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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102133/2022**

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**Held in the Dundee Tribunal on 17 and 18 October 2022**

**Employment Judge L Murphy  
Tribunal Member M McAllister  
Tribunal Member J McCullagh**

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**Ms A Vial**

**Claimant  
Represented by:  
Ms S Ossei**

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**Mr S Alsafar**

**Respondent  
Represented by:  
Mr Hoyle,  
Consultant**

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**JUDGMENT** having been sent to the parties on 19 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

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## **REASONS**

### **Introduction**

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1. This public preliminary hearing took place in the Dundee Employment Tribunal on 17 October 2022. A final hearing had been scheduled to take place on 17 and 18 October 2022. During the preliminaries, the respondent's representative intimated that the respondent disputed that

he employed the claimant and maintained instead that she was employed by a limited company named Mazaj Dundee Ltd. This had not been averred in the respondent's ET3 nor at any of the earlier case management preliminary hearings. The hearing was converted to a public preliminary hearing to determine the correct identity of the employer of the claimant. There was no objection by the parties to this approach.

2. An oral judgment was given on the morning of 18 October 2022. The Judgment of the Tribunal was that the claimant was employed at all material times by the respondent. The respondent's representative requested written reasons for the judgment during the case management discussion which followed.

3. An Arabic interpreter attended by video link to assist the respondent. The claimant gave evidence on her own behalf and led evidence from her former colleague, Amanda Heath. The respondent gave evidence on his own behalf. Evidence was taken orally. A joint set of productions was lodged running to 90 pages. The respondent added a number of bank statements on the day of the hearing. Mr Hoyle indicated he also wished to add 3 payslips but these were not ultimately introduced into evidence. The respondent's representative conceded that they had not been provided to the claimant.

### Findings in Fact

4. The following facts were found to be proved on the balance of probabilities.

5. In October 2021 the claimant was a university student, studying in Dundee. She is 19 years old and has had one previous job in her hometown in England. She spotted an advert in the window of a restaurant which traded as Mazaj Arabic Charcoal Grill, indicating they were looking for staff. The advert was not produced to the Tribunal. As she was looking for work, the claimant entered the restaurant with her CV. She gave it to the respondent, who introduced himself as Sadeq. He did not provide his surname. He told the claimant he was the owner of the company. He explained he had opened up his own restaurant having previously worked

elsewhere as an employee. He explained they required waitresses and explained the duties associated with the role. He took the claimant's phone number and told her he would call her to come in for their next training session.

- 5     6.     Sadeq telephoned the claimant subsequently and asked her to come in. She began employment as a waitress at the restaurant on 15 October 2021. The claimant saved the respondent's mobile number to her phone. The respondent would thereafter contact the claimant from his mobile to ask her to come in for shifts. She was not provided with a contract of  
10     employment or statement of employment particulars. She was not provided with any other employment-related documentation such as a handbook.
7.     In the period of her employment, which ended with her resignation on 10 December 2021, the claimant was paid sometimes in cash. During the  
15     employment, she was paid on two occasions by bank transfer to her account on 1 and 8 December 2021. When she was paid by bank transfer, the transfer showed in her account as having been received from 'Mazaj Dundee'.
8.     After the claimant's employment ended on 10 December 2021, she  
20     received one further payment in connection with her employment by bank transfer on 15 December 2021. Once again, this showed as 'Mazaj Dundee' on her bank statement.
9.     The claimant never received a pay slip from the respondent. She never received a P45 from the respondent. She never received an email from  
25     the respondent which purported to come from any limited company.
10.    Shortly after her employment ended, on 14 December 2021, the claimant asked the respondent to provide her with a copy of her contract of employment. He did not do so.
11.    The respondent never told the claimant he was the director of a company.  
30     His only reference to a company throughout his interactions with the claimant until the issue was raised at the hearing on 17 October 2022 was during his first meeting with the claimant when he said he was the owner

of the company. He did not identify what company he owned. The respondent at no time told the claimant that she was employed by a limited company. The claimant never asked him who her employer was. The claimant believed that Mazaj Arabic Charcoal Grill was a restaurant which the respondent owned and that he was her employer.

12. The claimant inferred (erroneously as it turned out) that the respondent's second name was Mazaj. Following the termination of her employment, she initiated Early Conciliation through ACAS on 13 February 2022 and notified ACAS that the name of the prospective respondent was Sadiq Mazaj. That claim was rejected.

13. The claimant or her representative made online investigations to determine the respondent's full name. They discovered his surname was, in fact, Alsafar as a result of a post on Facebook. On 12 April 2022 the claimant initiated a further EC process through ACAS. She named the prospective respondent on this occasion Sadeq Alsafar. The rejection of the claim was reconsidered and the ET1 was treated as having been received on 3 May 2022.

14. The respondent did not assert in his ET3 response which he lodged on 1 June 2022 that he did not employ the claimant. At no stage before the hearing on 17 October 2021 did he assert that he was not the claimant's employer. There have been two preliminary hearings on case management where the issues in the case were discussed.

