Case Number:
3309376/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms. L. De Oro Pude	AND	The Station Hotel (Newcastle) Ltd

HEARD AT: **Watford Tribunal** (via CVP) **ON:** 21 February 2024

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: Mr. Stephens, Counsel

For Respondent: Mr. Cordery, Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. **The Claimant was not an employee or worker within the meaning of section 230 Employment Rights Act 1996;**
2. **All claims are therefore dismissed, as the Tribunal does not have jurisdiction to deal with them.**

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REASONS

Background

1. Following ACAS conciliation between 19 and 31 July 2023, on 31 July 2023 the Claimant presented her claims to the Employment Tribunal. Her claims were for: unfair dismissal; redundancy payment; notice pay; holiday pay; and arrears of pay.
2. The Respondent presented their response on 2 October2023, which included disputing the Claimant's employment and worker status, and therefore her right to bring the claims stated.
3. Therefore, a preliminary hearing was listed to *"determine whether the Claimant was employed by the Respondent under a contract of employment and if not, whether she was a worker within the meaning of the Working Time Regulations 1998".*
    3.1. The reference to the meaning within the WTR 1998, is in fact reference to the meaning within s.230(3)(b) (which is replicated within the WTR), or "limb b workers". For ease, I will refer to the ERA in this judgment.

Procedure, documents, and evidence heard

4. In advance of the hearing, I was provided with the following documents:
    4.1. An electronic bundle, which also contained the parties' witness statements. References to numbers within [ ] are to pages within that bundle. For references to a paragraph in a witness statement the number will be preceded with 'WS/initials of the witness:';
    4.2. An opening note on behalf of the Claimant;
    4.3. An opening note on behalf of the Respondent

5. I heard oral evidence from:
    5.1. The Claimant;
    5.2. Kiran Sehgal;
    5.3. Richard Warren (the Respondent's Chief Financial Officer);
    5.4. Richard Adams (the Respondent's HR Director)

6. Kiran Sehgal, amongst others, has her own litigation pending against the Respondent, in the Newcastle Employment Tribunal. No party has suggested that the outcome of that litigation will impact this Claimant's case and needs to be determined before this Claimant's case can be dealt with. I can see circumstances where resolution of Kiran Seghal's employment status may be informative, though not necessarily determinative, in relation to the Claimant's status. However, I was satisfied that the parties' representatives have given this proper consideration, and that I could proceed.
7. After evidence and submissions, there was insufficient time to deliver an oral judgment, so the decision was reserved.

Facts

Family business

8. In the 1960s, Roshan Handa established a chain of hotels – the Cairn Group. In 1985, the Respondent company, The Station Hotel (Newcastle) Limited ("SNHL") was incorporated, and has been largely run as a family business. The shareholders are Roshan Handa and his two sons, Arvan and Aran Handa. Kiran Seghal is Arvan's daughter; Roshan's granddaughter.
9. The wider group of family members received various benefits, including payment of personal/household staff for some.

The Claimant

10. The Claimant was engaged to work for Kiran Sehgal and paid by her, or Arvan from April 2019. The Claimant records her job as "Carer" in the ET1, and the Respondent's grounds of resistance state *"to SHNL's knowledge Luzviminda was engaged by Arvan Handa in order to provide personal care to his daughter, Kiran Sehgal."* Despite these references, it is not disputed that at the relevant time, the Claimant was working as a nanny/housekeeper [WS/C:12].
11. The Claimant was interviewed by Kiran Sehgal, agreed the terms with her, and was told that she had been successful in securing the role by Kiran Sehgal.
12. In October 2019, Arvan Handa instructed that the Claimant be placed on the Respondent's payroll [77]. This was done, and thereafter the Claimant's wages were paid via the Respondent.
13. The Claimant was not formally "onboarded". She did not receive a contract from the Respondent, was not assigned to a particular role/job title or have any training requirements. She was recorded as "SMT" which Mr. Adams believed referred to

"Senior Management Team". It was put to him that this meant the Claimant was treated as part of that group, which he did not accept.

