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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106872/2019

Final Hearing held by Cloud Video Platform (CVP) on 7 May 2021

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Employment Judge F. Eccles

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Mr W Paton

**Claimant
Represented by
Mr P Santoni -
Solicitor**

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Redstones Hotel

First Respondent

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Seray Ltd

Second Respondent

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Mr Serkan Aydin

Third Respondent

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Sattar Leisure Limited

**Fourth Respondent
In Attendance
Ms S Iqbal -
Company Representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

5 The Judgment of the Employment Tribunal is that (i) the first respondent is not a legal entity and shall be dismissed from the proceedings; (ii) the second respondent as a dissolved company shall be dismissed from the proceedings; (iii) the third respondent directly discriminated against the claimant in terms of Section 13 of the Equality Act 2010 and shall be ordered to pay compensation of £7,774.20 for
10 financial loss and £2,000 for injury to feelings & (iv) the fourth respondent is not liable for the claimant's unfair dismissal or discrimination and shall be dismissed from the proceedings.

REASONS

15 BACKGROUND

1. The claim was presented on 13 May 2019. It has a complicated procedural history including the addition of two respondents. The claim was for unfair dismissal, disability discrimination a redundancy payment and breach of contract (notice pay). On 31 July 2019 a request was received from Croner
20 HR on behalf of the second respondent for a copy of the ET1 and an ET3 form to complete. No response was presented by the second respondent. The third respondent was added to the claim on 6 August 2019 following amendment of the claim. In correspondence to the Tribunal dated 7 August 2019, an HR representative for the third respondent stated that the claimant
25 had not been dismissed and was still on the company payroll. On 11 September 2019 Croner HR informed the Tribunal that they were no longer instructed by the second respondent. An ET3 was lodged on behalf of the third respondent on 1 October 2019 but rejected as out of time. The fourth respondent was added to the claim by Order dated 13 October 2020. No
30 response was presented by the fourth respondent.

2. A final hearing was listed for 6 January 2020. Mr P Campbell, Solicitor attended the above hearing on behalf of the third respondent. He was permitted to participate in the hearing to explain that the ET1 had been served at the address of the third respondent's Accountant who had been out of the country. There being no objection from the claimant, the hearing was postponed for re-service of the ET1 on the third respondent. Mr Campbell agreed to accept service of the ET1 at his business address. Following service of the ET1, Mr Campbell sought an extension of time to lodge a response. An extension was granted by the Tribunal to 27 February 2020. The claimant made an application for additional information and provided the Tribunal with a Schedule of Loss.
3. A final hearing was listed for 14 May 2020. The hearing could not proceed because of the coronavirus pandemic. The hearing was converted to a telephone conference call to discuss case management. Mr Campbell was permitted to participate in the above conference call. Mr Campbell explained that he had not expected to participate in the call but having been contacted by the clerk he was attending out of courtesy to the Tribunal and to confirm that he had been unable to obtain instructions from the third respondent to lodge a response to the claim. Mr Campbell wrote to the Tribunal on 17 June 2020 requesting an extension of time to respond to correspondence he had received from the claimant's representative. No further correspondence was received from Mr Campbell on behalf of the third respondent. No response was presented by the third respondent.
4. On 7 September 2020 the claimant made an application to add the fourth respondent to the proceedings. The application was granted and a copy of the ET1 served on the fourth respondent on 13 October 2020. The fourth respondent did not present a response to the claim. The claimant sought a default judgment against the fourth respondent. It was considered appropriate to list the claim for a preliminary hearing to discuss further procedure.

