

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4100162/2017**

**Heard in Glasgow on 5 April 2017**

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**Employment Judge: Lucy Wiseman**

**Mr Stuart White**

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**Claimant  
Represented by:  
Mr S Milligan -  
Solicitor**

**GBRE Ltd  
Trading as Coldwell Banker UK**

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**Respondent  
Represented by:  
Mr L Magner -  
Barrister**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that a Tribunal does not have jurisdiction to  
25 determine the claim because the claimant is not a “*worker*” in terms of the National  
Minimum Wage Act and Working Time Regulations.

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**REASONS**

1. The claimant presented a claim to the Employment Tribunal on 23 January  
2017 alleging he was entitled to payment of wages and holiday pay. The  
claimant carried out work for the respondent as Operations Director and  
35 asserted he had worked from September 2014 until October 2016 without  
payment of at least the minimum wage and holiday pay.

2. The respondent entered a response asserting the Tribunal did not have jurisdiction to determine the claim because the claimant was not an employee or a worker, but had at all times been a principal in the business and had an agreement with his fellow Directors and shareholders to set up and manage the company in return for ownership and sharing in the profits.
3. A Preliminary Hearing was arranged to determine the employment status of the claimant.
4. I heard evidence from the claimant and Ms Eileen Smith, Administrator and from Mr Thadakeit Keitkraivalsiri. I was also referred to a number of documents by each party. I, on the basis of the evidence before me, made the following material findings of fact.

**Findings of fact**

5. The respondent is a company that was set up to acquire and operate the franchise license for Coldwell Banker in Great Britain.
6. The respondent company was funded by the claimant, Mr Victor Pegna, Mr Matt Begley and Mr Darren Hicks together with investment from Kitisak Jampathipphong and Vichit Vitayatanagorn.
7. The claimant, Mr Pegna, Mr Begley and Mr Hicks had operational responsibility for all company activities and performance. The claimant and Mr Pegna were Directors of the company and held a 20% shareholding.
8. Kitisak Jampathipphong and Vichit Vitayatanagorn were financial investors, and held an 80% shareholding. Kitisak Jampathipphong and Thadakeit Keitkraivalsiri were Directors of the company.
9. The company was in the business of selling new franchises in Coldwell Banker (estate agency).

10. The respondent company had an office in Coatbridge where Ms Eileen Smith was employed as Office Manager.
- 5 11. The claimant drafted the Business Plan and financial projections (C3). The financial projections included costs for “*staff salaries*” of £30,000 per annum and “*Directors costs*” of £60,000 per annum.
- 10 12. The claimant was involved in dealing with franchise enquiries, producing and delivering training courses for new franchise businesses and marketing. Mr Darren Hicks was also involved in selling franchises.
13. The claimant was also required to attend certain meetings with the other Directors and produce monthly reports for the financial investors.
- 15 14. The claimant was reimbursed for travel and expenses.
15. The claimant was instructed to close the Coatbridge office and move to London. The claimant resigned in response to this instruction.
- 20 16. The claimant, in response to his email of resignation, received an email from Kitisak Jampathipphong (C5). The email noted the claimant’s resignation could not be approved until the handover had been completed, with the financial history to be audited including performance, deals made under the claimant’s supervision and debts created.
- 25 17. The claimant also received a letter from the respondent’s representative (C4) noting serious concerns regarding the claimant’s conduct, including that he was no longer acting in the best interests of the company. The letter referred to (amongst other things) a failure to meet targets for the signing of further franchisees in accordance with the business plan and spending time on other (competing) business interests notwithstanding his obligation to devote his full time and attention to the respondent.
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18. The claimant owns another company which is also in the business of selling franchises. The office premises for this company are located in the same building as the office for the respondent.

5 **Claimant's submissions**

19. Mr Milligan submitted the claimant was seeking to establish he had worker status and was entitled to payment of the national minimum wage and holiday pay. Mr Milligan invited the Tribunal to find the claimant was a  
10 straightforward, reliable and honest witness, whose work for the respondent had been confirmed by Ms Smith.

20. The claimant's primary position was that the Business Plan expressly included directors' costs, and this demonstrated a clear intent of some  
15 remuneration for the Directors. The claimant agreed to undertake work personally for the respondent and he had the skills for this.

21. The claimant believed he was going to get paid, but he had not been paid at all. The respondent would argue the claimant received a shareholding in  
20 return for services, but Mr Milligan submitted the shareholding had been given to the claimant to incentivise him.