14. Mr. Adams agreed that not all employees would have a written contract, but
15. The Claimant received wage slips from the Respondent [85], had tax deducted at source [191], and was entitled to a Nest pension [100]. Having been set up on the system, the Claimant also received emails from the company regarding various matters including: the company bonus scheme [120]; referral fee [143]; and employee welfare consultation. Mr. Adams explained this as occurring because of the use of Mailmerge by the company system.
16. The Claimant's duties were varied [WS/C:11], including cleaning, giving the children medicine, hoovering, making beds, taking in food deliveries, and sometimes preparing meals [132-133]. The specific duties may vary depending on whether the family were on holiday.
17. Kiran Sehgal describes this as *"household duties at my home"* [WS/KS:5], and the Claimant confirmed that her duties were always for Kiran Sehgal and her family.
18. The Claimant worked Monday to Friday, 7am – 7pm (with a 1.5-hour break) [WS/C:11], living within the Sehgal home. She had her own flat where she stayed at weekends.
19. The Claimant confirmed that any changes were discussed and agreed with Kiran Sehgal, including requests for and approval of time off, and any pay increases. She believed that these were then relayed to the company. When pay was to be increased it was subject to board approval [190].
20. It was put to Mr. Warren that the Claimant was under the control of Kiran Seghal which was delegated from the Respondent company – his response was that this could be argued.
21. Mr. Adams agreed that depending on the circumstances, it is possible for a company to hire a nurse to care for an ill Director. He confirmed that 'Rafeek' was employed as a driver for Roshan Handa, who is a shareholder rather than a Director. He distinguished this as he has a role within the Cairn Group.
22. Mr. Adams confirmed that as a Director Arvan Handa had the power to decide who the company hires, but said that this would be rare
23. After Brexit, the Claimant had to prove her right to work in the UK [111].
24. Taking judicial notice, on 26 March 2020, the first national lockdown in relation to COVID-19 began. The government set up the Coronavirus Job Retention Scheme ('CJRS'), more commonly known as furlough, which refers to wages for employees on temporary leave. Employers could claim these wages through the CJRS. The initial guidance in March 2020 stated that: *"if you cannot maintain your current workforce because your operations have been severely affected by coronavirus (COVID-19), you can furlough employees and apply for a grant that covers 80% of*

their usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and pension contributions…". The guidance went on to say: *"HMRC will check claims made through the scheme. Payments may be withheld or need to be repaid in full to HRMC if the claim is based on dishonest or inaccurate information or found to be fraudulent."* It continued: *"You can only claim for furloughed employees that were on your PAYE payroll on or before 19 March 2020 and which were notified to HMRC on and RTI submission on or before 19 March 2020…. Employees can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts."* It further provided: *"As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE: office holders (including company directors) …. agency workers…. And limb (b) workers"*.

25. Given the nature of the Respondent's business, a large number of people were furloughed. This included the Claimant, between May and September 2020.
26. It was put to Mr. Warren that he should have been fully aware of the application of this scheme, and eligibility for it. He confirmed that retrospectively the position has been investigated to determine if there were any errors in the use of the scheme, but that currently no report to HMRC has been made.
27. In July 2022, there was a proposal that *"the family members on the payroll who do not work for the business should be taken off payroll"* [150]. Included in the list for removal was Kiran Sehgal and the Claimant [160].
28. There was much discussion internally within the Respondent company, its Board, and between affected family members. This included consideration of the employment status of each individual, the possibility of transferring people to other parts of the business, and calculation of potential redundancy payments. Mr. Adams explained that the latter was based on assumptions as he didn't have the relevant information, and that he wasn't looking at the issue of status. Similarly, he says he was asked to advise on notice, and references to this were in that context rather than applying a test for status.
29. Ultimately, in May 2023, the Claimant was informed that she would no longer be paid via the Respondent. Her last pay was processed in June 2023.
30. Since then, the Claimant has continued to work for Kiran Seghal, and is paid directly by her.

Relevant law

31. Employment Rights Act 1996
    Section 230 - Employees, workers etc.

(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.

32. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*, Mr. Justice Mackenna reasoned that a contract of service/ employment exists if the following conditions are fulfilled:
    - •the individual agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for the employer;
    - •the individual agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other an employer;
    - •the other provisions of the contract are consistent with its being a contract of service.
33. This three-part test has been unequivocally endorsed in later court decisions, and most recently by the Supreme Court in the employment case of *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC.* They also endorsed a line of cases which stressed that the circumstances under which employment contracts are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. The Court held that *"the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part"*.

