



EMPLOYMENT TRIBUNALS

Claimant: Miss Karen MacGregor

Respondents:(ET1)(1) 1) Mr Kevin Augustus Kavanagh

(ET1)(2) 1) 4 Front Design Ltd (in Creditors Voluntary Liquidation)
2) Soho Offices Ltd
3) Reynolds Venue Ltd
4) Property Soho Ltd
5) Greasy Spoon Eats Ltd

**Record of at Open Preliminary Hearing heard by CVP
at the Employment Tribunal**

Heard at: Nottingham

On: 23 November 2021

Before: Employment Judge P Britton

Representation

Claimant: In person

Respondent: (See explanation below)

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The Claimant was an employee of either Kevin Augustus Kavanagh or 4 Front Design Ltd.
2. As to the 1st claim the Respondent continues as being Kevin Augustus Kavanagh.

3. As to the 2nd claim it is dismissed against the 2nd – 4th Respondents and will continue only against the 1st Respondent namely 4 Front Design Ltd. But as it is in Creditors Voluntary Liquidation, I order re-service upon the Liquidator as per the address set out in my orders.

4. Other orders are also hereinafter set out.

REASONS

Introduction

1. Suffice it to say that the summary of the 2 claims and what they are about is set out in the record of the Case Management Hearing heard by Employment Judge Hutchinson on 5 July 2021. As he made plain and having considered both the claims and the responses thereto there was an issue as to who was the employer. What he did was to decide that there should be a Preliminary Hearing to deal with that issue. He noted that neither party had appeared before him. But it was then established shortly thereafter that both parties had contacted the Tribunal to say that they were not fit to participate.

2. In any event the Preliminary Hearing was therefore ordered to be heard on 21 September 2021 and it came before Employment Judge Broughton. It is to be noted first that at his Case Management Hearing on 5 July Employment Judge Hutchinson had made orders for the Preliminary Hearing namely that there should be an agreement on documentation to determine the issue; thence the preparation of the trial bundle for the Preliminary Hearing would be undertaken by Mr Kavanagh the principle Respondent and this bundle was to be prepared by 24 August. Second that the parties would exchange witness statements on the issue by 7 September 2021. Neither of these orders has been complied with.

3. In any event the parties having been provided with notice of the hearing before EJ Broughton neither attended, and so she made an order on 29 September 2021 specifically focusing on the Claimant as of course its her case for her therefore to proceed with, requiring by 7 days an explanation as to the lack of attendance and some documentary evidence as to her ill health.

4. As it is the Claimant had already emailed the Tribunal on 22 September to the effect that she was unable to appear the day before because of depression. And Mr Kavanagh had emailed actually on the morning of the hearing at 10.33am to the effect that he couldn't attend as he was at hospital for a scan on his lungs viz Covid.

5. So, then what happened is that on 4 October the Nottingham Welfare support organisation emailed the Tribunal to the effect that they were trying to assist the Claimant to obtain a personal independence payment (PIP) and that she had problems getting Universal Credit, and setting out the appeal application which essentially cited again that she was suffering from anxiety and depression and which was hampering her ability to undertake such as normal day to day living and thus is to be read in being able to conduct her case.

6. Suffice to say, that Employment Judge Adkinson on 20 October ordered this Preliminary Hearing and the parties were informed of the listing by the usual notice on 23 October. The principle item on the agenda was “to determine whether the Claimant was employed by the Respondent and/or Companies he owned and if so who employed her”.

7. Yesterday, Mr Kavanagh contacted the Tribunal to the effect that he had “only just heard about the hearing from Miss MacGregor.” Stopping there I find that unusual because Miss MacGregor told me that she is not on speaking terms with him and has not been for some months. Second that he was “too ill”. He provided no details as to what his illness is, and he has never supplied any medical evidence such as a letter from his GP in support of the fact that he has now failed to attend three hearings. This is unsatisfactory. And as the Claimant was able to attend I have decided to proceed.

8. The only documentation that the Tribunal has ever received in this matter was some attachments by Mr Kavanagh to the defence (ET3) to the 2nd claim and in particular his reference to an invoice dated 1 February 2021 which in effect he says is fraudulent. When I looked at said document it is to be noted that the invoice sent out for the purposes of rent due from a tenant was headed Reynolds Venue Limited but as to where payment should be made to set out was the Claimant’s name and her bank account details. So, Mr Kavanagh was saying that this was evidence of “embezzlement” by the Claimant. As to who dismissed the Claimant, however, in that second ET3 he stated against this background of a breakdown in the relationship between him and the Claimant, which I don’t need to rehearse and alleged repeated fraud/embezzlement of his businesses over the years by the Claimant who had been employed in effect as a Property Manager and indeed was a Director at one time of the Respondent’s Soho Offices Limited, that this time despite his desire to avoid such as bringing in the Police because he alleged it would only worsen relationships between him and the Claimant and in particular relating to their 16 year old daughter that nevertheless “I felt I needed to dismiss her”. He gave the date of the dismissal as December 2020. Curiously at the same time he stated that she was “self-employed” at all times on a “schedule D”. So what that tells me is that there was really two issues here, namely whether or not the Claimant was self-employed or an employee and second if she was an employee that on the face it he was confirming that he had dismissed her.