22. Mr Milligan referred to the correspondence from the respondent (C4 and C5) and submitted there had been reference to the claimant having to  
25 devote his time to the company. There was a clear indication that control had been exerted over the claimant, and this was supported by the fact there had to be a handover following the claimant's resignation.

23. Mr Milligan acknowledged the claimant had another business, but that did  
30 not exclude him from running a business on his own account, or from being a worker. The claimant had duties, he was expected to do them and he was subject to control.

24. Mr Milligan referred the Tribunal to the cases of **Stack v Ajar-Tec Ltd 2015 IRLR 474**; **Autoclenz Ltd v Belcher 2011 IRLR 820** and **Hospital Medical Group Ltd v Westwood 2012 IRLR 834**.

5 **Respondent's submissions**

25. Mr Magner submitted there was no contract because there was a lack of clarity regarding its essential terms. There was a misunderstanding regarding remuneration and this would be a key term. The witnesses had  
10 different expectations.

26. Mr Magner noted the claimant sought wages from September 2014 before the respondent company was incorporated. He also referred to the **Stack** case and in particular to paragraphs 24 and 26. Mr Magner submitted there  
15 were parallels between the cases insofar as the Directors had not ever resolved to pay wages to the claimant and the claimant had not ever made any representations to the company regarding payment for his services. Furthermore, the claimant had been working for several different companies at the same time.

27. Mr Magner submitted that if a contract was in place, it was clear from the expectation of the parties and the email from Mr Pegna (R5) that there was  
20 never any question that a wage would be sought. The "reward" was the equity/shareholding. The question had to be asked why the Thai investors would give a 10% shareholding to the claimant if not in return for services. The parties put in to the new company their money and/or expertise.

28. Mr Magner submitted there was no contract in place which included remuneration and there was no implied term to that effect. He invited the  
30 Tribunal to dismiss the claim.

**Discussion and Decision**

29. I firstly had regard to the claimant's evidence and issues of credibility. The claimant essentially invited me to accept he had been a Director of the respondent company and also worked in the business, using his experience of selling franchises and delivering training and support. He told me he was the only person qualified in franchising, licensing and training and that he personally had to do this work. He expected to be paid as a Director.
30. The claimant spoke of travelling to New York to present the Business Plan; attending meetings, meeting suppliers, and, when five franchises joined, he had to deliver the training courses.
31. The claimant accepted, in relation to the Business Plan, that the sum of £5,000 per month was noted as "*Directors' costs*" to cover all of the directors' costs and expenses. He also accepted that at no time had any of the management reports he prepared included a figure for unpaid wages or expenses; and, there had been no provision in the accounts for any such payments.
32. The claimant also accepted he was a Director of another business and divided his time between running that business and the respondent.
33. I did not find the claimant's evidence to be entirely credible and reliable: on a number of occasions his clear assertions became less clear upon examination. For example, the claimant stated he was the only person qualified in franchising, licensing and training and that he personally had to do this work. However, the Business Plan produced by the claimant described Mr Darren Hicks as having an "*extensive background in franchising*" and being "*an experienced franchisor*". It was further stated that Mr Hicks held the role of Franchise Sales Director for Century 21, and that as a franchise professional, he was highly competent at the sales and selection process and fully understands the legal and contractual relationship that exists between a franchisor and a franchisee.

34. The claimant's evidence was also contradicted by Mr Keitkraivalsiri who spoke of Mr Hicks selling franchises in the London area and submitting invoices for his expenses.

5 35. A further example related to the claimant's evidence regarding the financial accounts which he had prepared and presented to the financial investors and Realogy (from whom the master franchise had been purchased). The forecast accounts included Directors costs of £5,000 per month. The claimant described this was to cover all the directors' costs. The claimant, however, accepted there was nothing in the Business Plan to explain Directors were to be employees or workers and paid accordingly; and there had been no provision in the accounts for wages to be paid to Directors. The claimant accepted it had been his responsibility to show these matters in the accounts, and he invited the Tribunal to accept he had made an error.

15 36. I could not accept Mr White's evidence that he had made an error regarding this matter. Mr White is a very experienced and successful franchise operator. He produced the respondent's Business Plan and draft accounts because he had that experience. I could not accept, against that background, that he made an error and subsequently did nothing to rectify or note that error. I was satisfied that the only matters in the accounts were for payment of wages to Ms Smith the office manager and for directors' expenses, and this reflected the understanding that directors would be entitled to reimbursement for expenses and nothing more.