34. *In Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA* the Court of Appeal cautioned against using a checklist approach by which the court runs through a list of factors and ticks off those pointing one way and those pointing the other, and then totals up the ticks on each side to reach a decision.
35. *In Uber BV and ors v Aslam and ors 2021 ICR 657, SC* the Supreme Court held that the determination of 'worker' status is a question of statutory, not contractual, interpretation, and that it is therefore wrong in principle to treat the written agreement as a starting point. The correct approach is to consider the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work.
36. In *Dynasystems for Trade and General Consulting Ltd and ors v Moseley EAT 0091/17* the same principles as had been set out by the Supreme Court in *Autoclenz*, regarding the process of looking behind the formal contractual documentation to assess the reality of the situation were used to determine the true employer under the contract. In this case, the Claimant was employed under a contract which expressly stated that he was employed by the Respondent company. However, when he signed that contract, he also received a letter of authority signed by the head of a UK company, D Ltd. Throughout four-and-a-half years of employment, the Claimant did no work for the Respondent and dealt exclusively with the UK company. His line manager was a director the UK company, his instructions came from the UK company and, although he was paid by Respondent, he was held out by the companies as working for the UK company. When he sought to bring claims of unfair and wrongful dismissal, an employment judge decided that the claims should proceed against the UK company, taking the view, after applying the principles in *Autoclenz*, that the express terms of the contract did not reflect the actual agreement between the parties, and that in reality the UK company was the employer. The EAT dismissed the UK company's appeal against that decision, holding that the employment judge had correctly applied *Autoclenz*.
37. In *Clark v Harney Westwood and Riegels and ors 2021 IRLR 528, EAT*, the EAT reviewed all of the authorities to distil the following guidance on the correct approach to identifying the employer whenever its identity is in dispute:

    •where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law

    •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, requiring consideration of all the relevant evidence

•any written agreement drawn up at the inception of the relationship will be the starting point, and the tribunal will need to consider whether that agreement truly reflects the parties' intentions

•if the written agreement reflecting the true intentions of the parties points to B as the employer, any assertion that C was the employer will require consideration of whether there was a change from B to C at any point and, if so, how

•in determining whether B or C was 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.

Personal service – mutuality of obligation

38. In *Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA*, Lord Justice Stephenson stated that *"there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service"*. That view was subsequently endorsed in the House of Lords in *Carmichael and anor v National Power plc 1999 ICR 1226, HL*, where Lord Irvine stated that a lack of obligation on one party to provide work and the other to accept work would result in *"an absence of that irreducible minimum of mutual obligation necessary to create a contract of service".*

Control

39. In *Ready Mixed Concrete*, Mr Justice MacKenna stated: *"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."*

40. In *Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd 2024 UKSC 29, SC*, the Supreme Court confirmed that the degree of control over the 'what, where, when and how' will often leave no room for doubt that the level of control is consistent with employment. But there will be cases where some or all of those factors will be absent but where, nonetheless, it is appropriate to find that the necessary degree of control was exercised.

Other relevant factors - financial

41. In *Rainford v Dorset Aquatics Ltd EAT 0126/20*, the EAT upheld an employment tribunal's decision that R, a director and minority shareholder of a company that he ran with his brother, was not an 'employee' or a 'worker' for the purposes of the ERA. Although R worked for the company as a site manager and in various other capacities, and received equal monthly payments described as 'salary', which were subject to PAYE and national insurance deductions, it did not follow that the work and payments were necessarily referable to one of the types of contracts conferring employment status referred to in S.230(3) ERA.

Other relevant factors – organisational integration

42. The degree to which the individual is integrated into the employer's organisation remains a material factor under the approved 'multiple test'. Relevant considerations might include whether the individual wears a uniform or drives a vehicle adorned with the employer's logo, or whether he or she is subject to the employer's disciplinary and grievance procedure — this was a factor pointing towards employee status in *Motorola Ltd v Davidson and anor 2001 IRLR 4, EAT*.

Submissions

43. Both representatives made oral submissions to supplement their opening notes. I do not repeat everything here.

Claimant

44. There was obviously a contract, even if initially just between the Claimant and Kiran Seghal, this was expressly/impliedly novated by Arvan Handa. Terms don't have to be in writing, but are evidenced in numerous places, and the key provisions are easy to discern.
45. The Claimant's base was Head Office, and place of work was home of someone else. She was integrated, in an organised grouping, and entitled to participate in bonus schemes.
46. Everything the company did to and for the Claimant says she was an employee. The Respondent had control over how and when she was paid, furlough, approval of salary increase, consider transfer to CHG. They delegated that control to Director who was a family member - the situation is the same as seconding where the company doesn't know what the individual is doing on a daily basis.
47. There was a stark change in position in May 2023, when the family fell out.

Respondent

48. The Claimant had no contract at all with SHNL to prov services to the company, and did not provide any such services.

