted their brand to be represented at those events, they would not ask permission from the second respondent for the claimant to take part in those events. The arrangements for those events were all made between the claimant and the first respondent with no involvement from the second respondent at all.

<u>The relationship between the first respondent and Olympian</u>

52. The relationship between the first respondent and Olympian is governed by an Agreement for Services (pages 125-126). It is a very brief Agreement. It consists of one page of "terms and conditions", most of which deal with matters such as warranties and limitations on liabilities between the parties.

53. Clause 1.1 (p.125) provides that the "Service" provided by Olympian will be agreed in written assignment instructions prepared and agreed by both parties. The schedule to that Agreement in the bundle (page 126) says that Olympian "shall supply a manned security service to Harvey Nichols at the store". There is no further specification of the "Service" in that Schedule or in any other contractual documentation I was referred to. The Schedule sets out an initial contract period of 12 months, minimum hours per week and hourly rates for officers and supervisors provided by Olympian.

54. Clause 1.1 (p.125) also states that Olympian will be "required to provide staff that are courteous, suitably trained and who will exercise skills appropriate to their

function". There is nothing in the contract which clarifies whether, and if so to what extent, the security staff provided by Olympian have authority to act on behalf of the first respondent. Equally, there is nothing in the terms and conditions which expressly excludes the security guards from being agents of the first respondent.

Mr Borrikinni's work at the Store

55. The claimant was only able to give limited evidence about how the relationship between the Olympian security guards and the first respondent operated. She said that William Fisher, an employee of the first respondent, was in charge of security. She said that it was he who gave instructions to the Olympian security guards like Mr Borrikinni. The security staff were based in the security lodge which was on the left-hand side of the staff entrance. When it came to instructions to those security guards, the claimant's evidence was that she believed that Mr Fisher would direct them using the radios which they all had.

56. Mrs Rutherford was able to give more direct evidence. She confirmed that Mr Fisher was in charge of matters but that in his absence two store detectives who were direct employees of the first respondent would be in charge of directing what the Olympian security guards did.

57. When it comes to the distinction between the roles and duties of the store detectives and the Olympian security guards, Mrs Rutherford said that the security guards would apprehend and carry out bag searches, but it was the store detectives who would take statements and contact the police. It was not disputed, therefore, that part of Mr Borrikini's role was to detain individuals (including third parties such as customers) and carry out bag searches.

58. Mrs Rutherford's evidence was that there were policies and rules to which the security staff were subject but she did not have the details of those. There were no copies of those policies or any relevant rules in the Tribunal bundle.

59. There was a copy of Mr Borrikini's contract of employment with Olympian (p.127-134). It incorporated "Company Rules and Regulations" (p.131) which provide that the Olympian employee must not "detain any person for theft or any other offence unless you have completely followed the guidelines given to you during your Olympian training" and "do not use unnecessary force when apprehending/detaining suspects".

60. As part of those rules there is a section called "Written Assignments Instructions" which provides that Mr Borrikinni must read the written assignment instructions ("WAIs") at each site where he works and discuss anything he cannot understand with his area manager. He is required to comply with those WAIs at all times. If asked by the client to carry out duties or instructions which he feels are outside the scope of his normal duties, he is required to contact Olympian's head office who will "authorise such duties in writing".

61. The contract also provides that Mr Borrikini should call Olympian each Friday or Saturday to obtain his rota for the following week (clause 9 on p.128).

Discussion and Conclusions

62. In this section I apply the relevant law to the facts. I took into account both parties' submissions. I have not set them out in full but refer to them below where they are relevant to a point in dispute. I have found it convenient to re-order the questions in the agreed List of Issues because I need to answer questions 1.3-1.6 in order to answer questions 1.1 and 1.2, so it makes sense to deal firstly with questions 1.5 and 1.6, then 1.3 and 1.4.

1.5 To establish herself as a contract worker, does the claimant need to show a degree of influence or control by the first respondent?

63. As discussed at paragraph 16 control and influence is not necessarily required to establish contract worker status, but it is clearly a relevant consideration.

1.6 If yes, does she satisfy this test on the facts?

64. On the facts I have found, I am satisfied that the respondent did have a degree of control and influence over the claimant. She could only work at the Store for the first respondent if it gave her store approval. It is clear from the contract between the first and second respondents that the first respondent had an absolute discretion to remove that store approval at any point and that no-one could start working at the Store unless it did have that store approval.