25 37. I acknowledge the claimant's evidence to this Tribunal was supported by Ms Smith to the extent she confirmed the claimant was in the office on a daily basis and had a key role in setting up the company. I did not doubt Ms Smith believed what she told this Tribunal, however, given the points set out above (and below) I did not find her evidence to be of sufficient weight to materially alter the decision in this case.

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38. I next had regard to Section 54 National Minimum Wage Act 1998 which sets out the meaning of “worker” as follows:

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“(3) *In this Act “worker” (except in the phrases agency worker and home worker) means an individual who has entered into or works under (or, where the employment has ceased, worked under) –*

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(a) *a contract of employment, or*

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(b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual...”*

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38. I noted the definition of the term “worker” is wider than the term “employee” and is designed to be more inclusive. The essentials of a worker’s contract are:-

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- the individual has entered into or works under any other contract, whether express or implied;

- the individual undertakes to perform personally work or services;

- for another party to the contract;

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- whose status is not by virtue of the contracts that of client or customer of any profession or business undertaking carried on by the individual.



39. I also noted guidance on the Working Time Regulations provides that “*if you are self-employed, running your own business and are free to work for different clients and customers, the Regulations do not apply to you.*” The EAT, in the case of **Cotswold Developments Construction Ltd v Williams 2006 IRLR 181** stated that:-

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“*a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal’s operations, will in most cases demonstrate on which side of the line a given person falls.*”

40. The EAT in that case noted that one of the main differences between an employee and a worker is that the employee definition concentrates on the mutual obligations between the employer and employee, whereas the worker definition concentrates on the element of personal service by the individual. The EAT set out some questions which it considered may be helpful to ask:-

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- (a) was there one contract or a series of shorter assignments;
  - (b) if one contract, was it the natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable, amount of work for the company in return for being given that work, or pay (ie was there sufficient mutuality of obligations to establish a contract at all?)
  - (c) if so, was there such control as to make it a contract of employment;
  - (d) if there was insufficient control, or any factor negating employment, was the claimant nevertheless obliged to do some minimum (or reasonable) amount or work personally (and so qualify as a worker).

41. I also had regard to the cases to which I was referred by the parties. In **Stack v Ajar-Tec Ltd 2015 IRLR 474** the Court of Appeal held that a failure to agree on the amount of salary or wages to be paid will normally indicate that a contract of employment has yet to be formed; however, it does not necessarily preclude formation. The claimant in that case was one of three shareholders and directors of a business. He received no salary or income although there had been discussions about the possibility of him drawing a salary but no agreement had been reached. The Court of Appeal upheld a Tribunal's decision that the claimant was an employee because there was an express agreement that he would work for the respondent, and an implied term that he would be paid a reasonable amount for his services.
42. Mr Magner referred me in particular to paragraphs 24 and 26 of the Judgment where he drew a parallel with this case because the Directors did not ever resolve to pay wages to the claimant, and the claimant had not ever made any representations to the company for payment for his services.
43. I was also referred to **Autoclenz Ltd v Belcher 2011 IRLR 820** where the Supreme Court upheld a decision that the claimants were workers. The key aspect of the decision was that all relevant evidence must be examined, and the practice of the parties may demonstrate the true obligations of the parties rather than the written documents.
44. In the case of **Hospital Medical Group Ltd v Westwood 2012 IRLR 834** the Court of Appeal held that a GP in private practice who contracted with the respondent private medical company to perform minor operations for its clients one day a week was a "worker", being integrated into the organisation for several years and having a term in his contract that he would not do similar work for other organisations. It could not be said that the company was his professional client.
45. I next asked myself whether the claimant had entered into or worked under any other contract whereby he undertook to perform personally any work or services for another party to the contract. I had regard to the submissions of

the representatives: I noted the claimant's representative did not suggest which contract was being relied upon, and the respondent's representative submitted there was no contract.

5 46. I also had regard to the documents produced by the parties which included the Business Plan and financial projections; the Sub franchise Agreement; financial statements for the period ended 31 May 2016 and the draft shareholding agreement between the four members of the senior management team and the financial investors.

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47. I acknowledged there was clearly a relationship between the claimant and the respondent because the claimant was a Director of, and shareholder in, the company. There was also clearly a relationship between the claimant and Mr Keitkraivalsiri insofar as he was also a Director of the company. The draft shareholding agreement was described as having been agreed in principle by all but was never signed or "*ratified legally*".

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48. I concluded, in the absence of submissions regarding this matter, that the claimant sought to rely on the Business Plan as being the contract he had entered into or worked under. I could not accept that the Business Plan was a contract between the claimant and another party and for that reason I decided the claimant had failed to demonstrate that he had entered into or worked under any other contract in terms of section 54(3)(b) National Minimum Wage Act.