9. The Claimant told me that the history of matters is complicated in a way but in other ways to me it is quite straightforward. The Claimant was on her evidence a key player in Mr Kavanagh’s property businesses. The principle vehicle had been 4 Front Design Limited and she pleads that she was in effect fraudulently removed from that Company as a Director in 2014. Well I’ve looked at the Company House detail and I can see that she is recorded as having resigned on 28 December 2014. But really it is quite irrelevant because we are dealing with matters at the back end of 2020. In that respect the Claimant in her first ET1 stated that the employment had started back on 1 January 2005 and that she was dismissed on 1 February 2021 by Mr Kavanagh. I have already referred to what he says in the combined defence to the two claims.

10. Stopping there these claims are clearly absolutely totally linked together and

therefore as it has not been done before I hereby formally consolidate them.

11. So that brings me on to determining the nature of the working relationship and as to whether or not the Claimant was an employee and if so of whom. The Claimant told me today that even though the two of them split up as in terms of their relationship in 2015 she continued to in effect be the right hand person of Mr Kavanagh in terms of his business affairs. And she therefore undertook an instrumental role in guiding the fortunes of the business which then was principally through 4 Front Design Limited and is engaged in property in London.

12. She then explained how because of Corona and problems with in particular one freeholder of one of the commercial properties that they let not being prepared to accommodate a reduction in rent due to the impact of Corona, that she went about disassembling the property portfolio which was within 4 Front Design Limited, hence she set up the other four companies referred to in ET1(2). Again I've looked on the Companies House website and I can see that the 2nd was set up on 27 October 2020, the 3rd on 29 October 2020, the 4th on 26 October 2020; the 5th – Greasy Spoon Eats Limited was actually incorporated on 9 September 2019. It is then to be noted that as regards the 2nd, 3rd and 4th of those Companies all of them are overdue in filing the confirmation statement with Companies House and of course this is a fundamental requirement.

13. So, on the face it maybe those Companies are not trading. But of course there is the issue of the Reynolds Venue Limited invoice to which I have previously referred. In any event what the Claimant tells me is that she therefore went about this task of transferring assets out of 4 Front Design Limited for the reasons I have gone to.

14. She then told me that in effect she was never paid until we get to Reynolds Venue Limited by any of these Companies other than 4 Front Design Limited which Mr Kavanagh used as the vehicle to pay her on the face of it the very low wage of £120 per week for 16 hours, although it is clear from the statement set out in the ET1 and what she told me today that she received other benefits such as a sourced car and bonuses. I asked her therefore about the payment of approximately £1200 from Reynolds Venue Limited purported to be February 2021, and she told me that this was the vehicle by which Mr Kavanagh decided to pay her a bonus. Although it purported to be an invoice to be paid to Reynolds Venue Limited it was always intended that the money would go direct to her.

15. I intend to say no more about this summary other than there maybe issues for the parties to consider should there be a main hearing in this matter and in relation to accounting to HMRC for what would appear to be taxable remuneration. There is a secondary issue which is really not for me which goes to that 4 Front Design Limited is in Creditors Voluntary Liquidation and indeed winding up was commenced on 22 September 2021 and there is a Liquidator. Of course, the proceedings now need to be re-served upon that person. And I say no more than that the Liquidator may or may not be interested in what may have happened to the original asset portfolio of 4 Front Design Limited given what I have just said. But these are matters that the parties will need to think about in due course and are not for me today.

16. What I can establish from what the Claimant told me, and I have no evidence before me to the contrary from Mr Kavanagh, is that she was never registered as self-employed with the HMRC. She was always treated as an employee and asked repeatedly of Mr Kavanagh over the years for such as a contract of employment and wage slips. But she told me that there has never been issued a P60. Also post the ending of the working relationship she has never received a P45. But she explained in detail all the work that she in fact did for Mr Kavanagh. All that needs to be said is in the absence of evidence to the contrary that I am satisfied that she was an employee. So, the question then becomes as to who was she employed by? The Claimant has narrowed it down to being Mr Kavanagh because of the way in which these Companies were run and his relationship with her and if not him then 4 Front Design Limited. So, I am going to dismiss the claim against the other 4 named Companies as I have no evidence even from the Claimant that any of them employed her. Thus the issue of who was the employer in terms of Mr Kavanagh and 4 Front Design Limited can be determined at the final hearing.

