EMPLOYMENT TRIBUNALS

Claimant: Ms L Mayers

Respondent: Kaizen Martial Arts (a partnership)

Heard at: Watford Employment Tribunal (in public; by video)

On: **31 May 2022**

Before: Employment Judge Quill (**sitting alone**)

Appearances
For the claimant: Mr S Hawes, volunteer with Free Representation Unit
For the respondent: Mr T Wilding, counsel

RESERVED JUDGMENT

(1) The Claimant was an employee of the current respondent Kaizen Martial Arts (a partnership), without a break in continuity, from 2010 until at least August 2020.

(2) A new respondent, Kaizen Schools LLP, is added as an additional respondent. The Claimant alleges that EITHER (a) she remained an employee of the current employee until November 2020, and was unfairly dismissed by it OR ELSE (b) without her knowledge, her employment contract transferred to Kaizen Schools LLP in around September 2020 by operation of law, in which case that entity unfairly dismissed her (and is liable to her for the claims identified at the hearing before EJ Moore on 22 November 2021).

REASONS

Introduction

1. This was a public preliminary hearing which took place entirely by video.

2. The preliminary issues to be determined at this hearing were set out in Employment Judge S Moore's summary from the hearing on 22 November 2021. They were:

(i) Was the Claimant an employee, worker or self-employed?

(ii) Did the Claimant work for the Respondent under a contract of employment (i.e. was she an employee of the Respondent)? If so, between which dates?

(iii) If not, was she nevertheless a worker within the meaning of the Working Time Regulations 1998, or was she self-employed?

(iv) In the light of the answers to issues (i)-(iii) above, what, if any, of the claims remain and what are the issues that will need to be determined at any final hearing?

3. That preliminary hearing contained an order that: "The correct identity of the Respondent is Kaizan Martial Arts (a partnership)." The parties are agreed that the spelling should be "Kaizen". Subject to that, the decision is binding on me.

4. There was also an email sent to Tribunal by the Claimant on 14 April 2022 (page 289 of bundle) about the identity of the Claimant's alleged employer (and adding an additional respondent). That was an application which was also to be decided at this hearing. The Respondent's position was set out in its 10 May 2022 email (page 295 of bundle).

The Evidence

5. I had a preliminary hearing bundle of around 374 pages which was agreed by the parties.

6. I heard oral evidence from each of the Claimant and, for the Respondent, Ms Alex Edwards. The Claimant had produced two written statements, and Ms Edwards one (using her maiden name, Hart).

7. The Respondent had also submitted written statements from other witness, but told me that (while maintaining the contents were accurate) it did not seek to rely on those statements in connection with the determination of the preliminary issues.

The Hearing

8. The hearing took place by video. Other than some audio feedback, there were no significant technical problems.

9. Having heard oral evidence and submissions, I reserved my judgment, while making some case management orders and listing a final hearing.

The approach to the amendment application

10. I canvassed with the parties that, if Kaizen Schools LLP was to be added as a respondent, then the preliminary hearing should be postponed until after Kaizen Schools LLP had been served with proceedings and notified about the preliminary issue, and the hearing to consider that issue.

11. The Claimant's case is that she was employee (rather than a worker, or someone in business on her own account) from 2010 until November 2020.

12. Although only one respondent was named in the ACAS certificate and in the claim form (in each case, "Alex Hart Kaizen", but the name was changed at the 22 November 2021 preliminary hearing, as mentioned above), the amendment application is on the basis that there may have been a change of employer (because of TUPE, or some other reason) on or around 1 September 2020. In other words, that her employment with "Kaizen Martial Arts (a partnership)" ceased around 31 August 2020, but the contract of employment was transferred – without any break in statutory continuity of employment – to Kaizen Schools LLP (or else to Alex Hart Kaizen Ltd).

13. I commented to the parties that, if I was being asked to decide on the Claimant's employment status for the period 1 September 2020 to November 2020, then it would be inappropriate for me do so in the absence of the alleged employer for that period.

