EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Dewhirst**

Respondents: 1. Brighouse Patent Walling Systems Ltd (in Voluntary Liquidation)
2. Younger Homes (Northern) Limited

HELD AT: Leeds **ON:** 9 March 2022

BEFORE: Employment Judge Jones

REPRESENTATION:

Claimant: In person, accompanied by Mr N Dewhurst (Husband)
1st Respondent: Not in attendance
2nd Respondent: Ms J Duane, Counsel
Mr N Wilson, Solicitor

JUDGMENT having been sent to the parties on 11 March 2022 and written reasons having been requested by the claimant on 17 March 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

1. This is a claim for unfair dismissal presented on 22 October 2020. The claim was against Brighouse Patent Walling Systems Limited, the first respondent, who the claimant was her employer. She had contacted ACAS to comply with the early conciliation requirements with that proposed respondent.

2. The claimant learned that another company that had been owned by the same shareholders as the first respondent had been wound up in 2018. She feared that the same might happen in respect of the first respondent and she would not be able to satisfy any judgment. She therefore did some further reading and made an application to the Tribunal to add the second respondent. She said it had employed her.

3. The case has been subject to two preliminary hearings. At the first before Employment Judge Shulman the claimant did not suggest the second respondent was her employer, but at the second Employment Judge Miller determined that that issue should be decided today as a preliminary issue in the final hearing for the unfair dismissal claim, the claimant having withdrawn marital and sex discrimination claims.

Preliminary Issue

4. When a Tribunal has to determine and construe a contract of employment it is required to consider the common intention of the parties. That is a legal concept which means the Tribunal must try to ascertain what, objectively considered, the parties intended to be the terms of the contract. One of those terms, a very fundamental one, is who the parties to the contract were.

5. I have heard evidence from the claimant and also from Mr Ibberson, who is a part shareholder in the first and second respondents (the other shareholder being his wife) and he is also a director in both companies. His wife is no longer a director in the first respondent (she having resigned in that capacity in February 2021).

6. The first respondent was incorporated in 2011. The second respondent has been in operation for a substantially longer period. It has a significant number of assets in the form of real property. It has operated by leasing those properties, or previously selling them. The first respondent has operated by building and maintaining properties for the second respondent.

7. Mr Ibberson said in his witness statement and in evidence that the second respondent was solely an asset holding company. I am not entirely sure what that term meant and it generated some significant dispute and discussion in the case. Insofar as it was suggested that the second respondent simply held property and did not in any sense trade, it is incorrect because the second respondent clearly generates a significant sum in rental income from the properties it owns, and that has to be managed by somebody, as does the maintenance of those properties and the construction of further properties being constructed and to be owned by the second respondent.

8. The first respondent employed a number of staff to discharge functions which were both for that company's and for the second respondent's benefit. Mr Ibberson stated in his witness statement that there was a maintenance agreement between the two whereby services were undertaken by the first respondent for the benefit of the second respondent. I also was told that there was an agreement whereby the first respondent would pay rent for the property it occupied which was owned by the second respondent. It was in the significant sum of £250,000 per annum. Surprisingly there is no written documentation in respect of a lease or licence to occupy or a service agreement. I recognise a contract may be oral or in writing, but for such significant sums that was unusual.

9. The first respondent is in voluntary liquidation. I have read a report from the liquidator, insolvency practitioners. The report includes the assets and liabilities of the first respondent. Mr Ibberson stated that the reason the company was placed into voluntary liquidation was because a particular product, a construction design

which the first respondent had been working upon, was subject to significant delay because of the impact of the COVID-19 pandemic. The first respondent ran into financial difficulties and he was advised it would be trading insolvent so he placed the company into voluntary liquidation.

10. The claimant treats that with scepticism. She considers that the two companies, which were both owned by and had common directors, had a common interest. The second respondent could have funded the first respondent by way of loan or otherwise in the short-term. Moreover the directors and shareholders have incorporated a new company called "**Patented Housing Ltd**" which is now operating, to all intents and purposes, as the first respondent. The employees who worked for the first respondent have been taken on by the new company. The second respondent is operating again in conjunction with the new company in the construction of property. There is a development in Lincolnshire by Yorkshire Homes (Lincoln) Limited, another company owned and run by Mr Ibberson and his wife.

