



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000051/2023

Preliminary Hearing held at Aberdeen on 25 January 2024

Employment Judge McFatridge

Ms Margaret Pirie

**Claimant
In person**

Orka Artisan Cafe Limited

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

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's employer was Orka Artisan Cafe Limited who are the respondents in the case. The application to add Louise Smart as a respondent is refused.

REASONS

1. The claimant lodged a claim with the Tribunal on 3 February 2023 in which she claimed that she had been automatically unfairly dismissed for making protected disclosures. She also ticked the box in her ET1 for discrimination on the grounds of sex and disability but provided no additional information in relation to those claims. The claim was initially directed against "Orka" and against HR Services Scotland as second E.T. Z4 (WR)

respondent. Prior to lodging her claim the claimant had lodged a Tribunal claim which was not accepted naming Louise Smart as first respondent and HR Services Scotland as second respondent. On 4 November 2022 the Tribunal had written to the claimant confirming that that claim could not be accepted because the claimant had not complied with ACAS conciliation requirement. The claimant made an early conciliation notification to ACAS on 16 December 2022 in which she named the first respondent as "Orka Artisan". She also named the second respondent. The claim form which was accepted was received on 3 February 2023. Both respondents submitted a response. The first respondent in their response indicated that the name of the respondent was "Orka Artisan Cafe Limited". On 17 March 2023 the Tribunal advised the claimant that the response had been accepted. As is the usual practice the letter stated,

"Where the name given by the respondent on the response differs from that given on the claim we shall assume unless we hear from you to the contrary inviting within seven days to the date of this letter that the name given by the respondent is correct."

2. A preliminary hearing was due to take place on 4 April for case management purposes but the claimant wrote to the Tribunal on 23 March 2023 requesting a postponement. In this email she did not indicate that she disputed the name of the first respondent. There was then sundry other procedure in the case which included a case management preliminary hearing which took place on 9 May 2023 which dealt with a number of case management issues and a further open preliminary hearing which took place on 21 July 2023 following which the claim so far as directed against the second respondent, HR Services Scotland Limited, was struck out. It should be noted that for the reasons set out in that judgment the hearing proceeded in the absence of the claimant "on the papers". The note issued following that hearing included at paragraph 9 a statement:-

"The factual background does not appear to be in dispute in that the claimant was employed by the first respondent and not at any point by the second."

The first respondent is described in the judgment as “Orka Artisan Cafe Limited.”

3. Thereafter, attempts were made for the case to proceed to a full hearing however the hearing fixed to take place on 2 October 2023 was postponed
5 and thereafter the hearing due to take place on 23 and 24 November 2023 was also postponed.

4. A feature of the case is that the claimant has written numerous emails to the Tribunal complaining about the situation she finds herself in. Whilst many of these emails are intemperate in nature and indicate that the
10 claimant takes issue with many of the actions of the tribunal which are entirely routine and a consequence of the tribunal being an independent arbiter rather than an advice resource I accept that the claimant’s motivation is genuine and she is confused and upset at finding herself involved in a process which is unfamiliar to her. Whilst examining these
15 emails it appeared to me that the claimant may not in fact accept that her employer was Orka Artisan Cafe Limited. Whilst the claimant made no specific application it was clear from some of her correspondence that she believed that the claim should be directed against Louise Smart. I decided that rather than have the matter be left as one to be potentially raised at
20 the full hearing of the case which is now set down to take place on 13, 14, 15 March 2024 it would be appropriate to fix a preliminary hearing in order to determine whether the claimant’s employer was indeed Orka Artisan Cafe Limited and whether they were the appropriate respondent in the case.

- 25 5. The preliminary hearing took place on 25 January. The claimant attended and gave evidence on her own behalf. Mr McFarlane the respondent’s representative attended but did not lead any evidence. He indicated that he had intended to lead evidence from Louise Smart a Director of Orka Artisan Cafe Limited but that due to a family situation and the weather she
30 had been unable to attend. He invited the Tribunal to make their decision based on the papers in the case and the claimant’s evidence.

6. On the basis of the evidence and the productions I found the following essential facts relevant to the matter to be determined by me to be proved or agreed.