5. A preliminary hearing was held on 29 March 2021. Mr Campbell was permitted to attend the hearing but was without instructions. He informed the Tribunal that the third respondent is now resident in Turkey. He offered to provide details of the landlord of the Redstones Hotel on the basis that they were understood to have taken possession of the premises. It was considered appropriate to list the claim for a final hearing. The issues to be considered at the final hearing were identified as including: -

a. *The identity of the claimant's employer at the date of his purported dismissal;*

b. *If the claimant was not employed by the third respondent, the basis on which the third respondent, as employee, agent etc is liable for the alleged acts of discrimination &*

c. *if one or more of the first to third respondents are found liable for unfair dismissal and/or the alleged acts of discrimination, the basis on which the fourth respondent should be found liable to pay any compensation awarded.*

6. Orders were made by an Employment Judge for disclosure of additional information on 30 April 2021. The Orders were served on the second and third respondents and the third respondent's Accountant. Notwithstanding the period for compliance with the above Orders had not expired by the date of the final hearing, the claimant wished to proceed.

7. The final hearing was held by Cloud Video Platform (CVP). The claimant was represented by Mr P Santoni, Solicitor. The claimant gave evidence. The Tribunal was provided with a bundle of productions. There was no

appearance or representation on behalf of the first, second and third respondents. Ms S Iqbal, daughter of the fourth respondent's Company Director, was permitted to participate in the hearing. During the hearing, Ms Iqbal referred to the fourth respondent leasing the Redstones Hotel to Rumel Ltd.

8. Mr Santoni requested the opportunity to prepare written submissions. His application was granted. Written submissions were received from Mr Santoni for the claimant on 17 May 2021. They contained a detailed chronology of the Tribunal procedure to date. They were copied to the third and fourth respondents for information.

FINDINGS IN FACT

9. From the available evidence, the Tribunal found the following material facts to be established; from 1 April 2002 the claimant was employed by various companies who traded as the Redstones Hotel ("the hotel"). He began working as a Night Porter in 2013. The hotel is based in Uddingston. The claimant was first employed at the hotel as a Barman by Morris Inns Ltd. The fourth respondent has owned the hotel since 28 June 2010 (P10C). The claimant's wages have been paid by a variety of companies including the fourth respondent in May 2011 (P5AB), EDH5 Ltd in July 2012 (P5AC), Deosam Ltd in January 2017 (P5AD) and the second respondent from 22 October 2018 to 21 January 2019 (P5A1 - 5AD).

10. The second respondent was incorporated on 25 July 2018. The third respondent was a founding shareholder and Director of the second respondent. The claimant was employed by the second respondent when they started to trade as the Redstones Hotel in or around August 2018. The third respondent appointed a General Manager, Mr Wilson to manage the hotel on a day-to-day basis. The third respondent would regularly work in the hotel and arrange to meet clients there.

11. The claimant has a stoma. This was well known amongst the claimant's work colleagues. The claimant's stoma does not prevent him from undertaking day to day activities. It does not prevent him from working. The claimant was absent from work at the start of 2019 due to ill health. On returning to work, he was informed that the third respondent wished to meet with him. A meeting was arranged for the afternoon of 22 January 2019. The third respondent and Mr Wilson were present. During the meeting, the third respondent accused the claimant of not informing him that he "required treatment" ¹. The claimant denied that he "required treatment". The third respondent referred to the claimant having a stoma and expressed concern that he could go to jail if something happened to the claimant at work because of his "treatment". The third respondent told the claimant not to come back to work. The claimant was taken aback and upset by the third respondent's comments.
12. The claimant informed the third respondent that he would obtain a letter from his General Practitioner confirming that he was fit for work and not receiving medical treatment. The claimant obtained a letter from his General Practitioner (P3) The claimant's General Practitioner confirmed that the claimant was fit for work and that his stoma is "lifelong and not classed as "receiving treatment" as this is a permanent condition". The claimant passed the letter from his General Practitioner (P3) to the third respondent with a letter dated 29 January 2019 (P4) confirming that he was fit and available to do his shifts during the coming week. The claimant requested that the third respondent arrange a meeting with him if this was problematic. The claimant did not receive a response from the second or third respondent. The third respondent resigned as a Director of the second respondent on 30 January 2019 (P17B).
13. The claimant consulted his local CAB. With their support, he wrote to Mr Wilson on 8 February 201 (P1) confirming that he wished to return to work. The claimant referred to his employment rights and to the hotel coming under new management in August 2018. The claimant received no reply. The claimant wrote to Mr Wilson again on 25 February 2019 (P2). His letter (P2)

contained a grievance about not being permitted to return to work and failure to pay his wages. The claimant received no response to his grievance.