11. The claimant says that she regards the arrangement whereby she was employed by the first respondent as a sham and the assets were placed in the name of the second respondent consciously with a view to defeating any potential claim against the first respondent by her or any other employees.

12. Which party was the employer was considered recently by the President of the Employment Appeal Tribunal in a case called **Clark v Western and Regals [2021] IRLR 528**. In that case the President said that the following principles were relevant to the issue of identifying whether a person (A) was employed by (B) or (C). Those principles were:

(1) Where the only relevant material to be considered is documentary, the question as to whether (A) is employed by (B) or (C) is a question of law.

(2) However where, as it is likely to be the case in most disputes, there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence.

(3) Any written agreement drawn up at the inception of the relationship will be the starting point of analysis of the question. The Tribunal will need to enquire whether that agreement truly reflected the intentions of the parties.

(4) If the written agreement reflecting the true intentions of the parties points to (B) as the employer then any assertion that (C) was the employer will require consideration of whether there was a change from (B) to (C) at any point, and if so, how? Was there, for example, a novation of the agreement resulting in (C) or (C) and (B) becoming the employer?

(5) In determining whether (B) or (C) was the employer it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was (B) and not (C) as this could amount to evidence of what was initially agreed.

The Facts

13. The claimant applied for the job when she saw an advert. It was in "Jobs Today". It was for "Clerical Assistant with Younger Homes (Northern) Limited [the second respondent]". The claimant attended an interview with Mr Ibberson, was successful and was appointed to the post. Neither Mr Ibberson nor the claimant spoke about the corporate arrangement, or who her employer would be. She had known of Mr Ibberson. His business was well known in the locality as Younger Homes.

14. The claimant's first and every wage slip, from the date of her appointment on 20 September 2015 until the date of her termination of employment on 9 September 2020 were in the name of the first respondent.

15. The claimant undertook duties as clerical assistant, archivist and librarian. She represented herself on some occasions as associated with the second respondent. On 28 January 2016 the claimant sent an email to the NHBC which she signed off as "Clerical Assistant for Younger Homes (Northern) Limited". The claimant expressed the comment that "we [the second respondent] were registered" by a particular number but now required a certificate for the first respondent as the principal contractor. The claimant sent some further emails associating herself with the second respondent on 13 April 2016 and 29 September 2016. The claimant would answer the phone on behalf of Younger Homes. Her email address was @youngerhomes. The name Younger Homes was used. The claimant occasionally used the credit card of the second respondent to pay bills.

16. The claimant also represented herself as being with the first respondent. In minutes for a health and safety meeting at the Perseverance Building Site on 2 December 2015, she named herself as present for Brighouse Patent Walling Systems Limited, together with others including Mr Ibberson. She drafted a number of documents for the first respondent; the "Working at Height" documentation which she drafted and amended in January 2016; risk assessments which referred only to the first respondent which were then amended in March 2016 by the claimant, and health and safety policies of the first respondent prepared in November 2016.

17. Pension enrolment is confusing. The claimant signed a document expressing her wish to enter the pension of the second respondent on 7 June 2017 but, three weeks later, on 16 June 2017, signed a document that she wished to become a member of the pension scheme of the first respondent.

18. In September 2019 the claimant was provided for the first time with a statement of written particulars of employment. Those stated that the claimant's employer was the first respondent. The claimant did not sign that document but nor did she write to suggest that it inaccurately reflected her true employer. She was provided at the same time with an employee handbook in the name of the first respondent.

19. The claimant signed a furlough agreement on 24 March 2020 with the first respondent in which she agreed to be a party to the Coronavirus Job Retention Scheme. It was renewed by her and an employee on behalf of the first respondent on 19 June 2020.

20. On 31 March 2020 the claimant wrote to Ms Brierley at Younger Homes, to whom she submitted her timesheets (Ms Brierley looked after Younger Homes although I am not satisfied was employed by them). The claimant asked Ms Brierley to say where she stood with Younger Homes.

21. Later, in the following months, a redundancy consultation process took place and the documentation in respect of that was sent on behalf of the first respondent. The paperwork continued to deal with the claimant's termination of employment in the name of the first respondent. The P45 was in the name of the first respondent and so was the P60.

