



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113105/2018

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Held in Glasgow on 21 March 2019

Employment Judge: David Hoey (sitting alone)

10 **Miss O Nowicki**

**Claimant
In Person**

Skin Scotland Ltd

**First Respondent
Not present and
Not represented**

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Medica Skin Clinic

**Second Respondent
Represented by:
Mr R Ali -
Consultant**

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Samina Mohammed

**Third Respondent
Not present and
Not represented**

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Z1M1 Limited

**Fourth Respondent
Not present and
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

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- 1) The third respondent was the claimant's employer as at the date her employment ended and is liable for any sums found due to the claimant.
- 2) The claims as against the first respondent, second respondent and fourth respondent are dismissed.

E.T. Z4 (WR)

REASONS

1. The claimant had raised a claim for payment of a number of sums, with her claim being received on 3 August 2018. She had raised her claim against 3 respondents, none of whom had lodged a response form. At an earlier preliminary hearing a representative for the respondents had attended. It was noted that the first respondent had gone into liquidation. The claimant indicated that she was seeking the court's consent to progress with her claim. The agent for the respondents was of the view that the assets (and potentially staff, including the claimant) had transferred to a third party. That party was subsequently joined as a fourth respondent but had not lodged a response form. The first 3 respondents lodged a response form denying they employed the claimant at the material time.
2. This case called as a Preliminary Hearing to determine who the employer of the claimant was (and who would be liable for the sums sought by the claimant, if any).
3. The claimant attended herself. Initially there was no attendance by any of the respondents and attempts to contact their representative had not been successful. The case commenced around 10.15am whereupon I explained to the claimant that the purpose of the hearing was to identify who the claimant's employer was at the relevant time. The claimant began to lead evidence.
4. My clerk advised around 10.45am that Mr Ali had telephoned the Tribunal and had not realised the case was calling today but he would attend, albeit late. I adjourned the hearing to allow Mr Ali to arrive.
5. Upon resumption of the case I sought clarification as to whom Mr Ali was representing. He advised the Tribunal that his response form was intended to represent the original 3 respondents. I noted that the first respondent appeared to be in liquidation and the second respondent was identified as the trading name of the first respondent. The claimant had indicated that she intended to seek the consent of the court to proceed with her claim as against the first respondent. Mr Ali indicated that upon reflection he was representing only the third respondent.

6. The preliminary issue that required to be determined as indicated above was the identity of the claimant's employer. Both parties referred to a number of productions. The claimant gave evidence. I went through the evidence that was given in Mr Ali's absence so he knew exactly what was said before he arrived. Mr Ali initially led no evidence but after his submissions asked for leave to reopen his case and seek to lead new evidence. Initially he sought an adjournment to another day which I refused given he accepted that he had received notification of the Hearing. The overriding objective would not have been secured by delaying matters further, incurring further costs and delays in adjourning to another day.
7. Nevertheless as the Hearing was set down for the full day I permitted Mr Ali a 2 hour adjournment to consider leading further evidence. He had received communication as to the existence of the Hearing but had not checked the date or time. He subsequently led 2 witnesses, Ms Taylor, manager, and the third respondent. He also made reference to a few productions.
8. I make the following findings in fact from the evidence that was led and the productions to which reference was made in the course of the hearing. As I emphasised to the parties during and at the end of the Hearing, I make my findings in fact from the evidence that was presented and my assessment of it which I now do on the balance of probabilities having carefully considered the evidence in detail.

Findings in fact

9. At the end of February 2018 the claimant saw an advert on indeed.com for a beauty therapist in which she was interested. The advert stated that the post was with "Medica Skin Clinic". An immediate start was sought.
10. The claimant applied online for the role by sending her CV and ticked the box saying she had experience.
11. On 5 March 2018 the claimant received a call from the third respondent asking her to attend for an interview with the third respondent.