14. By chance the claimant met Mr Wilson towards the end of February 2019. Mr
5 Wilson asked the claimant whether he had received a letter from the second
respondent. Mr Wilson explained that in his capacity as General Manager he
had refused to sign the letter as he was working his notice at the time. The
claimant informed Mr Wilson that he had not received a letter from the second
respondent. The claimant contacted ACAS on 1 April 2019 about early
10 conciliation. On 13 May 2019 the claimant presented a claim to the Tribunal
against the first and second respondent for unfair dismissal and disability
discrimination.
15. The claimant was last paid by the second respondent on 19 January 2019.
He did not receive a P45 or a letter giving reasons for his dismissal. The
15 claimant's weekly wage was £250. Until October 2019 he lived off savings
and from 8 August 2019 received Universal Credit. The claimant obtained
alternative employment on 28 October 2019 with North Lanarkshire Council
for which he is paid a weekly wage of £81.00. He also obtained employment
with another local hotel on 1 November 2019 for which he is paid a weekly
20 wage of £111. As at the date of his dismissal the claimant was aged 64 (date
of birth 24/1/1956).
16. The fourth respondent applied for the third respondent to be appointed
Premises Manager of the hotel for licensing purposes on 8 August 2019
(P14). An application was made on 31 October 2019 to strike the second
25 respondent off the Company Register. The second respondent was dissolved
on 28 January 2020 (P9). On 3 July 2020 the third respondent held shares in
Rumel Ltd (P18C).

SUBMISSIONS

17. Mr Santoni for the claimant submitted that the conduct of the respondents in the proceedings has been deliberately disruptive. He submitted that there has been a concerted effort on the part of the respondents to confuse the Tribunal and, in the case of the second and third respondents, an attempt to pervert the course of justice. Mr Santoni did not seek an award of expenses against the respondents on the grounds of their conduct. He submitted that such an award in this case would be pointless and unenforceable, something he submitted the respondents have sought to achieve.
18. Mr Santoni submitted that given the deliberate attempts by the respondents to confuse and mislead the Tribunal, it should infer facts from the available evidence. Mr Santoni submitted that the Tribunal should accept the representation made on behalf of the third respondent on 7 August 2020 that the claimant remained in the company's employment. This, submitted Mr Santoni, is at a time when the third respondent is according to company paperwork no longer a Director or shareholder of the second respondent. The Tribunal submitted Mr Santoni should, whatever company structures existed at the time, find that the third respondent was running the hotel and was the Manager and person responsible for the liquor license. On the basis that an application to dissolve the second respondent was made on 30 October 2019, it is possible to conclude submitted Mr Santoni that the second respondent was not trading from the end of July 2019 or at least was certified as such by the Director applying for its dissolution.
19. Mr Santoni referred the Tribunal to the provisions of the TUPE Regulations 2006 and the case of **Litster & Others v Forth Dry Dock & Engineering Co Ltd 1989 ICR 341**. The Tribunal should find that the fourth respondent is liable for the claimant's dismissal following a series of transactions, the purpose of which he submitted has been to avoid liability and to circumvent the respondents' legal responsibilities to the claimant.