Analysis

22. The claimant attended an interview, ostensibly to be employed by the second respondent. There was no discussion about who her employer would be. She received wage slips from the first respondent. She represented herself as being employed by both on different occasions. The written documentation which should have been produced in 2015, by way of statement of particulars, has the important purpose of informing the parties who the employer is. When it was belatedly issued 4 years down the line it named the first respondent as the employer.

23. The claimant brought proceedings against the first respondent. She prepared her statement for the first hearing and said this:

> "*The title given to my post in the job advert to which I responded was 'Clerical Assistant Archivist Librarian'. Although the advert suggests that Younger Homes (Northern) Limited was my employer, I was employed by BPWS. The job was permanent.*"

24. I do not find the use of the term "Younger Homes" particularly helpful in resolving the conundrum. Younger Homes is simply a brand name; it is useful for the business to promote itself, promotes simplicity and avoids confusion, not least to its commercial or residential tenants. The way the claimant and others answered the phone and the email name gives nothing away about who the employer was.

25. Had some of these factual matters been absent it would have been easier to resolve the question. For example, had the claimant not received the wage slips in the name of the first respondent or the written particulars of employment, there would have been a compelling case for saying the second respondent was the employer. She went to an interview which was advertised specifically in the name of the second respondent, was never disabused of that and represented herself as acting for that company. It would be for Mr Ibberson to make clear who the claimant was employed by when, as an agent of another because he was not entering into this contract personally, he engaged the claimant.

26. On the other hand, I recognise the reality that when people enter into agreements of this type, unlike lawyers, they pay little thought to which legal personality will be the employer. Most people wish to work and be paid without troubling themselves about the actual name of the employer.

27. The Tribunal deals with many business arrangements whereby the employer is one of a corporate structure. This can involve one company undertaking some, or

sometimes all, of the work, for another. Those are often referred to as service companies. Who the work was done for, or reaps the benefits of the work, is not determinative. In this case the claimant's work was for the benefit of both respondents.

28. For the reasons I have set out, the documentary evidence points both ways. What was said does not particularly assist because the problem never really surfaced.

29. After the claimant was made redundant she brought a claim and, as many people do, she looked to see who she should put in as the named the respondent and the documentation she found suggested it should be the first respondent. That led her to say, rather emphatically in her witness statement, that the first respondent was the person who employed her. One wonders had the claimant chosen the second respondent and they were in voluntary liquidation, would she be saying that they were not her employer but the first respondent was? To that the claimant would say it had the assets and so would not be shielding another company from potential liability. That strikes at the fairness of which she complains.

30. That raises a question about the piercing the corporate veil. Not to identify Mr Ibberson personally as the one who is liable for these actions, but the second respndent. The approach has been helpfully clarified in the recent Supreme Court case of **Preston Petrodel Resources Ltd [2013] UKSC 34.** Lord Sumption said:

> "*The difficulty is to identify what is a relevant wrongdoing. References to a 'façade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming their identity is legally relevant. In these cases the court is not disregarding the façade but only looking behind to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories but in some circumstances the differences between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil*."

31. As to the concealment principle the claimant says that the reality is that the operator/the controller/the person who actually employed her was the second respondent through its agent, Mr Ibberson. The claimant also relies on the evasion principle. The claimant says this whole corporate structure is devised to avoid liability to employees. She argues that extends beyond limited liability of itself, which is the legal arrangement which, by its very nature, limits the liability of individuals who operate through a company.

32. Although I have commented upon the informality of the arrangements between the second and first respondents in respect of agreements between them to pay substantial sums of money whether by way of lease or a maintenance agreement, that evidence does not prove fraudulent activity from which to draw inferences to support the evasion principle. The report of the insolvency practitioner does not support the proposition of the claimant that the first respondent had been placed into voluntary liquidation to evade her claim and frustrate her ability to enforce it. There were other significant debts, not least one of council tax. Other factors led to that company facing financial difficulties with respect to the product it had been developing which was interrupted with the lockdown and consequential cash flow difficulties. The available material does not contradict the evidence of Mr Ibberson that he was advised to place the company into insolvency. I am not in a position to second guess business decisions to balance the risks and costs; or to comment upon whether inter-corporate support could properly have been provided from one respondent to another. Bearing in mind that limited liability of any company will always shield individuals, I am not satisfied this was a sham designed to evade the liabilities (or potential liabilities) of employees. The company has been operating for ten years. It has been trading and accounting for liabilities it has incurred to employees and others over that period. I have seen no evidence to suggest it had not been responsible for the employment of all nor that the second respondent had no staff during that period, as Ms Duane submitted.