65. I did take into account Mrs Rutherford's evidence that the power to remove store approval was rarely exercised in practice. That does not seem to me to negate the fact that it existed and did give the first respondent control over the claimant's ability to work in the Store. I also accept that clause 4.1 of the claimant's contract meant that withdrawal of store approval did not mean that the claimant would necessarily be dismissed. Again, I do not think that undermines the element of control and influence represented by the store approval requirement. It does not seem to me that to prove she was a contract worker, the claimant has to show that the control and influence extended to the first respondent being able to de facto dismiss her.

66. The first respondent's control and influence seems to me to be reinforced by the fact that the claimant was interviewed by employees of the first respondent as part of her recruitment process. I accept Ms Wilson-Theaker's point that on the claimant's own evidence the last interview she had before being employed was with Gina Gardner, the second respondent's employee. That does not seem to me to undermine the finding that the first respondent had a significant degree of control and influence over the claimant's recruitment. It is not it seems to me necessary for the claimant to show that the first respondent had the final say in whether the second respondent decided to employ the claimant.

67. Although I accept that the claimant was not asked to wear a uniform or otherwise identify herself as an employee of the first respondent, I have found that the first respondent had a degree of control and influence over what the claimant and her colleagues wore at work. I accepted the claimant's evidence that one of her

colleagues on the Counter was sent home for not complying with those requirements.

68. The claimant also had to comply with requirements for shop floor behaviour and conduct. Mrs Rutherford and other managers would patrol and resolve issues, such as minor customer complaints, without reference to the second respondent.

69. I also found that the first respondent had a degree of control and influence over the claimant's day-to-day work. That took the form both of requiring her to use the Store's promotional materials on the Counter and, on occasion, her being required to provide service at other counters when staff at those counters were not available.

70. I do not find that the provision of training by the first respondent was a manifestation of control and influence. I find that most of the training the claimant undertook was provided by the second respondent, with the training by the first respondent being focussed on health and safety matters.

71. As I have said, it is not a necessity for contract worker status that there be control and influence, but I do find that there was control and influence in this case. I accept it does not go so far as full managerial control in that, for example, if disciplinary proceedings were going to be taken against the claimant that would be done by the second respondent rather than the first respondent. As **Harrods** makes clear, however, that degree of managerial control is not necessary to establish contract worker status.

1.3 <u>To establish herself as a contract worker does the claimant need to show that she carried out work for the first respondent?</u>

72. As discussed above at paragraph 16 and 21-25, I find that the test to be applied in deciding whether the claimant is a contract worker are the tests set out in **Harrods**. It is, therefore, necessary for her to show that she carried out work for the first respondent.

1.4 <u>If yes, does she satisfy this test on the facts?</u>

73. It was accepted that the first respondent purchased the stock for the Counter. The stock the claimant sold at the Counter belonged to the first respondent and the proceeds of sale also belonged to the first respondent. When the claimant took cash for the sale of goods, it was deposited in the first respondent's cash store.

74. I also found that the claimant also undertook refunds or exchanges for the first respondent which were not necessarily of products bought and sold at the Counter. That seems to me to support a finding that the claimant was doing work "for" the second respondent as does my finding that the claimant undertook promotional events for the first respondent which were arranged between them without reference to the second respondent.

75. Ms Wilson-Theaker suggested that in cases unlike the **Leeds** case (where there was an exceptionally close relationship between the employer and principal) there is a need to show some influence or control and that was not evident here. I

accept that submission to the extent that there is a greater need to show influence and control if other factors are less supportive of contract worker status. As I have said in response to question 1.6, I concluded that the first respondent did have control and influence over how the claimant carried out her work. I do not find that the facts pointing the other way (the absence of a uniform, the fact that only a limited amount of training was provided by the first respondent rather than the second respondent and the fact that holidays, disciplinary matters and pay were dealt with by the second respondent) sufficient to undermine a finding that the claimant did work "for" the second respondent.

76. I find that the claimant did carry out work for the first respondent.

1.1 Is the first respondent a Principal in accordance with section 41(5) of the 2010 Act?

77. I have found that the claimant was doing work for the first respondent. For it to be a principal, section 41(5) also requires that the claimant was employed by another person (section 41(5)(a)) and that she was supplied by that other person in furtherance of a contract to which the first respondent was a party (section 41(5)(b)). I am satisfied that both those requirements are met in this case. The claimant was employed by the second respondent and I have referred in my findings of fact to the contract between the first and second respondent pursuant to which the claimant was supplied. I therefore conclude that the first respondent was a "principal" for the purposes of section 41(5) of the 2010 Act.

