

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**PRELIMINARY HEARING**

5 **Case No: 4105546/2017**

**Held in Glasgow on 12 March 2018**

10 **Employment Judge: Mary Kearns (sitting alone)**

15 **Mrs K Ure**

**Claimant**

**Represented by:**

**Ms J McKinley**

**Strathclyde University**

**Law Clinic**

20 **Chemcem Scotland Ltd**

**First Respondent**

**Represented by:**

**Ms Y Morgan**

**Solicitor**

30 **Blue Ridge Equestrian Limited**

**Second Respondent**

**Represented by:**

**Ms Y Morgan**

**Solicitor**

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40 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal was that:

45 (1) The claimant was employed by the first respondent from 8 June 2015 until 25 September 2017.

(2) The claim is in time and the Tribunal accordingly has jurisdiction to hear it.

**E.T. Z4 (WR)**

## REASONS

1. The claimant presented an application to the Employment Tribunal on 5 November 2017 in which she claimed notice pay, holiday pay, unfair dismissal, maternity discrimination and a redundancy payment. She is the daughter of Linda and Alasdair Beaton, who are the directors and shareholders of the first and second respondents. The first respondent lodged a response resisting the claim. Its position per its ET3 was that the claimant was on the first respondent's payroll from 1 September 2009 until 5 April 2015 but that she did not carry out any duties for them. They further stated that she was not in their employment in September 2016 or on any date thereafter. Following a Preliminary Hearing ("PH") on 5 January 2018 to discuss case management the second respondent was added as a respondent and the case set down for today's PH to determine the below issues. The second respondent's case per their ET3 was that the claimant began employment with them on 8 June 2015 and terminated her employment without notice on or about 23 May 2016.

### Issues

#### Identity of the claimant's employer and dates of employment

2. A Notice of Hearing had been sent out to the parties. The issues to be determined were: "1) What is the identity of the claimant's employer or employers? 2) What are the start and termination dates of the claimant's employment with that or those employers?"

#### Time bar

3. Parties' representatives also requested that the issue of time bar be determined at this PH. Both confirmed that they were in a position to lead the necessary evidence and make submissions on the matter. Time bar was therefore added to the other preliminary issues to be determined at this hearing.

### Evidence

4. The parties produced a joint bundle of documents and referred to them by page number. The claimant gave evidence on her own behalf and called her mother, Mrs Linda Beaton. The respondent called Mr Alasdair Beaton and Mr Leitch, a quantity surveyor with whom it has a business association.

**Findings in Fact**

5. The following material facts were admitted or found to be proved:-
- 5 6. The first respondent is a successful civil engineering company, owned and operated as a family business for many years by Mr Alasdair Beaton and his wife, Mrs Linda Beaton. Mr Beaton owns 70% of the company and Mrs Beaton owns 30%. They are both directors. The claimant is their daughter. The claimant and her sister were on the first respondent's payroll from 10 September 2009. They received payments through the payroll when they were at university. Although the claimant occasionally provided casual services to the first respondent (such as help with IT), she was not, at that time an employee of the company and the payments made to her were not in return for work. In or about the summer of 2010 the claimant graduated 15 from university and went to work as a full-time journalist for Johnston Press at the Falkirk Herald. In that job she had Friday afternoons off and she would sometimes go and help her mother with IT issues or take cheques to the bank. She continued to receive payments from the first respondent through their payroll but there was no obligation upon her at 20 that time to accept and perform work for them and they were under no obligation to provide her with work.
7. In or about May 2015 the first respondent purchased the Blue Ridge Equestrian Centre which was situated close to the Beatons' home and 25 office at Wester Crosshill Farm. The first respondent also purchased the horses and other assets of the centre. On 27 May 2015 the second respondent was incorporated. However, the Equestrian Centre itself, the land, buildings and other assets acquired by the first respondent were retained by the first respondent and continued to be owned by them 30 throughout. The contracts to supply utilities to the Centre were between the first respondent and the respective utility companies.
8. The claimant was asked by Mr Beaton to take on the role of 'General 35 Manager' of the Equestrian Centre. Her duties were to design and set up a web-site for the Centre and thereafter to maintain it; to set up and maintain the Centre's social media profiles and deal with enquiries, emails and phone calls; to arrange horse shows; to market the Centre; to hire staff; and to deal with livery agreements. The claimant also applied to Sport Scotland for funding and dealt with an issue where the Land Register had 40 registered the first respondent for too many hectares resulting in an over payment of business rates. The claimant had regular meetings with her parents to discuss how the work was going. It was specifically agreed between the claimant and Mr Alasdair Beaton that the claimant would be paid by the first respondent. At that time the Centre had three other 45 employees, all of whom were paid by the second respondent with the first respondent providing the funds.
9. The claimant commenced in her post of General Manager of the Equestrian Centre on or about Monday 8 June 2015. At that point she was

