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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 8000696/2024

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**Hearing held in Glasgow by Cloud Video Platform (CVP)
on 12 September 2024**

Employment Judge: R Sorrell

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Mrs P Allen

**Claimant
In Person**

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Hamberley Care 1 Ltd

**Respondent
Represented by:
Mr R Preston -
Head of Human Resources**

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PRELIMINARY HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that Hamberley Properties (FV) Milngavie Ltd ('HP') and the respondent were associated employers at the time the claimant entered the respondent's employment and the claimant has the requisite length of continuous service to pursue her unfair dismissal claim.

Accordingly, the Tribunal has jurisdiction to hear the claim.

E.T. Z4 (WR)

REASONS

Introduction

1 The claimant lodged a claim for unfair dismissal on 22 May 2024.

2 This hearing was scheduled to determine whether the claimant has the
5 necessary length of continuous service in order that her claim for unfair
dismissal can proceed to be heard at a Final Hearing. It was a virtual hearing
held by way of the Cloud Video Platform.

3 As parties did not have legal representation, I explained the purpose of and
procedure for the hearing, as well as the issues I had to decide in accordance
10 with the law. I further explained that I was required to adhere to the Overriding
Objective of dealing with cases justly and fairly and to ensure that parties were
on an equal footing.

4 Both parties lodged productions during the course of the hearing.

Findings in Fact

15 The following facts are found to be proven or admitted;

5 The claimant's date of birth is 25 January 1965.

6 The respondent is a private care home provider.

7 The claimant commenced full-time employment with Hamberley Properties
(FV) Milngavie Ltd ('HP') on 13 December 2021 as a Business Administrator.

20 8 'HP' is a private care home provider.

9 The claimant worked 40 hours per week and was paid £24,000 gross per
annum.

10 The claimant was provided with a statement of main terms and conditions of
employment which she signed on 10 November 2021. (D1)

- 11 In May 2022, the claimant was asked to work two of her working days a week
at the respondent company due to the position of Business Administrator
being vacant. She agreed to that request and this arrangement commenced
on 31 May 2022. She continued to work at 'HP' for three days a week. Her
5 pay slips still recorded her employer as 'HP.' (D2)
- 12 Richard Preston is the Head of Human Resources for 'HP' and the
respondent. At the time the claimant entered the respondent's employment,
C Quartey was the Operations Director of 'HP' and the respondent.
- 13 Around the end of September 2022, C Quartey contacted the claimant and
10 asked if she was agreeable to working for the respondent as the Business
Administrator on a full-time basis. She told the claimant that it was a transfer
and that other than receiving a salary increase, nothing else would change.
- 14 After giving it some thought due to the further distance she would need to
travel and the caring responsibilities she had for her Mum, the claimant
15 agreed to work for the respondent on a full-time basis. This commenced on 1
October 2022. She did not receive a P45 from 'HP.'
- 15 On 12 October 2022 the claimant completed and signed a 'Notification of
Change' form. This form recorded that her base location had changed from
Milngavie Manor ('HP') to Newton House (the respondent) with effect from 1
20 October 2022 and that she remained in the role of Business Administrator. It
noted that her gross salary per annum would increase from £24,000 to
£30,000, which was due to the respondent being a larger care provider. It
further recorded that the change was requested by the respondent Home
Manager, S Blair and was authorised by C Quartey. It was also signed by S
25 Blair. It did not record that there was a change of employer. (D3)
- 16 The claimant did not receive a new statement of terms and conditions of
employment from the respondent.
- 17 The claimant was dismissed by C Quartey and S Blair on 15 January 2024
with one month's payment in lieu of notice. Her effective date of termination
30 of employment was 15 February 2024.