1.2 If yes, is the claimant a contract worker in accordance with section 41(7) of the 2010 Act?

78. To fall within section 41(7), the claimant would have to be an individual supplied to the first respondent in furtherance of a contract to which it is a party. I find that the second respondent did supply the claimant in furtherance of the contract between it and the first respondent (pages 112 and 113). I therefore conclude that the claimant was a "contract worker" for the purposes of section 41(7) of the 2010 Act.

2.1 Was Samuel Borrikinni a worker supplied by Olympian Security to work temporarily for and under the direction of the first respondent?

79. I find that Mr Borrikinni was a worker supplied by Olympian to work temporarily for and under the direction of the first respondent.

2.2 If yes, who controlled his day-to-day responsibilities, was it William Fisher?

80. I find that Mr Fisher did have a role in controlling the day-to-day activities of Mr Borrikinni. I also find, however, that he had a limited authority to act on his own initiative, for example if he decided it was appropriate to apprehend and carry out a bag search of customer or member of the first respondent's staff. There was no suggestion that he would have to refer to Mr Fisher or another of the first respondent's employees before taking that step. If he did, in practice it seems likely

the bird would have flown. I accept that it was Olympian who set his rota, but it was the first respondent who controlled his day-to -day activities in the Store.

2.3 Was Samuel Borrikinni carrying out on a day-to-day basis acts on behalf of the Principal in line with the common law definition of "agent" and if so, in relation to which acts?

80. As discussed above, I find that **Kemeh** means that the claimant has to provide very cogent evidence that Mr Borrikinni was an agent of the first respondent, because when carrying out his role he was also an employee of Olympian. I accept that to establish an agency relationship, there must be very cogent evidence that Mr Borrikinni was authorised to act on the first respondent's behalf.

81. Miss Ferrario submitted that in this case Mr Borrikinni was (according to Mrs Rutherford's own evidence) carrying out searches where necessary, patrolling the shop floor or the entrance of the Store and carrying out searches of customers and workers. She said that was itself cogent evidence that he was carrying out work for the first respondent.

82. Ms Wilson-Theaker stressed that in **Kemeh** the Court of Appeal said it was not enough to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of the third-party employer. She reiterated that the test I had to apply was the common law test, in other words there had to be someone who was authorised to do something on behalf of the principal. In **Kemeh** what the Court of Appeal had effectively said was that the individual concerned should be standing in the principal's shoes in relation to third parties (**Kemeh**, paragraph 44).

83. In response to Ms Ferrario's submission that the security guards carrying out patrols etc. was cogent evidence to support the idea that they were agents, Ms Wilson-Theaker submitted that that was simply not the case. They carried out work alongside others but that was simply part of their duties under the contract. She submitted that the question was whether a person would understand Mr Borrikinni to be standing in place of the first respondent. She said that they would not. It was clear the first respondent needed a security guard but that was very different from someone acting as an agent and therefore she submitted there was no agency between the first respondent and Mr Borrikinni.

84. I have not found this an easy decision. The evidence from Mrs Rutherford was that certain tasks were only carried out by the first respondent's employees. This included contacting the police in relation to a customer or staff member. However, she did accept that the security guards like Mr Borrikinni did, of their own initiative, carry out searches of customers as well as employees. Sometimes those actions were in relation to third parties such as customers.

85. The question is whether that is in itself enough to constitute "very cogent evidence" that the first respondent had authorised Mr Borrikinni to act as its agent? I do not think that the "very cogent evidence required need necessarily be specific written authorisation to act as the first respondent's agent. However, it does seem to me that there is in this case very little cogent evidence about the basis on which Mr

Borrikinni was acting when carrying out his duties. It seems to me that some of the relevant evidence may be contained in the rules and policies which Mrs Rutherford referred to, but they were not before me.

86. Ultimately, I have concluded that the claimant has not provided the very cogent evidence required by **Kemeh** to support a finding that Mr Borrikinni was an agent of the first respondent for the purposes of section 109(2) of the 2010 Act. There is a lack of evidence about the basis on which he was acting when carrying out searches and apprehending. It does not appropriate for me to fill that gap with speculation in the absence of evidence. The claim that the first respondent is liable for Mr Borrikinni's actions as his principal under section 109(2) therefore fails.

Next Step

87. The next step is for a preliminary hearing case management to be convened. The parties will be asked to provide their dates to avoid for such a preliminary hearing.

Employment Judge Rhodri McDonald

Date: 12 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 June 2020

FOR THE TRIBUNAL OFFICE