12. The claimant met with the third respondent on 6 March 2018. The premises had a sign above the door saying "Medica Skin Clinic". The third respondent told the claimant that she thought the claimant would fit into the business and that she could be trained on the machines for laser treatments. The discussion lasted around 5 minutes at the end of which the third respondent asked the claimant if she would like to work for her. The offer was subject to a trial shift running from 9am to 6pm on 7 March 2018. The claimant was required by the third respondent to purchase her own tunic until she could obtain her own uniform. The claimant accepted the offer.
13. A trial shift was completed on 7 March 2018 during which the third respondent directed the claimant in her tasks and supervised her. No discussion took place as to who the claimant's employer would be but the third respondent asked for the claimant's bank details which were provided verbally and written down by the third respondent at the end of the trial shift.
14. The third respondent told the claimant she would be paid every 2 weeks, with her first 2 weeks being worked in lieu (essentially as lying time). She would receive her first pay on 6 April (and if her employment ended she would be due 2 weeks' pay as her lying time).
15. The third respondent also told the claimant her hours would be 9am to 6pm Tuesday to Saturday, paid at the national minimum wage rate, with Sunday and Monday off each week.
16. The claimant worked for the third respondent on a day to day basis as was agreed with the third respondent. She was told what to do on a daily basis mostly by the third respondent, with the third respondent's manager giving the claimant instructions. Mr Ali also assisted the third respondent in the business occasionally.
17. No contract of employment or written statement was ever issued to the claimant. She was never told who employed her.

18. The claimant accepted the offer of the third respondent and was an employed beauty therapist. She understood her pay would be covered by the third respondent.
19. The claimant had heard of Medica Skin (the second respondent) but did not know what it was. She understood it was a trading name. She had also heard of the first respondent via media reports.
20. The claimant's wages were paid to her by bank transfer (following the claimant giving her bank details to the third respondent). The payments made to the claimant were as follows:
 21. On 6 April 2018 payment was from "Medica Skin" of £627.04.
 22. On 20 April 2018 payment was from "Medica Skin" of £598.14.
 23. On 8 May 2018 the claimant was told by the third respondent that as she was changing banks she would be paid in cash for that month. Mr Ali asked the claimant to sign a sheet that had her name and the sum of £521 next to it.
 24. On occasion the third respondent had discussions with the claimant and told her that the claimant was not making enough money and that the third respondent "might let her go". The third respondent was controlling the day to day activities of the claimant and acting like her employer.
 25. On 18 May 2018 the claimant was paid £573.49 this time from "Diva Beauty" which the claimant understood was a company related to a family member of the third respondent. The third respondent had told the claimant her sister had run a similar clinic in Livingston and the claimant would be paid via that company for various reasons.
 26. On 1 June 2018 the claimant was paid £565.22 via Diva Beauty again. The third respondent told the claimant again this was her sister's company. There was no suggestion given to the claimant during her employment that any other organisation or person was her employer.
 27. Prior to 14 June 2018 the third respondent had met the claimant and said she was not selling enough and had suggested that the claimant's employment

might be in jeopardy. The claimant was concerned as to the actions of the third respondent and how she conducted herself in relation to the claimant.

28. On 14 June 2018 the claimant was told by the third respondent that her (the third respondent's) job was "on the line" if the claimant did not cover the costs of the business. The claimant understood the third respondent was telling her that if the claimant had not made enough money (via sales etc) the third respondent's business (and therefore her job) was at risk. The claimant had a discussion with the third respondent who advised her that she (the third respondent) thought the claimant had "a bit of attitude" and that the claimant should "get her bags". The claimant was told by the third respondent that she "could easily find someone else". The claimant understood that to mean she was being dismissed.

29. The third respondent then said that "it's OK you can stay but you can leave if you want to". The claimant felt that she was unwanted and that she was not welcome in the business.

30. The claimant asked the third respondent to pay her the 2 weeks' lying time she was due and for the time she had worked up to her departure, 14 June 2018, which was a day before pay day.

31. Around an hour or so later the claimant received a message on her mobile telephone bearing to be from Mr Ali (from a mobile number that had been used by the business before). It noted that the claimant had left referring to her behaviour, referred to the heat of the moment and asked if the claimant reconsiders her position to let him know urgently. The claimant did not respond to that message. She was angry as to how she had been treated.

32. No P45 was sent to the claimant.

33. At no time during her employment was the first respondent ever mentioned by anyone in connection with the claimant's employment. For example at no time did the third respondent explain she was a director of the first respondent or that that the first respondent was the claimant's employer. The second respondent was a trading name.

34. The claimant had no idea who her employer was. She thought it was the third respondent (given the day to day interaction with the third respondent). She was not sure if there was a partnership perhaps with Mr Ali too (given his occasional involvement in the business).