49. There is no evidence of a contract between the parties in: her statement; answers to supplementary questions of cross-examination; or within the documents.
50. The only agreement the Tribunal has heard evidence of is between the Claimant and Kiran Seghal. A precise finding of that agreement isn't needed, but the evidence is fatal to establishing employee/worker status with the Respondent.
51. Arvan's instruction in 2019, doesn't create employment – it is merely and instruction to ensure payments are processed. There is no evidence of offer or acceptance with intention to create legal relations
52. Irreducible min mirror images of mutual obligation are wholly absent in the present case – no evidence of obligation to provide work by the Respondent. Would expect Claimant to be deployed elsewhere when the family are on holiday – she was not, which supports the picture that there is no obligation on the Respondent to provide work and and her to undetake.
53. Auto-enrolment, taxation, furlough, company communications, and right to work check, all flow from the Claimant being on the payroll. Nothing can be read into or derived from the functions of these systems. The Claimant was not managed, had no email, no desk, no location, and was not within/under the management systems if anyone at the respondent company.

Conclusions

Employee

General

54. The issue before me was to determine whether the Claimant was employed by the Respondent under a contract of employment and if not, whether she was a worker within the meaning of the Working Time Regulations 1998.
55. I was not tasked with identifying *who* the correct employer was, simply whether the Respondent was, or was not. Therefore, whilst there may be inferences drawn from the facts found, I do not draw any specific conclusions about who may have been the Claimant's employer in the absence of the Respondent. Whilst there is no written agreement between the parties, or between the Claimant and Kiran Sehgal, the Claimant relies on the Respondent's actions at the time she began her role as indicating the intentions between the parties.
56. The relationship between Kiran Sehgal and the family business has clearly caused confusion. Whilst it is possible for a company to employ someone in a role such as the Claimant on behalf of a Director, that is not what happened in this case.
57. I recognise that other staff for other family members had different arrangements, but that does not automatically import that arrangement to the Claimant's situation.

Contract

58. There was no contract, written or otherwise, between the Claimant and the Respondent company.
59. The company had no involvement with the engagement of the Claimant, aside from the instruction by Arvan to put her on the payroll. Everything else was solely between the Claimant and Kiran Seghal. There was no intention to create legal relations between the Claimant and the Respondent.

Mutuality of obligation

60. The Claimant provided personal service to Kiran Sehgal as a nanny for her children, and other associated household tasks. This was where her obligations lie. The Claimant did not provide any services to the Respondent company.
61. The only obligation on behalf of the Respondent was the payment of wages.

Control

62. All of the Claimant's instructions came directly from Kiran Seghal. This continued even when they were on holiday.
63. If Kiran Seghal was simply the Claimant's 'manager', having that power delegated from the Respondent company, it would be reasonable to expect that another manager would take responsibility for the Claimant during this period.
64. The Respondent had no specific knowledge of the Claimant's duties, and at no time during the years that she worked in the Claimant's house did anyone from the company give her any instructions about what she should do.

Other factors

65. The only involvement that the Respondent company had in relation to the Claimant was facilitating payment of her remuneration. Their method of doing this – adding the Claimant to the payroll - has muddied the waters further, and there may well be other financial issues that need to be rectified following these proceedings. The company payroll was, I find, simply a vehicle or mechanism by which money could be channeled to the Claimant.
66. However, that doesn't take away from the absence of the irreducible minimum factors between the Claimant and the Respondent.
67. I place no weight on the fact that Kiran Seghal was unable to increase the Claimant's pay without board approval. That is not unsurprising, when the money was coming from the company. In any event, it further distances her from the delegated power that it is suggested she had in relation to the Claimant.

Worker

68. Having determined that there was no contract between the Claimant and the Respondent company, I must also conclude she was not a worker within the meaning of the legislation.

Summary

69. The Claimant was not an employee or worker of the Respondent and is therefore not entitled to bring the claims that she has presented to the Tribunal.
70. All claims are dismissed, as the Tribunal does not have jurisdiction to deal with them.
71. Finally, I am aware that the Regional Employment Judge has written to the parties in general terms about the delay in this judgment being completed. I would like to take this opportunity to apologise to the parties and their representatives for the time that this has taken. I am grateful for the patience of all involved. The delay has been caused by my ill health, and I have finalised and promulgated the judgment as soon practicable.

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Employment Judge Douse

Date: 27 January 2025

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JUDGMENT SENT TO THE PARTIES ON

27 January 2025

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AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL