EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms. M.Hippolyte	**v**	(1) Piccadilly Leisure Ltd, trading as The Windmill (in liquidation) (2) Mr. D. Owide

PRELIMINARY HEARING

Heard at: **London Central** **On: 21 January 2019**

Before: Employment Judge Goodman

Appearances
For the Claimant: in person
For the Respondent: did not attend

RESERVED JUDGMENT

1. The claimant was not an employee of the respondent and the unfair dismissal claim fails.
2. The claimant had from time to time been a worker, but not at the time of the 2018 events complained of; the claims of discrimination for events in August 2018 fail.
3. Any claim for an alleged theft in 2013 fails because it is brought out of time, alternatively it is struck out because it was or should have been brought in the earlier claim which was struck out in January 2018 for failing to pay a deposit, and in June 2018.
4. Any claim for victimisation in relation to events in August 2018 is dismissed because the claimant does not establish on a balance of probability that they were in any way connected with either respondent, nor has she any reasonable prospect of success.

REASONS

1. This claim for unfair dismissal and sexual orientation discrimination was presented on 5 September 2018.

2. The respondent did not file a response but did, on 6 November, reply by counsel asking for the claims to be struck out as an abuse of process. The respondent was then (3 December 2018) directed to file a response setting out

the reasoning and the application would then be heard today (originally listed as a case management hearing). Nothing more has been heard from the respondent.

3. In view of that I have treated today as a hearing under rule 21, which states that where no response has been presented:

> "An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.
> The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."

4. The respondent's letter had referred, among other things, to a previous claim having been struck out, and to there being duplication. I have referred to the case file on that, claim no. 2200655/2017. I will call that the first claim.

5. In the first claim, presented in March 2017, the claimant claimed harassment on grounds of race and sex in respect of two assaults, one by a man (D) in July 2014, another in January 2015 by a woman (J), and some racist remarks from another woman (L).

6. At a preliminary hearing for case management in May 2017 which the claimant did not attend, it was to be listed for a hearing on whether the claim should be struck our or a deposit order made. At the hearing on 19 September 2017 Employment Judge Hodgson noted the (first) respondent was in liquidation and allowed the second respondent to be joined to the claim. On 24 January Employment Judge Isaacson made a deposit order of £100 on grounds that the claims were old and there was little reasonable prospect of success in showing it was just and equitable to proceed. Judge Isaacson also identified as issues in the case whether the claimant was an employee (as the response asserted she was self-employed), permitted an amendment as to the identity of the first respondent, and outlined the harassment alleged under. As a case management hearing, no evidence was taken, and no findings were made.

7. There was an administrative muddle on whether the claimant had or had not paid the deposit. Initially an employment Judge drafted an order dismissing the claim for non-payment, but he was then informed by administrative staff she **had** paid and instead the claim proceeded to a hearing before a three person panel (Employment Judge Gordon) on 26 June 2018 which decided that the claims should be struck out because made out of time and because it was not just and equitable to extend time.

8. As the judgment was promulgated an administrative check showed the claimant had **not** in fact paid the deposit, and the parties were informed. The respondent complained. The administrators of the Employment Tribunal Service then investigated, conceded there had been administrative errors, and paid the fees of counsel for the second respondent for the 26 June hearing and preparation for it.

9. The second claim (this claim) is about three incidents at or near the claimant's home in August 2018, and an episode in December 2013 (theft of a barrette). The claim form asserts it was found on 26 June 2018 that she was an employee of the first respondent.

10. On careful examination of the judgment and of the file, there is no such finding. The 26 June 2018 tribunal considered only whether the tribunal had jurisdiction on the time point. The judgment is silent on the status point. Reasons were given at the hearing. Neither side asked for written reasons.

11. Accordingly the issue of whether the claimant was an employee (whether in the narrow sense required for an unfair dismissal claim under the Employment Rights Act 1996 or the broader sense required for claims of discrimination and harassment under the Equality Act 2010, is still live, and relevant. If she is not an employee (however defined) the tribunal does not have jurisdiction.

12. I therefore heard evidence from the claimant about her working arrangements, as well as seeking to clarify what the claim was about, and some of the dates, which are contradictory. She had also prepared a bundle of documents and legal materials which I have read.

13. Throughout the hearing I took account of the fact that although the claimant has reproduced some legal materials and identified criminal offences, she has represented herself, and this appears to be her own uninformed research, and she seems not to have had any competent legal advice at all. The first claim referred to personal injury, which can only be claimed in courts, not tribunals. The second claim refers to offences under the Public Oder Act 1986, the Highway code, Data Protection legislation, and the Offences Against the Person Act 1861. I have therefore tried to understand the substance of the claim based on the facts asserted rather than the labels she has applied to them, and as will be seen, considered whether there was a victimisation claim.

14. At the conclusion of the hearing I reserved judgment because (1) the respondent was not here to understand the reasons, and (2) the claimant did not always understand the legal points being made, or the questions being asked, and it was better for her, and for confidence in justice, if there were written reasons on which she could if necessary seek advice.

Relevant Law

15. Section 230 of the Employment Rights act states that:

> (1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."
>
> (3) In this Act 'worker' (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) –

(a) a contract of employment, or

(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;

and any reference to a worker's contract shall be construed accordingly."

16. Earlier cases held that a contract of employment requires mutuality of obligation and an element of control. **In Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99 CA** was about a dancer working on very similar terms to the claimant – she paid a fee per night, then was paid direct by clients. It was held, in an infair dismissal claim, she was not employed under a contract of employment. It did not decide whether she was a worker.

17. Section 83 of the Equality Act 2010 provides that "Employment" means—

(a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

18. This definition includes both employees and "workers" in the Employment Rights Act definition. In **Bates van Winkelhof v Clyde & Co LLP and another [2014] UKSC 32,** Lady Hale stated**:**

"24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them.... The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else...."

19. A number of cases discuss arrangements where work is intermittent, as often with bank workers, such as **Carmichael v National Power (1999**) about employment status, and **Uber v Aslam (2018) EWCA Civ 2748**, about workers. In neither was it held that someone between work assignments was under any obligation to the other to work or offer work. They may be employed – or workers – when working, but not otherwise.

20. It is well established that status is a matter of fact and that while respect must be add to clearly drafted contract documents, how the parties describe their status is not determinative.

Facts

21. The club provides a licensed bar and a DJ for dance music. It also advertised "fully nude dances in all private booths". The claimant says that on the floor the dancers dressed in "lingerie".

22. On the claimant's account she applied for (or to) work at the first respondent on 16 December 2013 when she was interviewed and signed a Dancers' Code of Conduct, and then worked that night. Much of this code is about dress and physical contact with clients of the club. There is a requirement not to leave the club during a shift, and a ban on "indecent conduct" and "acts of prostitution". A dancer may be subject to a disciplinary procedure if held to be in breach of the code. A separate list of rules bars touching while dancing with a client, bans husbands and boyfriends from the premises when a dancer is working, and bans meeting clients off the premises; it also requires obedience to instructions, and states that failure to attend when scheduled will after warning result in her being barred.

23. Rule 11 says "you are self-employed and therefore responsible for your own tax affairs". Other than this there are no documents about financial arrangements. The claimant said that she paid a house fee of £30 each evening she signed in, and a further £30 on completion of her shift. She was paid direct in cash by individual clients, £20 per initial dance, thereafter £100 per hour, or another rate f negotiated between dancer and client. The club provided a cash machine for clients to draw cash if they ran out during the night. At the end of the shift the dancer had to declare her earnings to the club which then asked for payment of 30% commission (though according to the response to the first claim commission was 20% until January 2015, thereafter commission on amounts above £300 increased to 30%). If a dancer does not make any money, she may suffer loss of the house fee.

24. The claimant registered with HMRC as self employed on 10 January 2017 and was allocated a UTR in February 2017. She says she was subsequently told she need not file a tax return.

25. There are no documents showing what her earnings were at any stage, which makes it hard to judge when she worked. If it is right that she was told by HMRC in 2016 that she need not file a tax return, her earnings may have been very low – under the personal allowance limit – suggesting she did not work much in 2015 or 2016.

26. The claimant did not explain the system for when she went to dance, but described herself as being on the respondent's bank. The respondent in ET3 explained the booking system as having no mandatory rota, that there is a call each week to the 45 or so dancers on the books,

27. The claimant says she started dancing in December 2013. She says she did three shifts a week but ceased dancing in December 2016 when she verbally informed the club she was returning to college. She explained she is doing a distance learning course with a college in Birmingham and she does not have time to work. She is now supported by clients, who give her presents.

28. The respondent asserted in ET3 in the first claim that her last engagement at the club was on 9 January 2015, after she was accused of making an exorbitant charge (£400) to a client, and that she was taken off the books on 15 March 2016. That followed a visit to the club by the claimant with her mother and brother in

March asking to be reinstated. Then it is said that in May and July police officers attended seeking information on an assault alleged by the claimant and the respondent provided information. In July 2016 the claimant attended and asked for her address to be changed on her initial application form; she was told she was no longer on the books and her current address was not needed; a few days later she said to a receptionist who did not know her that she wanted to re-register, and when asked to fill in a new form, asked to change the details on the old form. She was then told she was not allowed on the premises. On two occasions in January 2017 (the second time in disguise) the claimant attended and asked for a current price list; she was asked to leave.

