



EMPLOYMENT TRIBUNALS

Claimants: Mrs D Booton and others (formerly Mrs Farmer and others)
(as per attached schedule)

Respondents: (R1) Hinckley Carer Support Scheme (a charity)
(R2) Ms Gemma Ball
(R3) Mrs Gillian Ball
(R4) Mrs L Wilson
(R5) Mr Roger Ellis

Heard at: Leicester

On: 10 July 2020

Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Ms Nabila Mallick of Counsel

Respondent: Mr Jack Feeny of Counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal Judge is that:-

The Second, Third and Fourth Respondents were *not* the Claimant's employer at the effective date of termination of the Claimant's employment and are therefore not liable for any claim by the Claimants. The claims against the Second, Third and Fourth Respondents are therefore dismissed.

REASONS

1. These proceedings involve 17 or so Claimants who are variously bringing complaints of an unlawful deduction of wages, damages for breach of contract and a redundancy payment. Some of the claims are against the First Respondent only but the majority are against all of the five Respondents. The Claimants were until recently all representing themselves and most of them have attended the previous open Preliminary Hearings. It was suggested to them that they may wish to pool their resources and instruct someone on their behalf as it was clear that they were understandably finding it difficult to navigate their way through these proceedings. The amounts involved individually as well as the uncertainty of being able to recover anything has clearly been a deterrent. They have recently instructed Ms Mallick of Counsel who has kindly accepted instructions on a pro bono basis. For those who have not instructed Ms Mallick a copy of this decision should be sent to them direct. I am grateful to Ms Mallick for her

carefully prepared submissions in respect of this preliminary hearing which was as will be explained below was dealt with on paper alone. I am also grateful for the carefully prepared submissions from Mr Jack Feeny of Counsel who represents the Second, Third and Fourth Respondents only.

2. The First Respondent, a charity under the name of Hinckley Carer Support Scheme ('the charity') which employed the Claimants has now been wound up. The Fifth Respondent, Mr Roger Ellis, is the former Chairman of the Management Committee of the First Respondent. Neither the First nor the Fifth Respondent have taken any part in these proceedings. Neither of them have entered a Response (the ET3 Form) and neither of them have attended or been legally represented at any of the hearings held so far. I was informed by the Claimants at the first of the attended open Preliminary Hearings that the address to which papers were served on both was correct. A Rule 21 judgment (sometimes referred to as a 'default judgment' though that is not what the rules call it but that term is widely understood) was entered against all of the Respondents on 1 July 2019. The Second, Third and Fourth Respondents, all represented by Howes Percival, subsequently applied to have the default judgment against them revoked. The judgment against both the First and Fifth Respondents still stands. There has been no application at any point for it to be set aside or revoked.

3. All of the Claimants were employed by the First Respondent in various administrative roles from various dates. The charity was registered with the Charity Commission. It has now been removed from the Register though at the time of the first Preliminary Hearing that was not the case and the registered Trustees included the names of the Second, Third and Fourth Respondents. The stated charitable objects of the First Respondent were to benefit disabled, infirm and terminally ill or otherwise ill people and their carers. It appears to have relied on funding from various sources. It had a written Constitution, a copy of which is produced in the bundle which will be referred to in more detail below, which governed its procedures.

4. The charity seemingly ran into financial difficulties in May/June 2018. The minutes of a meeting in August 2018 state that the financial information available to the Trustees "seemed to identify that the scheme was no longer solvent". All of the staff were called to a meeting by Mr Ellis on or around 30 October 2018 and told that they were at risk of redundancy. It is not clear what the degree of consultation was but it appears that most if not all of the Claimants were later told at an impromptu meeting on 7 November 2018 that they were being made redundant forthwith. Apart from being given some information as to how they could make claims against the Secretary of State (the Insolvency Service), very little assistance appears to have been provided to them. When the Claimants subsequently did make applications to the Insolvency Service they were informed that because their employer was not deemed insolvent, no payment whatsoever would be made to them. Thus they have been left in a state of limbo without payment for arrears of wages, notice pay and (for those who qualify) a redundancy payment. I understand that any claims for payments from the Secretary of State have been rejected. The only letter I have seen though is to Mrs Booton (now the lead claimant in place of Mrs Farmer) from the Insolvency Service dated 19 November 2018 which gives the reason for rejection as being "...your employer is not insolvent as described in sections 166 and/or 183 of the Employment Rights Act 1996". It does not identify who the Secretary of State considers was the claimant's "employer".