Findings in fact

- 5 7. In October 2021 the claimant saw an advert on Gumtree for cafe staff at Orka Artisan Cafe. The claimant was interested in the job as at that time she worked part time as a cleaner for the MoD but her job only gave her 10 hours per week. She had previously been employed at a cafe for around seven years which had closed after the Covid pandemic. The claimant contacted and met with Louise Smart at Orka Artisan Cafe in Aberdeen for interview. Louise Smart offered the claimant the position there and then and the claimant started work on 15 November. She was to be paid £10 per hour and work 10-3 Monday to Friday.
- 10 8. After she started she became aware that Louise Smart had the cafe in Aberdeen and also a cafe in Ballater. Louise Smart told the claimant that she was mostly based in Ballater and that her partner Garry Eunson was a part owner of the business and also based in Ballater. She advised the claimant that she and Garry owned the cafe businesses and that her son had also been made a director.
- 15 9. After a fairly short time the claimant had a further conversation with Louise Smart where it was agreed that the claimant's rate of pay would be increased to £11 per hour and her role would change to that of Supervisor.
- 20 10. The claimant worked at the Aberdeen cafe however on a couple of occasions she was asked to cover shifts at the cafe in Ballater which she did.
- 25 11. The claimant was at no time given a statement of terms and conditions of employment or a contract of employment. The claimant was paid by direct bank transfer into her bank account. Notes of the payments were lodged (pages 66-68). The payments are noted to come from "Orka Artisan C..."
- 30 I consider that on the balance of probabilities they came from an account in the name of Orka Artisan Cafe. To begin with the claimant was paid monthly but thereafter wages started coming in on a fairly random basis.

Initially the claimant was aware that all staff were paid on the same date but this was fairly random. The claimant advised Ms Smart that she had direct debits coming out of her account and that she was finding the random nature of the payments difficult. She then agreed with Ms Smart that the claimant would be paid fortnightly. Thereafter she was paid fortnightly. She was aware that other members of staff still were being paid on a fairly random basis. The claimant also had some further issues where her pay was paid late.

12. On occasions when the claimant required to speak to Ms Smart about her wages Ms Smart would say words to the effect of “oh, I will get on to the bank about it” or “I will speak to my accountant.”
13. The claimant was aware that invoices arrived at the premises addressed to Orka Artisan Cafe Limited. She was also aware that some personal mail arrived at the premises addressed to both the claimant and her partner Mr Eunson. She understood from suppliers that there were two separate customer numbers, one for the Aberdeen cafe and one for the Ballater cafe.
14. All of the claimant’s communications about her work were with Louise Smart. She never communicated directly with Garry Eunson. The claimant was aware that there was company headed paper and that it was a “proper business”. All paperwork came with the name of Orka Artisan Cafe Limited.
15. On occasions the claimant asked Ms Smart about pay slips and Ms Smart would say there was a problem with her accountant or at the bank. The claimant understood that Ms Smart, her partner and son were directors of the business. The claimant did not believe that the business could be a proper limited company because she noticed at the time that no tax or national insurance deductions were being made from her wages. She has also since discovered that no payments were made to HMRC in respect of tax and national insurance which she believes ought to have been deducted during the course of her employment.
16. There are two limited companies whose certificates of incorporation were lodged. One is Orka Artisan Cafe (Ballater) Limited which is limited

company number SC690614. The registered office is in Aberdeen. That company was incorporated on 1 March 2021 and dissolved on 26 September 2023. The company documents in respect of this company were lodged (pages 60-63). The other company is Orka Artisan Cafe Limited who are the respondents in this case. Their company number is SC640136. The registered office is in Aberdeen. The claimant's position is that she understands steps are being taken to have this company removed from the register.

Matters arising from the evidence

10 17. It is clear to me that the claimant was genuinely trying to give truthful evidence to the Tribunal. The claimant's evidence at times strayed into matters which were not strictly relevant to the point at issue at the preliminary hearing and given that I will require to make findings in respect of these points at the final hearing in the case I do not make any findings at present in relation to those matters. With regard to the evidence she gave which was relevant to the matter at hand I had absolutely no hesitation in accepting her evidence as truthful.

18. It is clear to me that the claimant, who does not have any legal training or experience, is unsurprisingly unaware of different types of business and the potential significance of whether someone is acting in a personal capacity or as director of a limited company. During her evidence she referred on many occasions to the fact that all her communications were with Ms Smart. She considered Ms Smart to be her employer at the time. She readily accepted that she had been told that there were three directors of the business and she accepted that all of the business correspondence which came to the cafe was in name of Orka or Orka Artisan Cafe. She also said that personal mail came for Ms Smart and Mr Eunson. She said that all of the invoices were addressed to "Orka". When it was specifically put to her that Ms Smart was a director the claimant answered "Yes, she, Garry and her son were directors." When it was put to her that this meant it was a limited company her answer was "No because limited companies pay tax and national insurance and she didn't pay tax or national insurance."