15. The respondent sought professional advice on 13 October 2021 and, following his representative's appointment, his representative intimated that the respondent disputed being the claimant's employer on 17 October 2022. He averred that the claimant was employed by Mazaj Dundee Ltd. This was the first occasion on which the claimant had heard of that company.

16. The respondent is the director and sole shareholder of Mazaj Dundee Ltd which was incorporated on 19 March 2021, a number of months before the restaurant opened for business. The company is incorporated in Scotland. The company has a business bank account with the TSB. On

the three occasions when the claimant was paid by bank transfer, the money was transferred from the account of Mazaj Dundee Limited. As set out in paragraphs 4 and 5 above, the payments showed up on her bank statements as 'Mazaj Dundee'.

5 17. Amanda Heath also worked in the restaurant Mazaj Arabic Charcoal Grill. She also began employment there in October 2021. She worked there for longer than the claimant with her employment ending around April 2022. She was not given a contract of employment or statement of employment particulars. She was not given pay slips. She was not given a P60. She  
10 received a P45 after the end of her employment but did not recall who was identified as her employer on that document. She believed she was employed by the respondent as an individual.

18. Amanda Heath did not, during her employment, have sight of, or did not notice, any insurance certificate at the restaurant premises. No insurance  
15 certificate was produced to the Tribunal. She did recall seeing an Environmental Health Certificate. She did not pay particular attention to the document, but her recollection was that the name stated on the certificate was 'Mazaj Dundee'. The certificate was not produced to the Tribunal. With regard to the name on the restaurant license, the  
20 respondent told the Tribunal that when he opened the restaurant, he initially "borrowed a license". It did not say his name or the name of Mazaj Dundee Ltd. The license document was not produced.

19. Ms Heath was paid by the respondent partly by bank transfer and partly in cash. The respondent paid her in cash for hours worked in excess of 16.  
25 When he paid her by bank transfer, sometimes the payment showed on her bank statements as coming from Mazaj Grill. There is no separate company trading under that name. Whether a payment showed as coming from Mazaj Dundee or from Mazaj Grill depended upon the reference the respondent chose to enter in the company's bank account app. The  
30 respondent sometimes typed 'Mazaj Dundee' and sometimes typed 'Mazaj Grill' in the reference field when making payments to staff using the app. He did so interchangeably.

## Relevant Law

20. McBryde observes that Scots law “as a general rule decides questions of contractual ... intention objectively.” (The Law of Contract in Scotland, 3<sup>rd</sup> edition, para 5-02). He cites the dicta of Lord Denning in **Storer v Manchester CC** [1974] WLR 1403 at 1408.

“In contracts you do not look into the actual intent in a man’s mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying ‘I did not intend to contract’ if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

21. McBryde also acknowledges that problems can arise in deciding who the parties to the contract are. It is observed that “*The problem is at its most acute when one of the parties acts in a way which makes it obscure whether the party is contracting as an individual, or as an agent or principal, or on behalf of a partnership or company or on behalf of several companies*” (at 5-87).

22. As a general rule, the agent acting within his authority who discloses both his representative capacity and the name of his principal will successfully form a direct contract between principal and third party. An agent can contract on the basis that he engages himself and not the principal in a direct contractual relationship with a third party (The Law of Agency in Scotland) SULI 1<sup>st</sup> Ed (para 14-18). Where an agent fails to disclose both his representative capacity and (inevitably) the identity of the principal, the agent is liable under the contract. Where the third party later becomes aware of the previously undisclosed principal, the third party may treat the agent as liable in contract or the subsequently emerged principal (*ibid* 12-25).

23. The following principles have been identified by the EAT as relevant to the issue of identifying whether a person A is employed by B or C in **Clark v Harney Westwood & Riegels & ors UKEAT/0018/20/BA** and others:

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- a. Where the only relevant material is documentary, the question whether A is employed by B or C is a question of law;
- b. However where (as 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.
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- c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will require to inquire whether that agreement truly reflects the intentions of the parties.
- d. In determining whether B or C is 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; and
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- e. Documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. It would be a rare case where a document about which a party had no knowledge could contain persuasive evidence of the intention of that party.

20 **Submissions**

24. Ms Ossei submitted there was no official documentation provided to the claimant or her colleague, Amanda Heath and it was reasonable for them to conclude the respondent was the employer.
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25. Mr Hoyle suggested such a conclusion was contrary to the evidence the Tribunal hearing. He asserted this was a case of *res ipsa loquitur*, meaning the thing speaks for itself. Payments to the claimant came from the business account of Mazaj Dundee Ltd. The company had existed since March. Mr Hoyle said there was no evidence the respondent traded in his own right.