5. As a result, claim forms were presented individually on various dates from

January 2019 onwards by these claimants individually as litigants in person. I will not set out the dates and particulars of each of the claims. There is no material factual difference between all of them and the present issue to be determined is common to all. The full list of the claimants is set out in the schedule attached to this decision.

6. As a result of the fact that no ET3 forms were submitted (or believed to have been submitted in time) or because the claims appeared to be undefended, default judgments were entered against all of the five Respondents. The Second, Third and Fourth Respondents obtained legal advice and representation and made applications to have the judgments against them personally to be set aside.

7. At a Preliminary Hearing on 10 October 2019 it was decided that (for the reasons set out in the decision of that date) the judgments against the Second, Third and Fourth Respondents would be revoked.

8. At a further Preliminary Hearing on 20 March 2020, by which point the majority of the Claimants had instructed Ms Mallick, there was a discussion as to the best way forward to determine the claims. The Claimants had default judgments against the First and Fifth Respondents but these were practicably unenforceable as the First Respondent had no assets and the Fifth Respondent either had no assets or was untraceable. Counsel on both sides agreed that the best way forward was for a preliminary hearing to take place to decide whether the Second, Third and Fourth Respondents were at the material times the Claimant's employer. It was agreed that this could be dealt with by way of written representations given that there was no substantial dispute of fact. Case management orders were made in relation to disclosure, preparation of a bundle and exchange of written representations which have all been complied with. There is no dispute in principle that all of the Claimants are entitled to their unpaid wages (subject to proof and assessment), damages for breach of contract where applicable and, depending on their length of service, to a redundancy payment. The question is: who is ultimately liable to pay that and in particular whether it includes the Second, Third and Fourth Respondents personally?

9. Accordingly, the issue that was defined at the Preliminary Hearing on 20 March 2020 and which falls to be decided at present is as follows:-

"Whether the Second, Third and Fourth Respondents were at the material times Trustees and/or members of the Executive Committee of the Hinckley Carer Support Scheme and consequently whether they are personally liable as employers of the Claimants in these proceedings. The material times are agreed as any dates after 1 November 2018 which is when all of the Claimants would have been dismissed."

10. On 17 August 2018, Ms Gemma Ball, the Second Respondent, submitted her written resignation to Mr Ellis. The relevant part of her letter states:

"Unfortunately in view of the accounts evidence, I cannot support the present hiatus and regretfully tender my resignation as a trustee of the Hinckley Carer Support Scheme."

11. On the same day Ms Gillian Ball, the Third Respondent herein, submitted her written resignation in more or less identical terms.

12. On 13 September 2018, by an e-mail timed 23:47 Ms Linda Wilson, the Fourth Respondent submitted her resignation.

13. On or around 7/8 November 2018 all of the Claimants in these proceedings were dismissed from their employment by reason of redundancy.

14. Within the agreed bundle for this preliminary hearing is a copy of the Constitution of the First Respondent. It is a relatively short document consisting of no more than 7 paragraphs. There are no relevant provisions as to retirement or notice from Trustees. Clause 5 is as follows:

“5. Management Committee (The Trustees)

(a) The Trustees shall be responsible for the formation of the overall policy for the running of the Scheme for the active pursuit of its objects and for the control of all matters related to the Scheme’s running and finance and shall and shall be authorised to have full power and discretion in these matters subject to the overall authority of the members in the General Meeting.”