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49. I should state that if I had found the claimant had entered into or worked under any other contract, the next question I would have had to determine is whether the claimant agreed to undertake some minimum or reasonable amount of work for the company in return for being given that work, or pay. I had regard to a number of factors when considering this question. The first point is that the claimant had clearly entered into a business relationship the purpose of which was to sell franchise agreements and earn money. The senior management team, of which the claimant was one part, would undoubtedly wish to earn as much money as was possible from the venture:

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to this end, the claimant and others would require to do some work in order to sell the franchises. However, there was no evidence to suggest the claimant either had to, or had agreed to, undertake a minimum or reasonable amount of work for the company. I preferred the evidence of Mr Keitkraivalsiri to the effect the claimant was not required to be in the office from 9am to 5pm each day, and that the only thing the claimant was required to do was report on what he was doing.

50. The second point is that I did not find the claimant's evidence that he was the only person in the company with franchising, licensing and training experience and therefore had to do this work, as credible or reliable (and I have set out above my reasons for this finding). The Business Plan makes specific reference to Darren Hicks being the Franchise Sales Director with responsibility for all franchise sales activities. Ms Smith is referred to as being responsible for carrying out franchisee administration. The claimant was referred to as having extensive experience of creating market leading and brand initiatives and would oversee all marketing. There was also reference to the senior management team overseeing franchisee training and support. The documentary evidence, and the evidence of Mr Keitkraivalsiri, contradicted and undermined the claimant's evidence and supported a finding that the claimant was not solely responsible for carrying out work in relation to franchising, licensing and training.

51. The third point was that there was no evidence to suggest the claimant had to personally undertake certain work for the respondent. I did accept the claimant delivered a number of training courses for new or potential franchisees.

52. The fourth point was that there was no suggestion the claimant was given work to do: the evidence supported the conclusion that it was the claimant who decided what activities to carry out. The only requirement he spoke of was being required to attend some meetings.

53. The fifth point was that the financial investors had "*limited control*" over what the claimant did: this was demonstrated by the fact that Mr Keitkraivalsiri, when asked what would happen if the claimant did not carry out some tasks, responded "*nothing*".

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54. The sixth point related to pay. The claimant invited the Tribunal to accept he had always believed he would be paid a wage. I did not find that evidence to be credible in light of the documentary evidence produced at the time, which I considered accurately represented the positions and expectations of the parties at that time. There was no dispute regarding the fact the reference in the financial projections to "*staff salaries*" related to Ms Smith's salary. The reference to "*directors' costs*" related to the monthly sum expected to be paid in respect of the costs/expenses of all the directors.

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55. I also had regard to the fact the claimant had never, in all of his discussions with the other directors, or in correspondence, made reference to payment of wages being expected or due. I found this difficult to reconcile with the fact the claimant is an experienced operator in this type of business and I concluded that had he truly expected payment, there would have been provision for it in the financial projections which he produced.

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56. I also had regard to the email from Mr Victor Pegna, Director (R6) where he clarified that there were three ways he and the claimant, and later Mr Hicks and Mr Begley, would derive earnings from the company, and that was from commission from new franchise sales; profit share after targets had been achieved and equity share. Mr Pegna also confirmed that the only payments made were for expenses in return for the reasonable costs of carrying out duties on behalf of the respondent.

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57. The seventh point was that the financial investors had made a significant investment to purchase the master franchise, and had also made a capital investment in the company. The claimant had been given a 10% shareholding in the company.

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58. The eighth point was that the claimant was a Director of another company, and he acknowledged he divided his time between running this company and the respondent, although he had not been called upon to account for his time.

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59. I concluded, having had regard to all of the above factors, that the claimant undertook some work for the respondent company, however he was not required to undertake a minimum or reasonable amount of work and he was not required to undertake that work personally. I further concluded that there was nothing to suggest payment of anything other than expenses would be made to the claimant. The documents which were drawn up at the material time, rather than oral evidence given with hindsight and for the purpose of supporting a particular position, clearly demonstrated this; and this was supported by the fact the claimant had not ever raised the issue of payment of wages or made provision for it in the accounts.

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60. I decided the claimant was not a worker. I accepted Mr Magner's submission that the claimant was a principal in the business and had received a 10% equity/shareholding in return for services.

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Employment Judge: Lucy Wiseman  
Date of Judgment: 22 May 2017  
Entered in register: 23 May 2017  
and copied to parties

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