5 still employed by the Johnston Press and she worked for the first  
respondent on a part time basis. Her first payment from the first  
respondent in respect of the role was made on Friday 12 June 2015. The  
claimant was paid £150 gross (£120 net). She continued to receive this  
10 sum weekly until December 2015. In December 2015 the claimant said to  
her parents that she would be happy to work full time for them at the  
Equestrian Centre and to leave her job at the paper provided they  
matched her salary. This was agreed to by both Mr and Mrs Beaton and  
the claimant resigned from her journalism job and increased her hours for  
15 the Centre to full time. On 11 December 2015 her weekly pay from the first  
respondent increased to £292.50 gross (£217.60 net). This was then  
adjusted and from 22 January 2016 she received £324 gross (£238.92  
net) per week from the first respondent, with a corresponding increase in  
her hours.

15 10. In or about January 2016 the claimant discovered she was pregnant and  
told her parents that her due date was 2 October 2016. Her intention was  
to take one year's maternity leave. She decided to work until her due date,  
but this was not specifically discussed with her parents at that point.

20 11. In or about May 2016 the claimant discovered that her father had been  
having an affair with one of the other employees at the Equestrian Centre.  
On or about 23 May 2016 she confronted him and told him she was  
disgusted with him. After that the claimant continued working for the  
25 Centre but she worked from home as much as possible so that she would  
not have to see the employee in question. However, it was occasionally  
necessary for her to attend the Equestrian Centre for meetings and other  
events.

30 12. The claimant continued working until late September when she went into  
hospital to have her baby induced. She told her parents about the birth of  
her son and his date of birth. Her maternity leave started on or about 26  
September 2016 when she gave birth. Her first payment of statutory  
maternity pay ("SMP") was received on 30 September 2016 (J5b19).  
35 Despite being on maternity leave, the claimant dealt with a horse show  
from her hospital bed. Thereafter, she continued to do numerous tasks  
included within her role by working from home on correspondence (J11).  
Both her parents gave her instructions in relation to her work for the  
Centre at this time. The claimant also attended various shows and took  
40 her new born son with her.

45 13. At the point where the claimant's maternity leave began, the first  
respondent's accountant was taking instructions from Mr and Mrs Beaton  
about what the first respondent's employees were due in terms of pay. On  
a Thursday he would email them this information. Neither respondent  
gave the claimant notification of the date when her Statutory Maternity  
Leave ("SML") would end.