- 18 At the time the claimant entered the respondent's employment, ('the relevant time'), 'HP' was a registered company in Scotland. There were three Directors, Daniel Kay, Duncan McAlear and Timothy Street. The registered office address was 50 Lothian Road, Festival Square, Edinburgh, EH3 9WJ.
5 The correspondence address was 1 Vine Street, London, W1J 0AH. The person with significant control of the company was Hamberley Holding Fv (Milngavie) Limited ('HH'). (D4)
- 19 'HH' was a registered company in Scotland. The Directors, registered office address and correspondence address were the same as for 'HP.' The person
10 with significant control of the company was Patron Capital Advisers Llp ('PCA') and it had the same correspondence address as 'HP' and 'HH.' (D5)
- 20 'HP' formed part of an umbrella company, Hamberley Care Management (FV) Ltd ('HC'). 'HC' was a registered company in England & Wales. The Directors were the same as for 'HP' and 'HH.' The registered office address and
15 correspondence address were the same as the correspondence address for 'HP' and 'HH.' The person with significant control of 'HC' was 'PCA' and it had the same correspondence address as 'HP' and 'HH.' (D6)
- 21 At the relevant time, the respondent was a registered company in England & Wales. There were three Directors, Daniel Kay, Duncan McAlear and Timothy
20 Street. The registered office address and correspondence address was 1 Vine Street, London, W1J 0AH. The person with significant control of the respondent was Patron Capital Advisers Llp ('PCA') and it had the same correspondence address as the respondent. (D7)
- 22 The respondent formed part of an umbrella company, Hamberley Care
25 Management Limited ('HM'). The Directors, registered office address and correspondence address were the same as for the respondent. The person with significant control of the company was 'PCA' and it had the same correspondence address as the respondent. (D8)

23 At the relevant time, 'PCA' was a third person that controlled 'HP' and the respondent. Therefore, 'HP' and the respondent were associated employers.

24 The claimant had a continuous period of employment from the commencement of the claimant's employment with 'HP' on 13 December
5 2021 until the effective date of termination of her employment with the respondent on 15 February 2024.

Respondent's Submissions

25 Mr Preston submitted on behalf of the respondent that the respondent and
10 'HP' are completely different and separate companies under different shareholding groups. It is acknowledged that there was a period when the claimant assisted at the respondent company whilst still employed at 'HP' to assist when the respondent had a vacant Business Administrator post, but she was always paid from the 'HP' payroll for that and there was a cross
15 charge between the two companies which the claimant did not know.

26 As the claimant assisted at the respondent company, she was offered the position as Business Administrator on a permanent basis. She accepted that position which came with an increase in salary. This was a new employment
20 and we believe she would have received a P45 to confirm the end of her employment with 'HP.' In addition to her P45 and P60, the payslips and payroll were completely different between the two organisations, so this is a further indication that the claimant was aware this was a new employment. The claimant has provided a 'Notification of Change' document which she
25 completed herself, but this was purely to advise of a change of salary and care home so that it would go onto the correct payroll.

27 It can be demonstrated that the claimant was aware it was a new and separate employment and also that 'HP' and the respondent are different companies
30 under different shareholding groups. As the claimant has less than two years service with the respondent, the respondent requests that the claim be struck out. The respondent has provided the documentation to show they are under

completely different shareholding groups and so completely different groups, hence why payroll was completely different, why a P45 was generated and why the P60 only shows the claimant's earnings from 1 October 2022 to 31 March 2023.

5 Claimant's Submissions

28 The claimant submitted that there was no official correspondence to state she was changing companies. She should have had something in writing to say it was a change of employment, not just a transfer form that states a different
10 work location. She was not provided with a contract which stated it was a different employment. She is not responsible for files or changing contracts, that would be for Human Resources. She does not deny that there are two different names on her payslips, but it would not be obvious to her that they are two different companies and therefore different employers. She never
15 received a P45 ending her employment with 'HP.' She would not have brought her case to this stage if she knew they are two different companies and thought that her service was under two years.