14. Both parties, however, were content for me to proceed on the following basis, and I agreed to do so.

    14.1 There is no formal concession from the Claimant that her employment with "Kaizen Martial Arts (a partnership)" ceased prior to 20 November 2020; her amendment request is made because the Respondent is alleging that that entity ceased trading on 31 August 2020.

    14.2 I should make a decision about employment status based on the evidence at this hearing. If I decide that the Claimant was not an employee or a worker, then it might be appropriate for me to dismiss the entire claim, and the amendment request might be irrelevant.

    14.3 If I decide that the Claimant was an employee of the current respondent, then I will decide whether to add Kaizen Schools LLP as an additional respondent. However, my decision about the Claimant's employment status will not prevent Kaizen Schools LLP raising any defence which it wishes to raise (including arguments as to why there was no TUPE transfer to it, and/or why the Claimant was not an employee of theirs) in defence to any claims against it.

The findings of fact

15. In around 1993, Ms Edwards (Ms Hart, as she then was) started a business as a sole trader. She taught martial arts.

16. She worked full time running the business from 1993. Until 2012, she taught all of the classes. From 2012, as the business grew, she included classes provided by for other instructors. She managed the administration, marketing, billing, accounts. She operated under the trading name Alex Hart's Kaizen Martial Arts Academy.

17. In around 2014, that business transferred to the ownership of a partnership. The 4 partners were: Ms Edwards; her husband (Russell Edwards); Mr Perry Mayers and Mr Luke Henderson. Mr Perry Mayers (Mr Mayers) is the Claimant's son.

18. In around March 2020, Kaizen Schools LLP was formed. The members are Ms Edwards and her husband, and only them. According to its accounts, it started trading on 1 September 2020. (Page 347 of bundle).

19. An entity called Alex Hart Kaizen Ltd was incorporated on 19 March 2020. Ms Edwards is a director and a person with significant control. Her husband is company secretary.

20. Mr Mayers had started out as a student at Ms Edwards academy, later becoming an instructor and eventually, as mentioned, a partner in the business.

21. In 2010 (in other words, while Ms Edwards was operating as a sole trader) the Claimant began doing work for Ms Edwards for which she was paid. (Prior to that, she had done some work as a volunteer/parent of a student).

22. From around February 2010 until around January 2015, the Claimant was paid by Alex Hart's Kaizen Martial Arts Academy, and received payslips. There were PAYE deductions made. In other words, this period started while Ms Edwards was a sole trader, and continued after Alex Hart's Kaizen Martial Arts Academy had become a partnership.

23. She was paid monthly according to the number of hours worked and this varied from month to month. In 2009/10, she was paid £990. In 2010/11, it was £7835. In 2011/12, it was £10,109. In 2012/13, it was £12,130. In 2013/14, it was £14,114. In 2014/15, it was £11,946. All these figures being supplied to the Claimant by HMRC based on their records.

24. She was doing administration work for the business which Ms Edwards had previously done herself. It was not full-time. The hourly rate started at £10, increasing to £11 in 2012 and £12 in 2014. So she was working (very roughly) slightly more than 1000 hours per year on average.

25. There is an important dispute of fact about what happened in January 2015, and why. Both agree that a P45 was issued. It states the employer name as "Alex Harts Kaizen Martial Arts Academy" and is dated 19.01.2015.

26. Ms Edwards evidence was that the Claimant resigned, telling Ms Edwards that she had decided to work elsewhere. Ms Edwards states that the Claimant gave oral notice of resignation in December 2014, with last day of employment being 7 January 2015. According to her written statement, the Claimant then did no work at all for several weeks and a new agreement commenced with effect from 4 February 2015, with the Claimant being self-employed from then on. Furthermore, this work was to be different from what the Claimant had done previously. It was the provision of, and then maintenance, of a database which the Claimant and the Claimant's husband had created, as part of a business venture.

27. In fact, in oral evidence, Ms Edwards accepted that the Claimant had actually done work, for which she was paid, in January 2015. Contrary to the written statement, there was no gap.