17. The next point to make is that the Claimant has sought in her claims to ask for compensation for emotional distress/injury to feelings. But her claims are ones of unfair dismissal, breach of contract (notice pay), holiday pay, outstanding wages and "other". As to what the other might be is not at all clear and I am still none the wiser. All those claims come within the Employment Rights Act 1996 and there is therefore no provision to make an award for compensation other than for financial loss. And on the unfair dismissal claim her basic award would of course be confined to the usual multiplier given the length of service and the weekly wage of £120. She was aged 50 at the effective date of termination and on what she says had been employed for 16 years at the effective date of termination which would mean that her entitlement as to basic award on a full win would be £2280. And otherwise, she cannot claim for loss of earnings post the dismissal for more than a maximum period of 52 weeks as any award is capped to that extent and the notice entitlement to which she would get which would normally be 12 weeks would of course be subsumed into that amount.

18. Also she has not set out at all as to what is the claim for outstanding holiday pay or unpaid wages. I pointed out to her that there are time limits. First there is a 2 year limit on the amount of back pay that could be awarded and second if she had taken holiday and thence there was a gap of more than 3 months before the next holiday then the carry forward wouldn't apply to those preceding holiday periods. And that begs the question as to whether she ever did take any holiday and to turn it round another way did she every ask for any. From the text messages that I saw attached to the second ET3 via Mr Kavanagh, the Claimant appears to have taken at least one holiday because she was asking for some monies by way of purchases and all that needs to be said that she then told me that's got nothing to do with it because that's personal, but how can that not engage if she's claiming for holiday pay? It means at the present moment the claims are to some extent in disarray and need far more particularisation and focusing on the time limits in particular relating to those two claims. The next point to make is that the flavour to be gained from both the ET1 and the two ET3's is that the working relationship in this case had by the time of the Claimant's dismissal become parlous. Therefore I pointed out to the Claimant that a Tribunal might find even if she was unfairly dismissed that engaged was the well known authority of **Polkey v A E Dayton** and thus as to how long this employment would really have lasted in any

event. So I asked the Claimant to consider all that, and the same applies to Mr Kavanagh, and as to whether this matter really needs to go before the Tribunal or could be settled between them via ACAS. But that is not for me today other than as an observation.

19. That brings me to the way forward.

1. It is not good enough for Mr Kavanagh to on each occasion simply say that he is too ill to attend without further evidence. Bear in mind, and she maybe wrong, that the Claimant says that he simply using this as an excuse. What it means is that I am making an Unless Order which is set out hereinafter. If he does not comply, then he will be struck out from defending the case.

2. As to 4 Front Design Limited we shall just have to see what the Liquidator decides to do in relation to the claim following it having been served upon her. I then observed the following that the Claimant told me that the company was in Liquidation. She didn't tell me that it was a CVL. This is important because a CVL does not prevent the case proceeding against that Respondent. So, its fundamental that the Tribunal finds out as soon as possible from the Liquidator as to what she intends to do. That may depend upon what assets might be available for distribution and of course the Claimant's status as an unsecured Creditor should she succeed against 4 Front Design Limited.

3. As to the final hearing it seems to me that the case can actually be got through by a Judge with full knowledge of this case, i.e. me given my extensive reading in, comfortably within about 3 hours.

20. Against that background I make the following orders.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Unless the 1st Respondent, Mr Kevin Augustus Kavanagh provides a full explanation for his nonattendance on what is now 3 occasions supported by a letter from his Doctor **by Friday 14 January 2022** then he will be **struck out** from defending this case by way of unreasonable conduct/failure to comply with the Tribunals orders.

2. In any event **not later than 6 December 2021** the Claimant will provide a schedule of loss setting out what she is claiming and by reference to calculating the basic award and future loss given what I have explained to her. She will set out full details of what she is claiming by way of unpaid wages and as to why and the amount and the dates involved and likewise as to her holiday pay claim. She will set out as to why she therefore says those claims or part of them are in time.

3. The 2nd claim **is to be re-served in relation to 4 Front Design Limited upon the Liquidator** who is Laura Ann Walshe, Gill House, 140 Holyhead Road, Birmingham, West Midlands, B21 0AF. She will have **21 days** from the service thereof to provide a response indicating whether or not the Company now being in Creditors

Voluntary Liquidation wishes to defend the claim or not. She will of course be sent a copy of this Judgment.

4. At present I hereby relist this matter before me on **Tuesday 1 March 2022 commencing at 10.00am to be heard by Cloud Video Platform**. Joining in details will be sent in due course. Presently the intention will be to determine the unfair dismissal and other claims should they continue to be defended and if not address remedy.

Employment Judge P Britton

Date: 7 December 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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Notes

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.**
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.**

(iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:

<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>

(v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so*”. If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.