Relevant Law

20 *Associated Employers*

29 Section 218 (6) of the Employment Rights Act 1996 ('ERA') preserves continuity of employment where employees are transferred between associated employers. It states that: *"If an employee of an employer is taken
25 into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer – (a) the employee's period of employment at that time counts as a period of employment with the second employer, and (b) the change of employer does not break the continuity of the period of employment."*

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30 Section 231 of the 'ERA' states that: *"For the purposes of this Act any two employers shall be treated as associated if – (a) one is a company of which the other (directly or indirectly) has control, or (b) both are companies of which*

a third person (directly or indirectly) has control; and “associated employer” shall be construed accordingly.”

31 **Secretary of State for Employment v Newbold and anor 1981 IRLR 305,**
5 **EAT** held that ‘control’ of a limited company in this context means legal control based on a shareholding test, i.e. control by the majority of votes attaching to shares, exercised in general meetings of the company. Control by a person might include control by a group of persons where they acted in concert to control the two companies; **Zarb & Samuels v British & Brazilian Produce**
10 **Co Ltd [1978] IRLR 78.** For two companies to be associated employers, the legal control of both of them must be in the hands of the same person; **South West Laundrettes Ltd v Laidler 1986 ICR 455, CA.**

32 It was recognised in **Harford v Swiftrim Ltd 1987 ICR 439, EAT** that there
15 might be practical difficulties in applying the strict approach to control. In certain circumstances, it could be relevant to know about de facto control; **Secretary of State for Employment v Chapman and Payne [1989] ICR 771**
 CA. Regard may be had to de facto control to an appropriate extent when drawing inferences regarding legal control due to a lack of transparency;
20 **Schwarzenbach and anor t/a Thames-side Court Estate v Jones EAT 0100/15,** applied in **SD (Aberdeen) Ltd v Wright and ors EATS 0003/18.**

Issues to be Determined

- 33 The Tribunal identified the following issues as requiring to be determined:
- 25 a. Were ‘HP’ and the respondent associated employers at the time the claimant entered the respondent’s employment?
- b. Does the claimant have the necessary length of continuous service to
30 pursue her claim for unfair dismissal?
- c. Does the Tribunal have jurisdiction to hear the claim?

Conclusion

34 It was explained to parties at the outset of the hearing that in order to
determine whether the claimant had the necessary length of service to pursue
5 her claim for unfair dismissal, the issue I had to decide was about legal control
of 'HP' and the respondent. However as both parties were litigants in person,
it was not surprising that both parties evidence tended to focus more on the
issue of whether 'HP' and the respondent were the same employer or not at
the relevant time.

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35 Overall, I found the claimant's account of events credible and she gave her
evidence in a clear and straightforward manner.

36 The claimant did not know anything about the legal structure or control of 'HP'
15 or the respondent which I considered was understandable. In terms of her
understanding about her transfer from 'HP' to the respondent, I accepted that
she had not been told by C Quartey that her transfer from 'HP' to the
respondent meant a change of employer and that the 'Notification of Change'
form did not indicate that either. It was not in dispute that she was not issued
20 with a new statement of terms and conditions of employment from the
respondent. I further found that she did not receive her P45 from 'HP' when
she transferred to the respondent because the P45 produced by the
respondent during the hearing was dated 12.9.24, which was the date of this
hearing. (D9)

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37 Whilst the claimant accepted the respondent's name was recorded on her
payslips once she commenced working for the respondent on a full-time
basis, I considered her explanation plausible that she did not know this meant
the respondent was a new employer. I further accepted her evidence as
30 reliable that had she known the respondent was a different employer from
'HP,' she would not have brought this claim as she did not have the necessary
two years continuous service to do so.

38 Overall, I found Mr Preston to be a reasonably honest witness. Although the
respondent did not produce any documentation in advance of the hearing, at
the request of the Tribunal, Mr Preston did produce documentation from
Companies House during the course of the hearing which provided
5 information about the corporate structure of 'HP' and the respondent, as well
documents concerning the claimant's employment with them.