19. It was extremely unfortunate that Ms Smart did not attend the Tribunal to give evidence since her evidence could have cleared matters up fairly readily. I also note that no PAYE wages records were lodged and, again, I would have thought that these would have readily cleared matters up. I can only draw the inference that, as stated by the claimant no records exist because none of the proper payments were being made. I note that previously Ms Smart has sought postponements on the basis that she is medically unfit to attend however on this occasion I understood that that was not the case and certainly she did not produce any medical evidence. Whilst it is clearly up to the respondent and those representing them to make a decision as to what evidence they can call the Tribunal shared some of the claimant's frustration that we were being asked to determine this important matter on the basis of the papers combined with the claimant's own evidence. In the circumstances I decided that no weight whatsoever could be given to ex parte statements from the respondent's representative and that I required to make my decision based entirely on the evidence before me which comprised the claimant's evidence together with those documents in the bundle to which the claimant was specifically referred in evidence. I should also say that whilst I had grave concerns regarding the way the respondent has conducted the proceedings I required to base my decision on what I believed, on the balance of probabilities, to be the factual position at the time the claimant was employed.

Discussion and decision

20. In this case the sole issue which I was required to determine at the preliminary hearing was the identity of the claimant's employer. If I had determined that the employer was not the current respondent then I would have required to give consideration to amending the claim so as to direct it at the correct employer.

21. It was the respondent's position that the employer was Orka Artisan Cafe Limited. The claimant's position was that, as she put it, she may not have dotted the 'i's and crossed the 't's at all points but that she considered her employer to be Louise Smart.

22. For the benefit of the claimant I will reiterate what is essentially trite law. A business can be run in a limited number of ways. It may be run by a government or local authority. It may be run by an individual. It may be run by a partnership. It may be run by a limited company. In this case
5 there was no question of the government being the employer and the issue is whether the business which the claimant worked for which was called Orka Artisan Cafe was run either by an individual in which case the claimant's position would be that it was run by Louise Smart as a sole trader or if, on the other hand it was run by a partnership or by a limited
10 company.
23. If it was being run by either a partnership or by a sole trader then there would be no need for Directors. The claimant's evidence was quite clear that she was told that Louise Smart's son was appointed a director of the company. This would not be possible if Louise Smart was a sole trader.
15 It only makes sense if the employer was a limited company. I did briefly consider the possibility that the business was being run as a partnership but the claimant at no point indicated that this could potentially be the case.
24. In addition to the claimant's own statement that this was a company with
20 directors we have the fact that the respondent company was set up as a limited company and that supplier invoices appeared to have been sent to the limited company.
25. As Mr McFarlane pointed out in his submission every limited company must operate through an individual human being. All communications
25 must come from someone within the company and the fact that all of the claimant's communication was with Louise Smart is entirely consistent with the respondent's position which was that Louise Smart was a director of the company.
26. Matters would of course have been much more straightforward and there
30 would have been no need for a hearing of this type had the respondent complied with the law and in particular section 1 of the Employment Rights Act 1996 which requires an employer to provide particulars of employment to an employee at the outset of the contract. It appears clear to me that

the respondent were in breach of this duty and on the basis of the claimant's evidence also in breach of their duty to provide itemised pay slips. That having been said, I am required to decide the question of the identity of the employer as a matter of fact on the balance of probabilities.

5 The above facts together with the fact that the claimant was paid apparently from a bank account in name of the company would all lead me to the view that on the balance of probabilities there is really no question but that the employer was Orka Artisan Cafe Limited who are the present respondents. Accordingly that is my finding.

10 27. I can appreciate that this may be disappointing to the claimant particularly as the claimant advises that she believes that there are ongoing steps to have this company struck off the register of companies. The claimant has already flagged up her concern that if she is successful in her claim then she may have difficulty in obtaining payment. Unfortunately this is a
15 matter which arises out of the general law of the land which the Tribunal is bound to enforce. It is not something which the Employment Tribunal can change. If the claimant wishes to ensure that the company is not struck off the register of companies then it is open to her to write to the registrar advising of the position and seeking that this be delayed. This of
20 course may not assist the claimant in recovering any eventual award which may be made in her favour. I also appreciate that the claimant feels aggrieved that whilst she has clearly set out a claim that she was unfairly dismissed as a result of making protected disclosures to Aberdeen Council Environmental Health Department the respondent's defence has been to
25 accuse her of theft and she naturally feels aggrieved at this. No doubt this is a matter which can be explored at the hearing should the respondent company still be on the register of companies at that hearing. The claimant also feels aggrieved that she believes the respondent did not make appropriate PAYE deductions from her wages and account to this
30 to HMRC. This is not a matter for the tribunal but there is nothing to stop the claimant reporting the matter to HMRC for them to investigate.

28. Finally, I did consider whether on the facts alleged by the claimant it would be appropriate for me to amend the claim so as to include Ms Smart as a second respondent on the basis that there are certain circumstances

where an individual Director may be responsible for a claim under section 47B of the Employment Rights Act. I have decided that this would not be appropriate at the present time not least because the claimant has made no such application but also because on the basis of the facts alleged in the claimant's ET1 there would appear to be absolutely no grounds for doing this.

Employment Judge: I McFatridge

Date of Judgment: 31 January 2024

Date Sent to Parties: 1 February 2024