- 5 14. In January 2017 the Beatons separated and Mr Beaton moved in with the employee at the Equestrian Centre with whom he had had the affair. The family became very divided and there was a great deal of bitterness and acrimony. From this point Mr Beaton dealt with the accountants directly and Mrs Beaton no longer received payroll information or had an input into what employees were paid. The claimant was still on maternity leave and continued to receive SMP from the first respondent on the instructions of Mr Beaton.
- 10 15. Throughout the beginning of her period of statutory maternity leave and until around February 2017 the claimant carried on doing some work at home for the respondent, answering emails and arranging shows. However, she did not make her father aware of this at the time and because of the family breakdown he did not have access to the Centre's email system.
- 15 16. With effect from the beginning of February 2017 and without any consultation with or notification to the claimant, Mr Beaton gave instructions to his accountant to switch the claimant from the payroll of the first respondent to the payroll of the second respondent. From Friday 5 February 2017 the claimant's payslips started to show the second respondent's name.
- 20 17. The claimant's entitlement to statutory maternity pay ("SMP") was 39 weeks. Her SMP payments started on 30 September 2016. The final SMP payment to which she was entitled was made on 18 June 2017.
- 25 18. The Equestrian Centre was not a success and the second respondent ceased trading on 1 July 2017. All the employees of the second respondent including the claimant were transferred to the first respondent on 1 July 2017. Since then, the business of the Blue Ridge Equestrian Centre has been operated by the first respondent, who continued to own all the assets including the land, buildings and horses used by the Centre.
- 30 19. Those assets had previously been provided to the second respondent for use in running the Centre. That arrangement ended on 1 July 2017 when the second respondent ceased trading.
- 35 20. In or about mid July 2017 the claimant queried with her mother why she was no longer receiving SMP from the respondents. On 17 July 2017 Mrs Beaton emailed Mr Beaton and Mr Blake the accountant (J4/7). On 20 July 2017 the claimant emailed her father care of the first respondent. She stated: *"I have now not been paid for three weeks running again. I have asked if I am dismissed following mat leave, and if so I need my P45 and my redundancy payment..."* She also texted Mr Beaton in similar terms
- 40 45 21. In the summer of 2017 the claimant had not decided whether she would return from maternity leave given the difficult circumstances. The non-

5 payment of SMP by the respondents after the claimant's entitlement had ended was not a breach of the claimant's contract. The claimant was due to return to work from maternity leave on 26 September 2017. The contract ended when she failed to return on that date or at any date thereafter.

### Discussion and Decision

#### 10 The claimant's employment start date

15 22. The claimant argued that she had been employed by the first respondent since 2009. It was not in dispute that she had been on the first respondent's payroll since 1 September 2009. The claimant produced a pay slip dated 30 May 2014 (J9) suggesting that she was receiving £120 per week from the first respondent for 20 hours' work. I did not conclude from her evidence or from Mrs Beaton's that she was in fact employed at that point. Although the claimant said that she was working on Friday afternoons for the first respondent from 2010 onwards, her evidence about  
20 what she was doing was more consistent with occasionally helping her mother in her spare time. At this time, the claimant was a full-time journalist. Mr Beaton stated in evidence that when the claimant and her sister were students and young adults they were paid "pocket money" through the company to help them with their living expenses. I accepted  
25 his evidence about this, preferring it to the rather vague and general evidence of the claimant and Mrs Beaton on the matter. Thus, I concluded that although the claimant was on the payroll of the first respondent from 1 September 2009, she did not become their employee until 8 June 2015, when she accepted the role of General Manager of the Equestrian Centre.  
30 It was only at this point that there appeared to be mutuality of obligation and a verbal employment contract, with agreed duties in exchange for an agreed salary. Before June 2015 there was no obligation on the first respondent to provide work and none on the claimant to perform it.

#### 35 The claimant's employer

40 23. Mr Beaton argued that the first respondent was a civil engineering company and that accordingly the claimant could not have been employed by them. However, there was no dispute that the company acquired and owned horses and an Equestrian Centre. Furthermore, the second respondent's ET3 avers (presumably on Mr Beaton's instructions) that all the existing employees of the second respondent transferred to the first respondent on 1 July 2017. Indeed, Mr Beaton testified that the staff had been transferred to the first respondent because he needed them to look  
45 after that company's horses. He explained that they were *'still getting paid by Chemcem today to look after Chemcem's assets'*. The second respondent's ET3 also avers that the first respondent now operates the Equestrian Centre, the second respondent having ceased trading.