THE LAW

15. I have been referred to the following cases in written submissions:-

Finch v Oake [1896] ICH 409

Re: London Marine Insurance Association [1969] LR 8 EQ 176

Conservative and Unionist Central Office v Burrell [1982] WLR 522

Affleck v Newcastle MIND [1999] IRLR 405

Nazir v Asim [2010] ICR 1225

Conclusions

16. It is agreed, and if it was not there can be no doubt, that the First Respondent was an “unincorporated association”. The First Respondent satisfies the definition as set out in **Conservative and Unionist Central Office v Burrell** namely:

“Two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings each having mutual duties and obligations in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will”

17. It is not disputed, following **Nazir v Asim** [2010] ICR1225, that a person employed by an unincorporated association is employed by the Executive Committee of that association, and more specifically, the individuals who may comprise a committee of that association.

18. Insofar as it is disputed (as the point is not the subject of contrary submissions by Ms Mallick) I find - as I did at the preliminary hearing on 10 October 2019 - that in the absence of any express agreement a resignation given on a particular date is effective on the date it is received – see **Finch v Oake**.

19. It is not disputed that a member who authorises contracts, or is impliedly participant of any contract by reason of membership of the board on behalf of the association, will incur liability in respect of contracts made whilst he was a member – see **Re: London Marine Insurance Association**.

20. Although no issue is raised in respect of any distinction between the Trustees of the charity and members of the Management Committee, I am satisfied that there is no distinction to be drawn between the two. Although there is no provision within the Constitution that defines ‘Trustees’, the heading of clause 5 suggests that the roles of Trustee and membership of the Management

Committee are synonymous. Resignation as a member of the Management Committee will therefore mean resignation as a Trustee and vice versa. The question is whether the Second, Third and Fourth Respondents validly resigned as Trustees on 17 August 2018 and on 13 September 2018. I am satisfied that they did so.

21. The next issue is when the dismissals took place. Ms Mallick argues that this was on 20 June 2018 when redundancies were contemplated and when members of the Management Committee were taking advice from an external body on the redundancies. Included in the bundle are minutes of meetings of 17 August 2018 at which the Second, Third and Fourth Respondents were all present.

22. I am not satisfied that the dismissals of these Claimants took place in August 2018. At that time there were discussions as to what should be done but nothing definitive. In my view the dismissals occurred on 7 November 2018 for the following reasons:-

22.1 The majority of the Claimants have given their date of dismissal as 7 November 2018 or later in the ET1 Forms. Some of them say it was 8 November but that makes no real difference. Mrs Paula Farmer and Mrs Julie Gibbard give their dates of dismissal as 17 December. It is possible they may have been retained to stay longer as they were in managerial roles and may have been required to oversee the winding up of the affairs of the charity. But a date in December does not suggest a dismissal likely to be in June and if it was those claimants might well be out of time for making a claim anyway. Whilst it is possible that most of the Claimants may have misunderstood when their employment *legally* ended, their view on the effective date of termination is nevertheless an important consideration.

22.2 There is nothing in the minutes of the meetings in August 2018 to suggest that dismissals had already occurred. The charity and its Executive Committee were still seeking advice as to the processes to be followed.

23. I am therefore satisfied that the relevant date of dismissal for the purpose of these claims is therefore 7 November 2018 or after that date and not some date in June 2018.

24. In relation to the identity of the employer, I have been taken to the Employment Appeal Tribunal's decision in **Affleck v Newcastle MIND** and in particular the following passages from the Judgment of Mr Justice Morrison (President):

"1. Who is the employer in circumstances in which a registered charity and an incorporated association has members of staff who are dissatisfied with the treatment they received during the course of their employment and by the circumstances in which they came to be dismissed? That is the question at issue in this case. There are two decisions of Industrial Tribunals which concluded that the answer to that question was that the employees of that charity were employed by all the members of the charity. That decision will have come as a nasty shock, I am sure, to people who had become members of Newcastle MIND, because it would not have occurred to them that by paying a subscription and making a contribution to the charity they had exposed themselves to the potential liability that arises in these cases.