## Discussion and Decision

26. This is a case where no written agreement was drawn up to reflect the terms of the relationship, either at the outset of the employment or at all. Identifying the parties to the contract is a mixed question of fact and law.  
5 The Tribunal is entitled to and indeed must inquire as to what happened between the parties in discerning objectively the intention.
27. We require to return to first principles on the formation of contracts. It is clear that a legally binding contract of service existed. That is not in dispute. The claimant agreed to perform waitressing and cleaning duties  
10 in exchange for wages. She did so for approximately two months.
28. The contract was agreed on or shortly before 15 October 2021. It was agreed verbally between the claimant and the respondent. The respondent made no suggestion to the claimant that he was contracting with her on behalf of another entity, an 'unnamed principal'. The  
15 respondent told her he was the owner of the company. He did not indicate the name of the company he was referring to. He did not tell her he was contracting with her on behalf of a company.
29. We have also had regard to all the other relevant acts and deeds of the parties in determining whether it was objectively inferable from these that  
20 the intention was to create contractual relations between the claimant and the respondent or between the claimant and Mazaj Dundee Ltd.
30. The claimant understood his one and only reference to the company on their first meeting to be a reference to his business running a restaurant. Her subjective understanding was that she was employed by the  
25 respondent as a sole trader. She did not in her words or deeds act at any time in a manner inconsistent with this asserted understanding. On the contrary, she identified the respondent personally as the prospective respondent in her interactions with ACAS. She took instruction from the respondent. She liaised with him on his mobile phone regarding practical  
30 matters.
31. We accept that the respondent operated a limited company but he did not inform the claimant that it would be employing her. He did not make his

representative capacity as a director of that company known, nor suggest that any engagement of the claimant was on behalf of his unnamed company.

5 32. The acts and deeds of the respondent were consistent with the analysis that he, Sadeq Alsafar, personally employed her. These acts ranged from his initial offer to employ the claimant, his instructions to her from his mobile phone regarding shifts to attend, his payment of the claimant in cash, the absence of any reference to his position as a director of a limited company and his failure to name Mazaj Dundee Ltd as a company on  
10 behalf of which he was pursuing contractual relations with her. His failure to mention or identify the limited company at all during the employment or throughout the subsequent period of the Tribunal litigation is also consistent with this analysis. He did not take any opportunity to disclose what he claims is the true position. He omitted to provide a written contract  
15 of employment, which would have identified the parties, when requested.

33. It has been contended by Mr Hoyle that the fact the claimant was provided with bank transfers from Mazaj Dundee, made clear that the relationship was in fact with Mazaj Dundee Ltd. It is correct that the claimant received payment from this entity on two occasions while her employment  
20 subsisted. These occasions were relatively late in the brief period of her employment and took place on 1 and 8 December 2021. On one further occasion in December, she received payment by the same method after her employment had come to an end.

25 34. We are not persuaded that it can be objectively inferred from this fact that the claimant was employed by someone other than the respondent, much less that she was employed by Mazaj Dundee Ltd. The two pay occasions happened late into the relationship. Up to that point, the claimant had been paid in cash by the respondent. The contract had been formed. We have found as a fact that the bank transfers showed up in the claimant's account  
30 as Mazaj Dundee, not Mazaj Dundee Limited. The restaurant was called Mazaj and the claimant understood that this was the respondent's business name or trading name. It was objectively reasonable for this inference to be drawn.

35. The two payments from 'Mazaj Dundee' were not sufficient to amount to the tardy disclosure of a named principal as a party to the contractual employment relationship. The payment information provided by the claimant's bank in her statements did not name a limited company called 'Mazaj Dundee Ltd'. In and of themselves, they did not indicate the existence of a previously undisclosed principal in the shape of Mazaj Dundee Ltd as a party to the employment relationship. Nor could it be objectively inferred that they pointed to a novation whereby Mazaj Dundee Ltd was substituted for Sadeq Alsafar as the other contracting party to that relationship.
36. Mr Hoyle suggested that a concession had been made by the claimant's witness that a document was on display bearing the company name at the respondent. We do not accept this characterisation of Amanda Heath's evidence. Ms Heath said there was an Environmental Health Certificate which as far as she recalled said Mazaj Dundee. She did not concede it said Mazaj Dundee Ltd, with the Ltd connoting the existence of a limited company. In any event, the claimant was not cross-examined on her awareness of the certificate and there is no evidence before the Tribunal from which we could conclude that she had (a) noticed it; or (b) understood from it that it had a bearing upon her contractual relationship. The certificate was not produced to the Tribunal. No evidence was led from the respondent about what it said.
37. In the circumstances, based on all the relevant evidence, we find the intention of the parties, as inferred from their outward expressions and their actings was that the respondent entered into a contract of employment with the claimant and remained party to that contract at all material times. There was no evidence which undermined this analysis or raised a significant doubt as to the intention of the claimant and respondent or the identity of the contracting parties.
38. We recognise that, as McBryde observed, it can be difficult to identify the contracting parties where one of the parties acts in a way which makes it obscure whether he is contracting as an individual or as an agent on behalf of a company. In reality, this was not such a case. There was nothing in the respondent's words or deeds at the formation, during the subsistence

of the employment, or for a considerable period after its termination to indicate an intention by the respondent to contract in a representative capacity on behalf of Mazaj Dundee Ltd or any principal, named or unnamed.

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**Employment Judge: L Murphy**

**Date of Judgment: 25<sup>th</sup> October 2022**

**Date sent to parties: 27<sup>th</sup> October 2022**

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