24. In *Secretary of State for Education & Employment -v- Bearman* [1998] IRLR 431 at paragraph 22 the EAT gave guidance on the approach to be adopted when seeking to identify which of two or more possible candidates is the claimant's actual employer.

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*"It seems to us that the correct approach would have been to start with the written contractual arrangements and to have enquired whether they truly reflected the intention of the parties. If they did, then the next question was whether, on the commencement of their employment, the applicants were employees of [A] or [B]. If the conclusion was that, when properly construed, on commencement of their employment the applicants were employed by [B], then the chairman ought to have asked the question: did that position change and, if so, how and when?"*

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25. There were no written contractual arrangements in this case. The verbal agreement between the claimant and Mr Beaton was that she would be paid by the first respondent. Indeed, from the outset, most of the contracts in relation to the Equestrian Centre were with the first respondent. The utility companies contracted with the first respondent. This arrangement appeared to have been in place because the second respondent had no money or assets other than those given or loaned to it by the first respondent. I have concluded that the claimant's contract of employment which began on 8 June 2015 was intended by both parties at that point to be with the first respondent, and it was the first respondent who paid her. If I am wrong about this, or if the claimant's employment somehow transferred to the second respondent on 5 February 2017 when she was changed to their payroll without her agreement, then by the time her contract ended in September 2017 she would in any event have become an employee of the first respondent by operation of TUPE as indicated in the second respondent's ET3.

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26. In his evidence Mr Beaton said he could not remember exactly when the employees of the second respondent transferred to the first respondent. At one point he said it was the summer of 2017. Later in his evidence he said it was in September 2017. However, the second respondent's ET3 which was presented on 8 February 2018 clearly states that the second respondent ceased trading on 1 July 2017 and that thereafter, the business of the Blue Ridge Equestrian Centre was operated by the first respondent. It was also averred in the ET3 that all of the employees of the second respondent transferred to the first respondent on 1 July 2017. This admission, giving a specific date of transfer, is consistent with the rest of the evidence and it is therefore the basis for the relevant finding in fact. The first respondent continued to own all the assets needed for the Equestrian Centre including the land, buildings and horses used by the Centre. These had previously been provided to the second respondent to use in running the Centre but I inferred that that arrangement ended when

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5 the second respondent ceased trading. In these circumstances there was  
an organised grouping of employees and resources which had the  
objective of pursuing an economic activity and hence there was an  
economic entity. This clearly retained its identity as an Equestrian Centre  
before and after the transfer on 1 July 2017. The claimant was the  
Centre's General Manager and as such she was part of the organised  
grouping of resources employed immediately before the transfer and  
would have transferred along with the rest of the employees. Since the  
whole undertaking transferred the question of her assignment does not  
10 arise.

27. I have concluded for all the above reasons that the claimant was  
employed by the first respondent at the point when her employment  
ended.  
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The termination date of the claimant's employment

28. I turned to consider the date of termination of the claimant's employment.  
20 The right to take maternity leave is governed by sections 71 and 73  
Employment Rights Act 1996 ("ERA") and Part II of the Maternity and  
Parental Leave etc Regulations 1999 SI 1999/3312 ("the MPL Regs"). In  
order to qualify for Statutory Maternity Leave ("SML") an employee must  
notify her employer no later than the end of the 15<sup>th</sup> week before the  
25 expected week of confinement ("EWC") or as soon as is reasonably  
practicable after that of the following (MPL Reg 4(1)(a)):

- (i) her pregnancy;
- (ii) her EWC;
- 30 (iii) the date on which she intends her ordinary maternity  
leave to start.

The notice need not be in writing unless the employer so requests. There  
is no evidence of any request for written notice here. The claimant was  
35 dealing with her own parents in difficult circumstances and the evidence  
was accordingly rather vague. The claimant testified that she had told her  
parents about her pregnancy the week after she found out and that it was  
her intention to work until her due date. She did not specifically recall  
discussing the start date of her maternity leave with her parents. The first  
40 respondent's accountants paid her Statutory Maternity Pay with effect  
from 30 September 2016 and on the evidence, this could only have been  
triggered by instructions from her parents. Either she notified her parents  
of the SML start date, or, more likely, she gave birth and her leave began  
automatically in the circumstances set out in Regulation 6. It was not part  
45 of the case of either respondent that the claimant had lost her right to take  
maternity leave. Indeed, Mr Beaton testified that the claimant's leave and  
the consequent payment to her of SMP had his full agreement.