2. It seems to us at the end of the day that the position as to the identity of the employer in a case such as this can be answered in a straightforward manner. The Charities Act 1993 imposes statutory controls and restrictions upon registered charities. The Act does not apply to every charity but it does apply to this charity. It is plain from looking at the structure and definitions in the Charities Act 1993 that Parliament has

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recognised the different legal personae that a charity may have in law. A charity may be created through a Royal Charter. It may be a company, registered under the Companies Act. It may be a simple trust with trustees, or it may be, as in this case, an unincorporated association.

3. The Charities Act is apt to apply to charities registered under the Act in whatever guise they come. Furthermore, it seems to us that the question as to who is the employer is to be answered, not by reference to the Charities Act itself, but by reference to the general law which applies in this case to unincorporated associations. Unincorporated associations themselves take various forms. In this particular form, the assets of the unincorporated association do not belong to the members. They are imprinted with a charitable trust. They are held in this particular case, by trustees under the rules of the unincorporated association. It is not like a members' club where the members themselves may be said to own the assets of the club of which they are a member so that on its dissolution they will be entitled to a proportionate part of the money. In this case, if a charity comes to an end and there is property available then that property will be applied for charitable purposes. Those purposes will of course include the necessary administration which must be carried on so that the charity may be administered in a proper manner.

4. In the case in question, it seems to us quite clear that the management function of this charity was vested in the executive committee of the charity. It so happens that by reference to section 97 of the Charities Act 1993 the people who have the general control and management of the administration of a charity, that is, in this case, members of the executive committee, are also charity trustees within the meaning of the Act because section 97(1) defines for the purposes of the legislation charity trustees as meaning "the persons having the general control and management of the administration of a charity". The fact that members of the committee were under the Act charity trustees does not alter the position at law in relation to employment relationships."

25. It is agreed that the First Respondent was an unincorporated association. As clause 5 of the Constitution makes clear, the management function was vested (as in **Affleck**) in the Management Committee. It is not suggested that the assets of the unincorporated association belonged to the members but rather were held by the Trustees under the rules of the charity. The Trustees and the Executive Committee were in this case, as in **Affleck**, the same people. The circumstances of **Affleck** are materially the same as the charity in this case. Accordingly, I am satisfied that when the First, Second and Third Respondents had resigned from their roles as Trustees before the claimants were dismissed. As such the claims against them must be dismissed.

26. Ms Mallick argues that **Affleck** is not directly relevant as it was concerned with examining the issue of continuity of employment and not the identity of the employer. I do not agree. The decision is clearly about the identity of the employer as the first sentence of the judgment in paragraph 1 makes clear.

27. I will deal with one other point which did not originally appear to be in issue but now seems to be relied upon on behalf of the Claimants. That is whether the resignation letters were a sham and therefore not effective to amount to a resignation.

28. There is no reason advanced as to why the Second, Third or Fourth Respondents would concoct a sham resignation. No evidence has been provided in support of the proposition and the argument has no factual basis. If it is suggested that the relevant Respondents "jumped ship" when they saw it was sinking there was nothing legally wrong in doing so in order to avoid personal liability. A Trustee is entitled to protect their own position.

29. For the reasons given, the claims against the Second, Third and Fourth Respondents are dismissed.

30. So what happens now? As the issue of the identity of the employer is determined (subject of course to any appeal against this decision) the Claimants may wish to re-submit their claims for sums from The Insolvency Service along with a copy of this decision. It is clear that the First Respondent has been wound up. It is not however clear whether the Fifth Respondent is insolvent or whether there are any other reasons for the Insolvency Service not to make payments under the relevant statutory provisions. If the Fifth Respondent is not insolvent the claimants still have a remedy against him personally. The claimants should give an indication of what they wish to do within 21 days of the date this judgment is sent to the parties, or as soon as possible after that.

Employment Judge Ahmed

Date: 13 August 2020

JUDGMENT SENT TO THE PARTIES ON

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