5 35. The claimant was an employee and not a self employed individual.

36. The only mention of the first respondent given to the claimant was in a letter the claimant received from HMRC which was dated 26 March 2018 (received by her during her employment). This makes reference to the first respondent, but the claimant understood that this was perhaps a device through which the
10 third respondent was paying the claimant or some other forum (given the claimant had received her wages from different sources).

37. She received a similar letter after her employment ended, on 1 July 2018, again from HMRC again suggesting that the first respondent had paid tax in respect of the claimant, which was not known to the claimant as no one had
15 told the claimant when she was in employment that the first respondent was employer.

38. The claimant received no further communication from any of the respondents.

Observations on the evidence

39. This was an unusual case given the facts. The claimant accepted employment
20 and was given no clear information as to the identity of her employer. In the absence of a written contract that the claimant had signed or a written statement, the issue became one of credibility.

40. The claimant was clear and consistent throughout her evidence. She had
25 never been told that the first respondent was her employer. She had heard of them given issues that had arisen in the press. She knew the second respondent was a trading name but she did not know of the legal entity. The claimant knew that there was some connection between the first and third respondents but she was not given any details.

41. Both of the third respondent's witnesses maintained that the claimant had been given a contract of employment. Ms Taylor was adamant that this had been so but conceded that in fact she had never seen the claimant's contract nor had any direct knowledge of the claimant having been given a contract or having signed it. The third respondent believed that there was a contract in place in respect of the claimant but had not produced the document. I found the claimant's evidence on this point to be more credible and reliable.
42. A contract may well have been prepared by the third respondent (or an adviser) but I was not satisfied that the claimant had been given (or accepted) any such document. There was no evidence before the Tribunal that showed that the claimant ought to have known that the first respondent was her employer. Noone ever told her this.
43. It was alleged that the claimant had attended a meeting (with other staff) and the liquidator of the first respondent. It was alleged that the claimant was told that her (and all staff's) employment would transfer to the new employer (the fourth respondent) with all their rights being preserved. This was the evidence that Ms Taylor had provided. Her position was that all staff would continue to enjoy their existing terms and conditions and the only change would be the identity of the employer, who it was alleged staff were told would become the fourth respondent.
44. The claimant denied that she had ever been told her employment was changing. She was absolutely clear that her employment position remained constant during her tenure. The only issue was with regard to payment of her wages when she was told she would be paid via a different body.
45. I did not find it credible that staff would have been told that the only change was the identity of the employer and that all other terms and conditions would be protected. I note that in terms of Regulation 8 of the Transfer of Undertaking (Protection of Employment) Regulations 2006, significant rights staff enjoyed with their existing employer would be lost consequent upon a transfer (given the first respondent entered liquidation). That was contrary to what was allegedly said to staff.

46. The claimant was clear that she was never invited to any such meeting. No documentation was produced that supported the third respondent's position on this point. Had the meeting occurred as suggested, it was more likely than not that some correspondence would have been generated given the significance of the changes to those affected.

47. In any event I accept the claimant's clear evidence that she was never told that her employer was changing and was not present at any such meeting.

48. Finally it was alleged that the claimant was given pay slips regularly. It was suggested that these disclose the first respondent as the claimant's employer. Ms Taylor suggested she cut these up from the printer and provided a copy to the claimant every fortnight in an envelope. This was resolutely denied by the claimant. At best she was shown something on a computer screen but was not shown what it was. She was clear in that she was never given pay slips and was never explicitly (or implicitly) told who her employer was by the third respondent (or the first respondent). I accepted her evidence that she had never received any payslip or document showing the first respondent as her employer. This was never verbally communicated to her or otherwise.

49. The comment the third respondent made to the claimant about "losing her job" was understood by the claimant to mean that if sufficient income was not generated (by the claimant), the third respondent's business would falter and she would lose her income. I do not find that an unfair conclusion for the claimant to draw given the clear factual matrix facing the claimant, whereby no one had formally told her who her employer was and where the third respondent was directing and controlling her on a day to day basis.

25 **Submissions**

50. The claimant's position was, candidly, that she did not know who her employer was. She was not told at the time and had to try and work out the position following the ending of her employment when she realised she had not received the sums she believed she was due.