28. On the Claimant's case, Ms Edwards instructed her to register as self-employed, and told her that the only way she would be able to continue doing the work, and

being paid, was to accept that there would be a P45 showing a leaving date of 7 January 2015, and, after that, to submit invoices, and to be treated as self-employed for tax purposes.

29. The Claimant signed a document (pages 33 and 34 of bundle) with top heading "Alex Hart's Kaizen Martial Arts" and another heading, on the next line, being "Statement of Term of Self-Employment". This was a document produced by Ms Edwards and given by Ms Edward to the Claimant for the Claimant to sign.

30. Within the body of the document, the following phrases appeared:

> KMA reserves the right to dismiss you without notice or payment if it has responsible grounds to believe that you are guilty of gross misconduct or gross negligence, or other substantial grounds justifying your immediate dismissal including any significant breach of your contractual obligations …
>
> … On termination of employment you will …
>
> … I also understand that, from time to time KMA will review existing policies and procedures and is at liberty to amend and re-issue such, in line with current Employment Law. I accept that the terms and conditions of my self-employment will be covered by such policies but that the policies and procedures are non contractual.

31. The document also set out holiday entitlement and rules for taking holiday, including stating that, at Christmas, the Claimant must take 10 compulsory days off in line with the Academy closure. The holiday entitlement was "28 working days" per year.

32. The document was signed by the Claimant on 11 February 2015. A similar item, signed by Ms Edwards around 2 January 2020 appears at pages 42 and 43 of the bundle.

33. The Respondent invites me to decide that the Claimant's denial of the allegations that it was she, the Claimant, who instigated the P45 and the commencement of the new alleged self-employment contract are not credible. Amongst other things, it invites me to find that the Claimant's credibility is adversely affected by her failure to provide documents about her income from work (whether self-employed or otherwise) for other parties. The Respondent's position being that (a) such documents exist and (b) would support the contention that the Claimant was in business on her own account, and had several clients for that business and (c) that such documents have been deliberately withheld by the Claimant, because she was aware that they were potentially damaging to her case. In the alternative, the lack of properly documented income should potentially cause me to doubt whether she has given full and frank disclosure of all relevant matters to HMRC and, and, therefore, I should take an adverse view of her credibility.

34. I accept the Claimant's evidence that the bookkeeping work she did for a couple of local businesses was, in each case, short term and not documented. I accept that she came to do this work because of word of mouth discussions, and not as a result of her advertising a business. She has not deliberately concealed documents about that work, because no documents existed.

35. She did advertise her services as a dog groomer.

36. I do not know whether the Claimant would have been able to collate any other printouts from HMRC. However, I take her at her word that she tried her best to print out everything that was available, and to send to the Respondent.

37. It may or may not be the case that the Claimant has claimed too much by way of expenses when submitting her tax returns. That is not a decision which is in the scope of this hearing. Seemingly, the net profit declared to HMRC is less than the amounts paid to the Claimant by the Respondent and seemingly the explanation for that is that the Claimant claimed to have incurred expenditure (such as meals and travel) in connection with the work she was doing for the Respondent.

38. Even if there is anything wrong with her tax returns (and I am not saying there is) then it does not follow that she was lying on oath during this hearing.

39. Having heard from both witnesses, and considered the contemporaneous documents, I am satisfied that it was not the Claimant's idea that a P45 would be issued. Instead, it was Ms Edwards suggestion to the Claimant that a P45 would be issued, and, after that, the Claimant would be treated as self-employed for tax purposes.

40. The Claimant claims that it was Ms Edwards who suggested to her that an advantage of being self-employed was that she, the Claimant, would be able to claim expenses. It is not necessary for me to form an opinion on that specific sub-allegation. I do think it plausible that Ms Edwards may well have sought to persuade the Claimant to see the arrangement as being beneficial to the Claimant; however, that would not change the fact that the Claimant is the person responsible for any declarations made by her to HMRC.