39 In evidence, Mr Preston said the respondent's primary position at the relevant
time was that 'HP' and the respondent were distinct companies because they
10 were separate legal entities under different shareholding groups and did not
form part of the same corporate group. He stated that the 100% shareholder
for 'HP' is Hamberley Care Holding (FV) S.a.r.l, and that the 100%
shareholder for the respondent is Hamberley Care Holding S.a.r.l. They were
both registered in Luxembourg and were private equity backed companies.
15 He further explained that the main investor for both 'Holdings' was 'PCA'
which goes under a number of different names. Whilst they had different
investment funds, there may have been some cross-over in investments with
varying percentages within them. Although the Directors of 'HP' and the
respondent were the same, they did not have any formal shareholdings within
20 'HP' and the respondent company. Two of the Directors, Timothy Street and
Daniel Kay, had shareholdings of up to 25% in some of the investment arms.

40 In considering this evidence, I found that it did not provide any real clarity as
to the legal control of 'HP' and the respondent at the relevant time because of
25 a lack of documentary corroboration, specificity and ultimately, transparency.

41 In particular, there was no documentary evidence produced by the respondent
in support of their primary position that 'HP' and the respondent were
controlled by separate and distinct shareholding groups that were registered
30 in Luxembourg, which I considered would have been reasonable in the
circumstances. This meant there was a lack of evidence before me regarding
voting control arising from the ownership of shares in 'HP' and the respondent.
I further considered that the fairly generic evidence Mr Preston gave about
investment in 'HP' and the respondent did not assist me in this regard.

42 In view of the lack of certainty and transparency regarding the legal control of
‘HP’ and the respondent and in applying **Schwarzenbach** (“supra”) and **SD**
(Aberdeen) Ltd (“supra”), I have therefore had regard to de facto control
5 when drawing inferences concerning legal control.

43 I noted from the Companies House documentation produced by Mr Preston
that it showed ‘PCA’ was a person with significant control of ‘HP,’ the
respondent and their respective umbrella companies, albeit the term
10 ‘significant control’ was not defined or quantified for each of them and is a
term used by Companies House. The documentation further recorded that
‘HP,’ the respondent and their respective umbrella companies, had the same
three Directors and correspondence address. ‘PCA’ also had the same
correspondence address. Equally, the correspondence address for ‘HP’ was
15 the same as the registered office address for the respondent.

44 In light of this evidence, I decided that these apparent connections between
‘HP’ and the respondent lent considerable weight to an inference being drawn
that at the relevant time, ‘PCA’ was a third person that controlled ‘HP’ and the
20 respondent.

45 I further considered that such an inference was supported by the evidence in
respect to de facto day to day control of ‘HP’ and the respondent at the
relevant time.

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46 In particular, I noted that Mr Preston and C Quartey were the Head of Human
Resources and the Operations Director of both ‘HP’ and the respondent
respectively. During the period in which the claimant worked two days a week
for the respondent, this was not reflected in her payslips. The claimant was
30 not issued with a P45 when she transferred from ‘HP’ to the respondent, the
‘Notification of Change’ form did not indicate a change of employer and she
did not receive a new statement of terms and conditions of employment from
the respondent. In this regard, I have not attached any weight to the payroll

documentation submitted by the respondent after the hearing as this was not put to the claimant.

47 Having carefully considered all the evidence in the round, I am satisfied that
5 an inference can be drawn that at the relevant time, 'PCA' was a third person that controlled 'HP' and the respondent and that 'HP' and the respondent were therefore associated employers within the meaning of section 231 of the 'ERA.'

10 48 For all these reasons, I have concluded that the claimant has discharged the burden of proof on a balance of probabilities that she has the necessary length of continuous service to pursue her unfair dismissal claim in accordance with section 218 of the 'ERA.'

15 49 The claim shall proceed to be listed for a Final Hearing.

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Employment Judge:	R Sorrell
Date of Judgment:	14 October 2024
Entered in register:	16 October 2024
and copied to parties	