51. Having reflected upon matters, while she had learned of the involvement of the first respondent (as a result of her investigations after her dismissal) she did not consider that company to have in reality been her employer. At no stage was that communicated to her.

5 52. It seemed more likely to the claimant that the third respondent was her employer but she accepted it would be a matter for the Tribunal to assess.

53. Mr Ali argued that the claimant was clearly employed by the first respondent. He asked the Tribunal to accept the evidence of his 2 witnesses and find that the claimant had not properly recalled being given a contract and payslips. He argued she received a contract and payslips. He maintained that the paperwork supported the fact the first respondent employed the claimant.

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54. He argued that the claimant was given a contract and payslips that showed the first respondent as her employer which then changed to become the fourth respondent following its demise (on 18 May 2018).

15 **Decision**

55. This has not been a particularly easy decision to make in light of the evidence that was presented in the course of the Hearing (and the dearth of evidence). I required to assess the credibility and reliability of the witnesses given the clear disputes in relation to this central issue and given the absence of clear documentary evidence.

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56. Having done so, I accept the evidence led by the claimant. I found her reliable, credible and articulate. I did not accept that she was mistaken in her recollection. I considered that the third respondent's witnesses did their best to recall the position but I preferred the evidence of the claimant. At no point during her employment was the claimant ever told who her employer was. The absence of any direct or indirect communication to the claimant as to who others (such as Mr Ali and the third respondent) considered the claimant's employer to be created the uncertainty in this case despite the employer being a fundamental point.

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57. I can readily understand that the third respondent and Mr Ali believed that the first respondent was the claimant's employer. However, from the information presented to the claimant and the facts in this case that was not the position that was arrived at as a matter of fact and law.
- 5 58. At all material times the claimant was directed and controlled by the third respondent. She was interviewed by her. She was told her hours of work by the third respondent who also took the claimant's bank details and arranged for payment of her wages.
- 10 59. It was the third respondent who formally contracted with the claimant – following the interview – when the oral contract of employment was offered to the claimant by the third respondent (and accepted by the claimant). There was never any disclosed or identified principal on whose authority the third respondent purported to act. Looking at matters objectively in an attempt to understand who contracted with whom to form an employment contract (which was to be implied from the circumstances in the absence of anything in writing) the position was clear in my view: it was the third respondent who employed the claimant.
- 15 60. In light of the findings in fact, there is no basis for concluding that that the first respondent was the claimant's employer as argued by Mr Ali. The only mention of that entity was in an HMRC letter which was sent to the claimant independently of her contractual position. There was nothing given to the claimant by the third respondent that could reasonably have been said to counter the fact that the third respondent assumed the role of the claimant's employer from the facts.
- 20 61. All the other factors point to the third respondent being the claimant's employer. It was the third respondent that entered into contractual relations with the claimant, managed and directed her day to day activities and subsequently dismissed her.
- 25 62. I took account of the involvement of the other parties, including Mr Ali and Ms Taylor. Whether or not there was some association with Mr Ali did not affect her conclusion, which I conclude was a reasonable (and frankly the only)
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conclusion to reach in light of the facts as they presented themselves to the claimant. The fact the third respondent had engaged others to carry out day to day activities did not alter the position.

5 63. It was accepted that the claimant was an employee (rather than self employed). At no stage was there any suggestion that she was self employed. The only issue was the identity of her employer.

10 64. In all the circumstances therefore the third respondent is the party who is liable for any sums due to the claimant in terms of her claim. The claims as against the first respondent, second respondent and fourth respondent are accordingly dismissed.

65. Case management matters are dealt with under a separate note.

Observation

15 66. This case is a good example of the importance of employers issuing a written statement of particulars as required by Part 1 of the Employment Rights Act 1996 and of the need for clarity in communications with employees which should ideally be in writing.

67. By communicating with employees in writing the position is clear and this avoids the need to rely on oral evidence (given memories can fade etc). For example, had the claimant been told in writing the details as to her employment or even to confirm the ending of her employment (whether in a P45 or otherwise) the preliminary issue in this case would have been resolved far easier.

Employment Judge:

David Hoey

Date of Judgement:

22 March 2019

Entered in Register,

Copied to Parties:

27 March 2019