29. The claimant said that she remained on the books since last dancing, which she said was on an unspecified date in December 2016, and was dismissed on 16 November 2018 (after submission of her claim form) when she attended with a client and on starting to pay her house fee to dance that evening was told she was not welcome. Accordingly they went elsewhere and he bought her a drink.

30. The claimant had prepared three witness statements which are in the bundle (two for 13 March 2018, one 27 August 2018) but they do not deal with working arrangements, payments, or the dispute about when she ceased dancing, just the alleged harassment episodes, so I rely on her oral evidence today.

Discussion and Conclusion

31. The claimant was not employed under a contract of service. Leaving aside the disputes as to when she last worked, or whether she is still on the bank of dancers called on to work, even in 2013-15 she was not required to work if she did not offer to work any shift, although subject to rules and control if she did attend for work. Even when she was on the premises, the facts are on all fours with *Quashie;* she was not an employee. Even if she was an employee when working, she was not employed in November 2018 when she came to the club and was told to leave, as even on her account of the facts she had not worked there at all for 23 months, and had not started a shift even then, and did not have two years qualifying service. The unfair dismissal claim does not succeed.

32. The claimant argued that she must have been an employee rather than a self employed person because the terms of the entertainment licence from the local authority permitted alcohol to be provided to employees. The licence does not define its terms; ‘employee’ may commonly be used of those who are in fact found to be workers - and is so used in the Equality Act itself; tax statutes and HMRC do not distinguish between employees and workers; under the Industrial Training Act 1964, the self-employed are there defined as employees for the purpose of training levy - this is to illustrate that a definition for one legal purpose does not define status for another, and in particular here, whether someone is employed under a contract of service.

33. As to whether she was a worker or self-employed, the evidence of the rules is that she had to stay for the shift if she started, she was subject to rules and a disciplinary procedure, she was part of the club and subject to their prices; although nominally free to negotiate with a client, she was told to leave in January 2015 when she was said to have asked an exorbitant rate, evidence that she was

not a contractor operating her own business. This suggests she was a worker at least to January 2015.

34. It is possible she was a worker as late as December 2016 if it is true that she danced until then, and untrue, as the respondent has asserted, that she did not dance in 2016 and was on several occasions told she was barred, but even so, she was not a worker in August 2018, at the time of the harassment.

35. As for the theft of the barrette by a co-employee, (1) that occurred well out of time and (2) it occurred within the time frame of events alleged in the first claim. She is estopped, or barred by the rule in Henderson, from bringing a claim based on events which she had claimed, or could have claimed, in the earlier proceedings.

36. Finally, I have considered, in view of the timing, whether the alleged events at her home in August 2018 should be considered as acts of victimisation under section 27 of the Equality Act for the protected act of having brought a tribunal claim alleging harassment, even though the claimant does not frame her claim in this way. The claimant has provided a copy of her statement to the police, and says she has heard no more from the police since August, and she has described to me what happened. It involved (1) on 24 August an unknown person placing a speaker on a satellite dish, denting a roof in the process (2) on 25 August an unknown man or woman calling at the door and asking for her by first name – the door was answered by another and the claimant does not know who called (3) a man or a woman calling at the door and saying he or she would like to do the same to the claimant as the alleged assault by J and that the claimant was a tramp. The claimant says she has not identified the voice, nor is she confident of its sex, but says that as she had not publicised her claim, the information must have come from one of the respondents, and as the first was in liquidation it may have come from the second.

37. I do not consider the claimant has established or has any reasonable prospect of establishing that the third episode complained of is something for which the second respondent is responsible. The bare facts do not show that the person concerned had any connection with the club. There may have been gossip among dancers, who may have passed it on to others too, but that may not have arisen from the tribunal claim, as the police were visiting the premises in 2016 investigating her allegation of assault, and before any allegation or suggestion of discrimination. Only the timing (two months after the hearing, when the substance of the allegations was not under consideration) suggests a possible association with the claim. The claimant has little to go on, did not see the man or woman, and cannot suggest who it was. She is sometimes careless as to detail, for example on the second claim form she stated her employment began in December 2018 (not 2013). Her account of the visit in November 2018, was that she was going to pay a fee to dance, but by that date the club had lost its dance licence. I conclude that even taking her case at its highest it is not established that the respondents victimised the claimant.

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Employment Judge Goodman

Date: 21 January 2019

JUDGMENT and REASONS SENT to the PARTIES ON

23 January 2019

FOR THE TRIBUNAL OFFICE