41. In any event, I am satisfied that Ms Edwards (and her husband) insisted on the change. She insisted that a P45 would be issued. She insisted that - if the Claimant wished to continue to do work for the Respondent - the Claimant would have to sign the "Statement of Term of Self-Employment" document. Ms Edwards informed the Claimant that the Claimant would have to deal with HMRC on the basis of being self-employed.

42. Ms Edwards and the Respondent accept that the Claimant was an employee up to 7 January 2015.

43. Ms Edwards accepted in cross-examination that the Claimant worked throughout January 2015. She asserted that the status was self-employment after 7 January 2015. Her evidence was that the database creation was done by the Claimant and the Claimant's husband at Christmas 2014, and that the Claimant sought payment for the hours spent doing that. The Academy was closed at Christmas 2014, but the Claimant worked and claimed payment.

44. Other than the 2014 Christmas closure (during which the Claimant worked in any event), Ms Edwards did not allege in oral evidence that there was a period in which the Claimant was not working for the Respondent around 7 January 2015. More generally, other than holidays and sickness, she did not allege there was any period in which the Claimant was not working.

45. Around 2 February 2015, the Respondent issued the Claimant with a job description on its headed paper. It said "job title" was Programme Director/Personal Assistant. It said "reports to" the Master Instructor, Ms Edwards.

46. Ms Edwards accepts that the items in the document were things that the Claimant had to do. On Ms Edwards' evidence, these were a means by which the performance of the contract between Ms Edwards' business (the respondent) and the Claimant's business (as a database provider) could be assessed.

47. The document refers to "salary" being £12 per hour. It has a column "type of position" and "full-time" is ticked, rather than "part-time" or "casual". It says "hours" are to be approximately 25 per week.

48. In general description, it says

> The Programme Director/Personal Assistant (PD & PA) works in conjunction with the Master Instructor (MI) to manage and run the day to day operations of the KMA Academy. They are chartered with the ongoing success and growth of the academy. This includes assigned budgeting, marketing and sales targets, database management, and other business target set by KMA. PA focus is primarily but not limited to activities related to enrolment, in house marketing and budgetary control.

49. Some of the contents of the job description are not applicable. For example, the Claimant did not teach martial arts classes. I infer that this was probably because a template for another job had been adapted, and that paragraph had not been deleted. However, in the main, the document specifically refers to tasks which the Claimant had to do.

50. Around 2 February 2018 (page 36 of bundle) and January 2020 (page 40), the Respondent reissued the job description in similar terms, though with a different amount for salary. (I do not need to make a decision, for present purposes, about Ms Edwards claim that the £19 per hour figure is incorrect, or her assertions about why an incorrect figure appears in the document. Her very serious allegation was made after the Claimant's evidence had concluded, and the Claimant therefore did not have the opportunity to comment. Ms Edwards does not deny that the Respondent issued the document.)

51. After January 2015, the Claimant provided "timesheet/invoice" documents to the Respondent. These showed what hours the Claimant had worked each day, including start/finish times. They calculated the sum of money to which the Claimant claimed to be entitled. Following receipt of these documents, Ms Edwards authorised payment by the Respondent. The document for the allegedly self-employed period are in the bundle from page 91 (April 2015) to page 166 (September 2020). They are formatted in a way which is almost identical to some of the timesheets submitted during the period of admitted employment. Eg November 2011 to January 2012.

52. Between pages 197 and 272 of the bundle there appear various documents with the heading "work plan". These were created by the Claimant and supplied to Ms Edwards. They each refer to a different specific date. They list various tasks, many of which have ticks next to them. There are some handwritten comments and additions.

53. My finding is that these documents included lists of regular tasks which the Claimant was required to perform, including checking and actioning emails.

54. There was also another person who had a contract with the Respondent, named Kellie Bright. She was also someone who is, as far as the Respondent is concerned, self-employed and not an employee. It is not alleged that Ms Bright is a subcontractor or, or an employee of, the Claimant.

55. The same workplan documents also include some tasks which were performed by, and ticked off by, Ms Bright.

56. I am satisfied that the type of work done by the Claimant for the Respondent from 2015 onwards was not significantly different to the work she did before then. She was not specifically creating and maintaining a piece of software. She did use the database as part of her administrative duties.