33. The first question Lord Sumption poses brings me back to the question of who was the real operator here? In one sense of course it was Mr Ibberson because he was the principal controller and operator of the business in the broader sense and, as he says, he has interviewed and appointed many people. It is most regrettable that he could not do so by following up that with written particulars of employment as the law required him to.

34. How do I balance this conflicting picture and what was the common intention of the parties?

35. Ultimately, as I have said, I do not think the parties themselves were exercised about particular legal individuals or structures when they met at the interview. I have concluded that the common intention was that the claimant was to be employed by the first respondent. She has more consistently acted and suggested that was the case. The written particulars of employment are in the name of the first respondent, as is all the relevant necessary documentation which followed, as well as the wage slips, sent throughout. When one asks “who employs you?” the first thought is likely to be the person who pays me. I accept the evidence of Mr Ibberson that the placing of the advert had been at a time the second respondent had an account with the agency and that was done, in effect, by default. The subsequent conduct of the parties, on balance, reflected an understanding that the true employer was the first respondent.

Unfair dismissal

36. The first respondent did not attend. The claimant had spoken to the liquidator who had said she did not oppose the claim for unfair dismissal. Mr Wilson said he had instructions from the liquidator who had asked the Tribunal to read the witness statements of Mr Ibberson, Ms Leonie Whittaker and, HR consultant at Pennine HR

Ltd and Lyn Bradley, Director of Pennine HR Ltd. The Tribunal read those statements. Mr Wilson was not instructed to remain and represent the liquidator.

37. By section 139(1) of the Employment Rights Act 1996 redundancy is defined:

> *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—(a) the fact that his employer has ceased or intends to cease—(i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business— (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.*

38. By section 98 of the ERA*, (1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*.

39. Section 98 (2)(c) includes a reason that the employee was redundant.

40. Section 98(4) provides, "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)— (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*".

41. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

42. Under section 122(4) of the ERA the amount of the basic award shall be reduced by the amount of any payment made by the employer on the ground that the dismissal was by reason of redundancy.

43. By Section 123(1) of the ERA, the amount of the compensatory award shall be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer

44. The claimant was informed she was to be dismissed by reason of redundancy on 12 August 2020. She had a meeting with Ms Whittaker on 4 August 2020 and 12 August 2020. The claimant appealed the decision by letter of 18 August 2020. The appeal was dismissed following a hearing on 30 October 2020.

45. It is for the respondent to establish that the reason for the dismissal was redundancy. The claimant disputed this. She stated that Ms Whittaker misunderstood her role which had changed during her employment and she did not believe her work had diminished. As the first respondent did not call any witnesses, I was not satisfied it had discharged the burden of establishing the reason for the dismissal and so the dismissal was unfair. Even had it done so, the claimant criticises the exercise for not including her colleague Jayne Taylor in the pool for selection. She says she was singled out unfairly following a pattern of unfair behaviour over 5 years. I alternatively find that the consultation and procedure fell outside a reasonable band of responses for failing to address satisfactorily these matters.

46. The claimant found alternative work on 5 October 2020 as an assistant at a local nursery. This ended on 29 January 2021. She then took an offer for fewer hours looking after very young children and has taken up work as a learning support assistant on 17 August 2021. She received Job Seekers' Allowance in March 2021. There has been a shortfall between her earnings and what she would have been paid had she remained in the employment of the first respondent. I am satisfied the claimant has made reasonable efforts to mitigate her losses and that they will be likely to continue for several months. They are set out in the schedule of loss and exceed the statutory cut off 52 weeks' pay, under section 124(1ZA) of the ERA. I therefore award that sum by way of compensatory award.

47. In respect of the basic award, she received a redundancy payment which fell short of the statutory formula, because the weekly salary used was £4.93 less than it should have been. That is to be multiplied by 6, to leave a basic award of £29.58.

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Employment Judge Jones

Date: 30 March 2022

Corrected: 28 April 2022