DISCUSSION & DELIBERATIONS

UNFAIR DISMISSAL

20. The claimant claims unfair dismissal. In his ET1 he gave 22 January 2019 as the date on which his employment ended. No alternative date of dismissal was identified in his amended paper apart. In the amended paper apart the claimant claims disability discrimination against the third respondent on the grounds that he was dismissed because he was perceived to have a disability by the third respondent.
21. The claimant now seeks to advance an alternative position that his employment continued after 22 January 2019 to a later date as a result of a series of transfers ending with the fourth respondent. The claimant cannot be criticised for this given the complicated corporate arrangements of those operating the hotel where he was employed and the dissolution of the respondent against which he originally sought a remedy. The claimant's alternative position however is far from straightforward and notwithstanding the valiant efforts on the part of those representing him, the Tribunal was not persuaded that the fourth respondent can be found to have dismissed the claimant and therefore liable for the claim.
22. To establish employment after 22 January 2019 the claimant relies on a representation made on behalf of the third respondent in correspondence to the Tribunal in August 2019 that the claimant *"is still on the company payroll and Redstones hotel didn't issue him a P45 because they expected him to come back to work"*. It is also the claimant's position that it must follow from the application to strike off the company on 31 October 2019 that the second respondent stopped trading or at least running the hotel around the end of July 2019. The claimant submits that the third respondent continued to manage the business on a day-to-day basis until shortly before March 2021 and that the fourth respondent must have been aware of this as the entity with overall control and responsibility for the premises. It must also follow, submitted the claimant that despite apparent attempts by the respondents to avoid their responsibilities under the TUPE Regulations that the claimant's

contract of employment subsequently transferred to the fourth respondent either from the second respondent when they ceased to trade, from the third respondent when he ceased to manage the hotel or from Rumel Ltd, a company that was referred to as having leased the hotel from the fourth respondent. The claimant also sought to rely on information provided by Mr Campbell at the preliminary hearing on 29 March 2021 that the fourth respondent as landlords had taken possession of the hotel. In his submissions, Mr Santoni emphasised that this did not appear to be the first occasion that the fourth respondent has taken over the running of the hotel.

23. The Tribunal was not persuaded that there was sufficient evidence before it to find that the claimant's employment continued beyond 22 January 2019. This was the date identified by the claimant in his ET1 as his date of dismissal. This was the date on which he was told by the third respondent not to come back to work. The claimant was not paid after 19 January 2019. He was not contacted about attending work after 22 January 2019. He received no response to his correspondence (P1) confirming that he wished to return to work or to his grievance (P2) about being told by the third respondent that he was forbidden from returning to work (P2). In the absence of any persuasive evidence, the Tribunal did not accept the claimant's submission that the representation made on behalf of the third respondent on 7 August 2019 of him remaining on the "*companies payroll*" showed that he was employed at that time by the third respondent or subsequently by the fourth respondent.

24. From the evidence before it, the Tribunal found that the claimant was dismissed on 22 January 2019. At the date of his dismissal, the claimant was employed by the second respondent. There was no persuasive evidence that the sole or principal reason for the claimant's dismissal was a relevant transfer to either the third or fourth respondent under the TUPE Regulations 2006. While there may have been a number of business transactions involving the hotel and subsequent transfers of employees' contracts of employment under the TUPE Regulations 2006, the Tribunal was not persuaded that the termination of the claimant's employment was connected with such a transfer,

25. The Tribunal was satisfied that the claimant was unfairly dismissed by the second respondent. No potentially fair reason was shown for his dismissal in terms of Section 98(2) of the Employment Rights Act 1996. Had it been necessary for the Tribunal to determine the fairness or otherwise of the claimant's dismissal in terms of Section 98(4) of the Employment Rights Act 1996, the Tribunal would have found that the respondent acted unreasonably given the lack of any fair procedure. Had the second respondent not been dissolved on 28 January 2020, the Tribunal would have ordered that the second respondent pay to the claimant a basic award of £6,375 (£250 x 25.5 weeks) and a compensatory award of £8,124.20 calculated as follows;

£10,000 for the period 23 January 2019 to 28 October 2019 (40 weeks) at £250 per week

£101.40 for the period 29 October 2019 to 1 November 2019 (3 days) at £169 per week

£672.80 for the period 2 November 2019 to 21 January 2020 (11 weeks and 3 days) at £58 per week.