57. Both before and after 7 January 2015, the Claimant had paid time off which was called “holiday”. That continued until 2020.

58. When the Claimant wanted to take holiday, she had to agree that with Ms Edwards. As evidenced by (for example) the WhatsApp exchanges, when considering whether to approve time off, Ms Edwards would take into account whether she (Ms Edwards) and/or Ms Bright would be on the premises. (The Claimant usually performed her duties at the Martial Art Centre in Waltham Abbey, though she also sometimes worked at one of the Respondent’s other sites). I have not been provided with evidence of Ms Edwards saying “no” to any request for time off. However, the tone of the correspondence makes clear that both the Claimant and Ms Edwards regarded the situation as being that permission was needed.

59. The Claimant has held herself out the government as being self-employed, not only in relation to tax returns and payments, but also in relation to obtaining grants and assistance.

The Law

Definitions of "employee" and "worker"

60. Section 230(1) of the Employment Rights Act 1996 (“ERA”) states: "employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contact of employment". A contract of employment is defined at s.230(2) as "a contract of service or apprenticeship, whether express or implied (and if it is express) whether oral or in writing".

61. If there is no contract at all between the parties, then the claimant cannot be an employee. For a contract to be formed, there has to be offer, acceptance, an intention to create legal obligations, and certainty. The contract does not necessarily have to be in writing in order to be binding. If there is a contract, the tribunal has to decide if it is a contract of employment or not.

62. A number of different tests have been over the years in order to determine whether an individual is employed under a contract of service and is thus an employee, or whether they have been engaged under some other type of contract. The decision

in a given involves weighing all these factors – some might point towards the contract being one of employment, and some might not. However, what was called the "irreducible minimum of obligation" for an employment contract to exist (see (Nethermere (St Neots) Ltd v Gardiner [1984] I.C.R. 612) is that there be sufficient control by the Respondent, a mutuality of obligation, and an agreement by the Claimant to do the work personally.

63. The necessary degree of control to be exercised by the employer for a contract of employment to be found is discussed in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 Q.B. 497 (See below)

64. The factors relevant to the decision about whether mutuality of obligation exists between the parties include whether the employer is obliged to provide work and the individual is obliged to accept it (Carmichael v National Power Plc [1999] 1 W.L.R. 2042)

65. An individual is required to perform the contract personally if no right of substitution exists to allow the individual to send someone else in their place. If there is a clause in a written document which purports to give a right of substitution, there might still be a finding that the employee had agreed to do the work personally if, in reality, the parties never intended that there would be substitution.

66. Outside the field of employment law, the ability of courts to look behind the written terms of a signed contract is limited to situations where (there is a mistake that requires rectification; something which is not argued in this case or where) the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract. Ie where the contract is a “sham” in the sense described in Snook v London and West Riding Investment Ltd 1967 2 QB 786, CA. (“Snook”)

67. In the field of employment law, a claimant does not necessarily have to demonstrate a common intention to mislead in the Snook sense (although, if the Claimant can show the written contract is a “sham” in the Snook sense, the tribunal can determine the true agreement). In the field of employment law, potentially there might have been unequal bargaining power between the claimant and the alleged employer and that it might be the latter who decided upon all of the terms of the written document(s). This is a principle addressed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC (“Autoclenz”) and more recently in Uber v Aslam Neutral Citation Number: [2018] EWCA Civ 2748 Case No: A2/2017/3467 (“Uber”).

68. A tribunal faced with an allegation that a written document is a “sham” must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. Determining the true intentions of the parties does not mean that a tribunal should base its decision on what one (or each) party thought privately to itself; rather it requires the tribunal to determine what was actually mutually agreed – in reality – between the parties.

69. In assessing whether a person is an employee, Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 suggests that there are three questions to be considered:
    (1) Did the worker undertake to provide their own work and skill in return for remuneration?
    (2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?
    (3) Were there any other factors inconsistent with the existence of a contract of employment?