29. An employer must notify an employee of the date her maternity leave will end within 28 days of whichever of the below bullets applies. Again, this does not need to be in writing. The requirement for notification is triggered where:

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- The employee gives notice of the date she intends to start OML or of any variation of that date;

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- The employee gives notice that she has been absent for a pregnancy related reason, four weeks or less before the EWC and of the date that absence started; or

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- The employee gives notice that she has given birth and the date of birth.

30. The first, or more probably, the last of these occurred in this case and the employer's obligation was triggered. If the employer fails to inform the employee of the date her Statutory Maternity Leave will end he will not be able to complain if she comes back too early or too late. SML normally lasts 52 weeks in total and the claimant testified that her intention was to take her full entitlement. Her SML began on or about Monday 26 September 2016. She would, accordingly have been expected to return on Monday 25 September 2017. She did not return on that date or at any stage thereafter. An employee has an automatic right to come back to work after maternity leave and the assumption is that she will do so unless she says otherwise. Thus, if a woman returns to work at the end of her full entitlement to SML she is not required to give her employer any notice of her intention to return. She can just turn up and work. In the circumstances of this case the claimant could have turned up later than 25 September because she had not been given the necessary notification. However, if she simply fails to return at all the contract will end and that is what happened.

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31. Ms McKinlay submitted on behalf of the claimant that it was impossible to say when the claimant's contract terminated when it was a matter of never receiving pay. However, it is not correct to suggest that the claimant was entitled to pay which she did not receive. The first respondent, and latterly the second respondent made payment to the claimant of Statutory Maternity Pay ("SMP"). The first payment was made on 30 September 2016. The start date of that week was Monday 26 September 2016. The period during which an employee is entitled to be paid SMP is 39 weeks. The claimant was correctly paid the correct rates of SMP for 39 weeks. The payments stopped once the 39 week period had run its course.

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32. Mr Beaton's evidence was that he had understood that the claimant was not working for him anymore after her discussion with him on 23 May 2016. However, he also said that her maternity leave had begun from that point. This was not consistent with the payslips in the bundle (J5b) which showed that SMP had been paid from 30 September 2016. Furthermore,

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Mr Beaton accepted in cross examination that the claimant had not resigned during their conversation on 23 May 2016, and that indeed there had been no talk of her resigning. Later in his evidence he said that the claimant was to give them a date she would be returning from maternity leave. His position was very muddled and I preferred the claimant's evidence that on 23 May she had told her father she was disgusted with him but that she had not resigned. She had continued to work and had then begun her maternity leave in September 2016. This position was consistent with the rest of the evidence.

33. There was no evidence that the claimant resigned at any point. However, she did not return from her maternity leave on Monday 25 September 2017, nor at any point thereafter. Because of the nature of the arrangement, with her working from home much of the time the position was not straight-forward. However, the claimant was asked by Ms Morgan whether it had been her intention to return and she said she had not decided given the difficult circumstances. On her ET1 she stated that her employment had ended on 1 August 2017. This appeared to be on the mistaken assumption that she was entitled to further payments of SMP but in any event her evidence was that her employment had ended at some point around that date. She did not testify that she had returned or tried to return from maternity leave. I have therefore concluded that she did not do so.

Time bar

34. The claimant's employment ended on 25 September 2017. The ET1 was presented on 5 November 2017. No issue of time bar arises and the Tribunal has jurisdiction in principle to hear the case.

Employment Judge: Mary Kearns  
Date of Judgment: 23 March 2018  
Entered in register: 28 March 2018  
and copied to parties