£10,000 plus £101.40 plus £672.80 = £10,774.20 less £3,000 notice pay = £7,774.20 plus £350 for loss of statutory rights = **£8,124.20.**

The Tribunal would not have been persuaded that the claimant should be awarded any losses beyond a year after his dismissal. In accordance with the above calculation, the Tribunal would also have awarded the claimant notice pay of **£3,000** (£250 x 12 weeks). The Tribunal was not persuaded that the reason for the claimant's dismissal was redundancy and accordingly no order has been made in respect of that claim.

DISABILITY DISCRIMINATION

26. The claim of disability discrimination was brought against the third respondent. As a Director of the second respondent, the Tribunal was satisfied that third respondent should be found personally liable for his discriminatory acts in terms of Section 110 of the Equality Act 2010.

27. Section 13 of the Equality Act 2010 provides that "*a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Disability is a protected characteristic. It is defined at Section 6 of the Equality Act 2010 as a person who has "*a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities*". Section 13 of the Equality Act 2010 does not require the person to have the protected characteristic, only that they are treated less favourably because of it. Treating a person less favourably because of the perception that they have a protected characteristic can amount to direct discrimination.

28. Section 23 of the Equality Act 2010 provides that on a comparison of cases for the purposes of Section 13, there must be no material difference between the circumstances relating to each case. Circumstances relating to a case include a person's abilities if on a comparison for the purposes of Section 13 the protected characteristic is disability.

29. As regards proving discrimination, Section 136 of the Equality Act 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. This is referred to as the shifting burden of proof. It required the claimant to prove facts from which inferences could be drawn by the Tribunal that the third respondent treated him less favourably because of a protected characteristic - in the claimant's case the protected characteristic being disability.

30. The claimant did not seek to show that he is a disabled person within the meaning of the Equality Act 2010. It was the claimant's case that because the third respondent perceived him to be disabled, he treated him less favourably by making offensive remarks and refusing to allow him to attend work resulting in his dismissal.

31. The Tribunal had regard to the case of **The Chief Constable of Norfolk v Lisa Coffey 2019 EWCA Civ 1061** which was concerned with direct discrimination because of perceived disability. From the available evidence, the Tribunal was satisfied that the third respondent believed that the claimant had a physical impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities within the meaning of Section 6 of the Equality Act 2010. The third respondent referred to the claimant having a stoma and of him "*receiving treatment*". He questioned the claimant's ability to do his job. He refused to allow the claimant to attend work because of a perceived risk that something adverse may happen because of his condition. In all the circumstances the Tribunal was satisfied that the actions of the third respondent amounted to less favourable treatment because of disability in terms of Section 13 of the Equality Act 2010.

32. The claimant is entitled to an award of compensation. As the second respondent is dissolved and on the basis that double recovery will not apply, the Tribunal decided that it was just and equitable to order that the third respondent pay the claimant £7,774.20 as loss of wages attributable to his discriminatory conduct. (This is on the basis that the basic award and notice pay are only payable by the claimant's employer, the second respondent). In addition, the claimant is entitled to an award for injury to feelings. The Tribunal had regard to the case of **Vento Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318**. The claimant described feeling taken aback and upset by the comments made by the third respondent. Having considered the bands in **Vento** and the available evidence, the Tribunal was satisfied that in all the circumstances the third respondent should be ordered to pay the claimant **£2,000** for injury to feelings.

CONCLUSION

33. The Tribunal concluded that (i) the first respondent is not a legal entity and shall be dismissed from the proceedings; (ii) the second respondent as a dissolved company shall be dismissed from the proceedings; (iii) the third respondent directly discriminated against the claimant in terms of Section 13 of the Equality Act 2010 and shall be ordered to pay compensation of £7,774.20 for his financial loss and £2,000 for injury to feelings & (iv) the fourth respondent is not liable for the claimant's unfair dismissal or discrimination and shall be dismissed from the proceedings.

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15 **Employment Judge: F Eccles**
Date of Judgment: 11 June 2021
Entered in register: 15 June 2021
and copied to parties

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This document should be treated as signed by me - Employment Judge F Eccles - in accordance with the Presidential Practice Direction of 1 May 2020.

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