70. However, no single test to be applied to a contract, or one single feature of a contract, determines the issue of whether it falls into the definition of "contract of employment". A multi-factorial approach must be adopted, whereby various different features of the contractual relationship are analysed, some of which might point to the person being an employee and some others might point in the opposite direction or be neutral. The significance of each feature must be weighed and a decision made as to whether, in all the circumstances, the individual contract is a contract of employment.

71. In accordance with the Employment Tribunal Extension of Jurisdiction Order 1994, only people who were employees (and whose employment has terminated) can bring breach of contract claims in the employment tribunal. Similarly, only "employees" can bring claims of unfair dismissal under Part X of the Employment Rights Act 1996.

72. However, to bring a claim under Part II of the Employment Rights Act 1996, alleging deduction from wages, it is sufficient for a claimant to prove that they are a "worker" (under either of the limbs in s230(3)) and that the respondent was their employer in that wider sense.

73. Since section 230(3)(b) refers to any other contract, it is clear that a contract cannot fall within both s230(3)(a) and also s230(b). It can fall within the former (so limb (a), a contract of employment) or the latter (so limb (b), which a "worker contract"), or, of course, it could fall into neither.

74. In Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, the EAT gave guidance on section 230(3) and, in particular, on the factors that might help a tribunal to decide whether a particular contract fell into the definition in limb (a) or the definition in limb (b) or into neither. It held that the intention was to create an intermediate class of protected "worker" made up of individuals who were not employees but who could not be regarded as carrying on a business. Factors to consider could include the degree of control exercised by the alleged employer, the exclusivity of the engagement and the typical duration(s) of assignment(s), the extent to which the individual is integrated in the alleged employer's organisation, the method of payment, who supplies equipment, and how risk is apportioned.

Analysis and conclusions

75. As per the findings of fact, in practice, the working relationship between the parties was similar both up to 7 January 2015 (the period in which the Respondent

concedes that the Claimant was an employee) and after. The Claimant was doing the same tasks for the Respondent both before and after that date.

76. As per the findings of fact, it was the Respondent, not the Claimant, who suggested issuing a P45 and a move to self-employed status. In fact, the Respondent insisted.

77. The facts do not show that the Claimant was in business on her own account as any of: bookkeeper; office administrator; software engineer; database seller or provider, or any variation of any of these. She was not advertising as such and, generally speaking, she did not do any of that type of work for anyone else in the period 2010 to 2020. (She did do a couple of small pieces of work doing the books of local businesses, on a very short term and informal basis). Although she was providing invoices to the Respondent (that being at the Respondent's insistence) and holding herself out to HMRC as self-employed, she did not have her own stationery or tools. She used the Respondent's computer and did her work on the Respondent's premises.

78. It does seem that the Claimant claimed expenses for certain things on her tax returns (eg travel and meals). The evidence shows that the Claimant travelled to work by car, and worked a fairly short distance from home. Neither her travel arrangements nor her meal arrangements are inconsistent with being an employee.

79. The Claimant may have been in business as a dog groomer and/or a cosmetics sales person. However, I do not need to decide that, because, even if she was, the Respondent was not a client of either such business.

80. I am satisfied that the words "self-employment" in the "Statement of Term of Self-Employment" (signed by the Claimant in February 2015 and Ms Edwards in January 2020) do not accurately describe the true nature of the Claimant's contract with the Respondent. The other phrases used in the document (including "dismissal" and "termination of employment") more accurately reflect what was actually agreed.

81. The actual agreement between the parties was that the Claimant would work part-time, carrying out the administrative work mentioned in the job descriptions and as shown on the work plans. She could not send a substitute. The Claimant sought to maximise the hours that she worked, so as to maximise her income. However, she accounted in detail to Ms Edwards for how she spent her time. For example, on the work plans, she ticked off the regular tasks as she completed them each day, and added irregular tasks by writing them on by hand. She submitted these documents to Ms Edwards regularly. She was sure to note on them when any task was going to be done by Ms Bright rather than by herself, the Claimant.

82. The Claimant had a certain amount of flexibility about her start and finish times, but the expectation that she would usually do around 25 hours per week was reflected in the job descriptions which the Respondent created. She had a holiday entitlement which she needed to arrange with Ms Edwards.

83. Asking myself the questions as per Ready Mix:

83.1 the Claimant provided her services for an agreed hourly rate, and was paid for the hours that she worked (based on the timesheets/invoices which she produced.

83.2 Ms Edwards exercised control over the Claimant's work. The list of tasks to be done was drawn up by Ms Edwards (the job descriptions) and checked by her (the workplans submitted by the Claimant to her). All of the work which the Claimant did was in connection with the students and the classes run by the Respondent for those students. Ms Edwards asserts (and she may well be right) that the Respondent could get by without the Claimant and without using the database that the Claimant had used to perform her work. However, even if Ms Edwards could have used a paper system instead of an electronic one, she accepts that she knew the contents of the electronic system. On her own case, she told the Claimant what data she required the Claimant to input into the data, and what type of information she, Ms Edwards, wanted to be able to retrieve from it.

83.3 There are some factors which are contrary to the Claimant's being an employee. Notably, the fact that she has held herself out to the government as being a self-employed person. As a separate, but related, point, she has claimed expenses (deductable from her taxable income) that an employee would not be able to claim. However, these factors do not outweigh the fact that the Claimant was operating as an integral part of the Respondent's business, and was doing so both before and after 7 January 2015. The actual explanation for the tax status is that the Respondent, rather than the Claimant, insisted on that arrangement. In terms of claiming deductable expenses and government grants, it is not for me to say whether she had a good faith basis for doing so. I need say no more than that, even if I assume that she had a genuine belief that she was entitled to do so, such belief does not convert something that is otherwise a contract of employment into something else.

84. My decision, therefore, is that the Claimant had a contract of employment with the current respondent, which started in 2010, and had not terminated by 31 August 2020.

85. If the Claimant continued to have a contract with the current respondent up until November 2020, then that contract remained as a contract of employment.

Amendment

86. There is potentially a dispute, however. The Claimant's position (to oversimplify) is that as far as she was concerned, she remained employed by the same entity throughout. She claims never to have been told differently. However, in light of the current the Respondent asserting that it ceased trading no later than around August 2020, the Claimant seeks to protect her position by arguing that, if the current respondent ceased trading, then the Claimant – being assigned to the business – had her contract of employment transferred to the new business owner.

87. In response to the amendment application, Ms Edwards wrote, on 10 May 2022:

> The Claimant's application is opposed, at no stage did the Claimant provide services to either business, neither are therefore the appropriate Respondent. Further, and in

addition, I submit that the claim should be struck out due to nullity in any event due to the correct Respondent having ceased trading. It is acknowledged that this is unlikely to be determined prior to the hearing on the 31 May 2022, however in anticipation of that hearing I set out in full the reasons for this submission below.

The Claimant and the partnership entered into a contract in February 2015 by which the Claimant would provide services. That agreement is plainly between the Claimant and the partnership. That contractual relationship continued until it was suspended by me informally on 10th September over the phone. This was formalised in writing on 7th October and the contract was terminated finally on 20th November 2020. All the invoices submitted by the Claimant were submitted on invoices with the partnerships name on it.

The partnership itself was started by me as a sole trader. In 2014 it then changed to be a partnership between 4 named individuals. I was the 'senior partner' at all material times. I intended the business to cease trading in or around March 2020, however due to the breakout of the Covid-19 pandemic paused that. The business continued to operate until August 2020 when it ceased trading. Accounts to that effect have been submitted to HMRC.

In so far as the two other businesses are concerned, I have two:

1. Alex Hart Kaizen Limited incorporated on 19 March 2020, which has not as yet commenced trading.

2. Kaizen Schools LLP incorporated on 24 March 2020, commenced trading in September 2020

Both were incorporated in March 2020 with a view that they were due to commence trading at that time, however given the impact of the pandemic did not in fact start trading until later in 2020, as set out in the accounts attached. For the avoidance of doubt, the Claimant had no contractual relationship with either of these companies.

As a result in terms of the Claimant's claim, the only business to which the Claimant had a contractual relationship was the partnership, which is no longer trading. The other two companies have no relationship to this Claimant or this claim. This claim is therefore brought against an entity which no longer exists.

88. I do not need to express any opinion on the merits of the argument that there may have been a relevant transfer as defined by the Transfer of Undertakings (Protection of Employment) Regulations 2006. However, it is notable that the Respondent's email seems to say that it seeks to argue that (a) the entity which (I have decided) employed the Claimant no longer exists and (b) that there was a contract in existence until November 2020, albeit one in which no work was performed from September 2020.

89. It is not necessarily impossible for an employee who is suspended from work to be automatically transfer because of TUPE.

90. The existing respondent is a partnership with 4 members. One of whom is Ms Edwards, who is thoroughly familiar with the litigation and the allegations being made. As per the email just quoted, Ms Edwards, on her own account, is also closely associated with Kaizen Schools LLP.

91. If I refuse the Claimant's application, there is a risk of hardship and injustice to the Claimant. For example, if the termination decision was not made by the current respondent, but was made after a TUPE transfer to a different employer, the Claimant might have no remedy against the current respondent.

92. If I grant the Claimant's application, the risk of hardship and injustice to the current respondent comes mainly if there is a delay. Granting the Claimant's application does not remove from the current respondent any defence or argument that it might wish to make to the effect that it did not dismiss the Claimant, or that the claim against it should be dismissed for any of the reasons mentioned in the email quoted above.

93. If I grant the Claimant's application, there is a risk of hardship and injustice to the proposed new respondent. It will have to face a claim that it would not otherwise have had to face. If the Claimant succeeds, it may have to pay compensation that it would not otherwise have had to pay.

94. In terms of the manner of the application, the email of 14 April copied to the Respondent sets out reasonably clearly and succinctly what the Claimant would like to argue and why. In simple terms, that if the current respondent was not her employer in November 2020, then she wants to bring a claim against the actual employer. The application was clear enough for the Respondent to understand it, even though specific legislation was not mentioned.

95. In terms of the timing of the application, since the 22 November 2021 hearing was around a year after the end of employment (on the Claimant's case) and the presentation of the claim form, there does not seem to be a particularly good reason that the application could not have been made before that hearing. That is a factor for me to take into account, but is not a knockout blow to whether I grant the application.

96. In terms of timing of the application, it was made shortly before the hearing to determine the preliminary issue. However, neither party argued that the hearing needed to be postponed for that reason.

97. In terms of timing of the application, it was made long enough before the final hearing that all parties will still have adequate time to prepare for that hearing.

98. In terms of time limits, the Claimant has brought an unfair dismissal claim which seems to be in time based on the alleged effective date of termination, and on the assumption that the current respondent was her employer as of the termination date. (For avoidance of doubt, I am not making a decision that it is, in fact, in time). If I allow the amendment, any time limit issues will be determined later in the proceedings, and after the new respondent has had a chance to comment.

99. The Claimant's argument that there was, or may have been, a TUPE transfer is a brand new argument, and one that would add to the complexity of the case, and the number of issues and documents. It will not necessarily add to the number of witnesses. Ms Edwards and the Claimant will be the main witnesses for the respective parties in any event.

100. It is appropriate for me to exercise my discretion and add Kaizen Schools LLP as a respondent, taking into account the contents of Ms Edwards 10 May 2022 email. On her own account, Kaizen Schools LLP is one of "my two businesses". The person likely to be the main witness for Kaizen Schools LLP (Ms Edwards) will not be taken by surprise by the claim. The injustice and hardship to the two Respondents of adding the new respondent is significantly less than that to the Claimant if I refuse the application.

101. I am not adding Alex Hart Kaizen Ltd, based on Ms Edwards assertion that it was not trading at any time relevant to this dispute. I assume that position will not change. If it does, then the decision not to add Alex Hart Kaizen Ltd can potentially be revisited.

Employment Judge Quill

Date: 24 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS