



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Elliott

Respondent: K3 Business Technology Group PLC

Heard at: Manchester Employment Tribunal by CVP

On: 21 February 2022 and in chambers on 7 March 2022

Before: Employment Judge Cookson sitting alone

Representation

Claimant: Mr Williams (counsel)

Respondent: Mr Dennis (counsel)

RESERVED JUDGMENT ON A PRELIMINARY MATTER

It is the decision of the Employment Tribunal that:

1. The claimant was employed by K3 Business Technologies Ltd.
2. Accordingly as the claimant was not employed by the respondent in these proceedings, her claim is dismissed.

REASONS

Introduction

1. On 6 August 2020 the claimant lodged various claims against the respondent including for a statutory redundancy payment, equal pay, unfair dismissal and sex and maternity and pregnancy discrimination against the respondent in these proceedings, following a period of early conciliation between 19 June to 19 July

2020.

2. In her claim form the claimant acknowledged that the contract of employment she signed was with K3 Business Technologies Ltd (“K3 BT Ltd”) a company which is a subsidiary of the respondent, but which entered administration on 21 April 2020. The claimant asserted however that this company was purely responsible for the administration of her payroll and “had no control of her employment” and that she “was at all times employed by the respondent”. The claims were denied by the respondent which raised a preliminary issue that the claimant could not pursue the claims against the respondent if she was not employed by that company and sought a preliminary hearing to determine that issue.
3. On 1 April 2021 Employment Judge Slater directed that there should be a preliminary hearing to determine the following issue: “to decide whether K3 Business Technology Group plc was the claimant’s employer?” After the first preliminary hearing was adjourned that was the matter which came before me on 21 February 2022.
4. For the purposes of this hearing I received:
 - a. An agreed bundle of documents running to some 491 pages
 - b. Oral and written witness evidence from the claimant
 - c. Written statements from Ms K Covey, Mr R Barlow and Mr G Cochrane in support of the claimant.
 - d. Oral and written witness evidence from Ms Humphrey on behalf of the respondent.
 - e. Written and oral submissions from Mr Williams
 - f. Oral submissions from Mr Dennis.
5. Mr Dennis informed me that in relation to the other witnesses called by the claimant, although the respondent did not concede all of that evidence was correct, the respondent’s position was that this evidence was not relevant to the legal issues in this case and on that basis that evidence was not challenged.
6. I was grateful for that concession given this case had been listed for a day’s hearing and given the volume of evidence the parties had presented.

Findings of Fact

7. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. I have not made findings about all evidence presented to me but only the evidence which was relevant to the legal issue I had to determine.
8. Despite the volume of evidence presented to me, it became apparent that in fact there was little dispute between the parties about the underlying facts.

9. K3 Business Technologies is the trading name for a Group of Companies (which I have referred to as the “K3 Group”) that develop, implement, and support software solutions for a wide range of businesses across retail, manufacturing and other sectors.
10. The claimant was initially offered employment as a project manager in 2014. The offer of employment was made on a letter from the respondent which states that the claimant would be issued with a standard contract. The contract is between K3 Retail Solutions Limited as the employer and the claimant. The claimant signed that contract without objecting to the identity of the parties. The claimant was also subject to a company handbook. This is in the respondent’s name.
11. The claimant was paid by K3 BT Ltd throughout her employment.
12. When the claimant’s notice period was changed to 3 months from either party on 17 March 2016, that letter was sent to K3 Retail Solutions Limited (which became K3 BT Ltd).
13. In October 2018 the claimant was informed that company was changing its name to “K3 Business Technologies Limited”.
14. The claimant had a successful career with the K3 Group. On 15 March 2019 her job title was changed to Head of NAV Projects. That letter confirming that change is on the headed notepaper of K3 BT Ltd. The letter informing her of the outcome of her annual salary review in 2019 was sent on the headed notepaper of the respondent.
15. In December 2019 she was promoted to a new role as Head of Projects within the “Service Delivery PMO Team” which operated across the K3 Group. The letter which confirmed the promotion and accompanying salary increase, sent on 24 February 2020, was sent on the headed notepaper of K3 BT Ltd.
16. In the course of her role the claimant managed employees from across the K3 Group and undertook activities on behalf of the respondent and other companies in the K3 Group. I accept the claimant’s evidence that throughout her employment she dealt with product and services from across the K3 Group. She reported directly to the senior management team of the respondent which took budgetary and other decisions for the companies in the K3 Group. The claimant had her own team budget and objectives which were independent of K3 BT Ltd’s budgets and objectives and she was set targets and deadlines by the respondent. The K3’s HR department provides support across the K3 Group and on occasion the claimant worked closely with them in relation to issues relating to employees employed elsewhere in the K3 Group.
17. The claimant participated in a Group wide bonus scheme operated by the respondent. The letter to the claimant about her bonus was issued on the respondent’s notepaper. The pension scheme which the claimant participated in is referred to by the pension providers, Aegon, as the respondent. The respondent was also listed as the employer for the purposes of the healthcare plan she participated in.

18. The letter to the claimant about her P11D from for the tax year 2019/2020 says this "Please find enclosed your P111D in respect of the tax year from 6 April 2019 from 5 April 2020. This covers the benefits provided to you whilst an employee for K3 Business Technology Group plc". That letter was sent by a senior HR administrator of the respondent. The P11D itself states the employer is K3 BT Ltd.
19. The claimant's P60 End of Year certificate for the year ending 5 April 2020 states that the claimant's employer was K3 BT Ltd.
20. It was the respondent that dealt with the claimant's data subject access request.
21. The member of the respondent's senior leadership team comprise individuals from a number of different European countries. They are employed by subsidiaries of the respondent based in the countries in which they live. For example, Sjoerd Starren, the respondent's chief delivery officer and member of the senior leadership team, is employed by K3 Business Solutions BV, a Netherlands subsidiary.
22. In terms of corporate governance, Ms Humphrey explained that the board of each subsidiary company is comprised of members of the senior leadership team of the respondent. She was unable to explain how decisions making within subsidiaries is differentiated from decision making within the respondent and it would appear from her evidence that decisions about subsidiary company matters without any particular regard to fact that strictly the separate legal entities are involved. The claimant's evidence was the K3 operated as if it was a single legal entity and the different subsidiaries were treated simply "divisions". She says that was how the Group was described at the time of her recruitment. On a day to day basis that appears to be consistent with the evidence in the bundle of documents and I accept the claimant's evidence that this was her experience of how the K3 Group operated.
23. The claimant began maternity leave on 22 February 2020. The letter to her about her maternity leave was sent on the headed letterhead of K3 BT Limited.
24. On 1 April it was announced that the Board of K3 BT Ltd decided to file a Notice of Intention to appoint an administrator and on 21 April 2020 the company went into administration. The claimant exchanged some messages with other employees about what was going on. On 1 April in an exchange with Mr Starren she wrote "So we are all out of jobs or will some move to group?".
25. The respondent purchased a software component from the administrators shortly before the administration. It was Ms Humphrey's evidence that no part of K3 BT Ltd's business was retained within the K3 Group and there was not other transfer of business prior to the administration. Some 26 employees of K3 BT Limited were offered roles in the remaining group but the claimant was not. Ms Humphrey explained that they were not "transferred" but simply offered new roles.
26. The claimant's P45 is, unfortunately not very helpful. The employer is stated to be "K3 Business Technologies" at an address which was the registered office of K3 BT Ltd and the respondent. In the box which is labelled "works number/payroll number and department or branch (if any)" it says "Emp No 101276 Dept 640 K3

Business Technology Group P”. It appears that the number of available characters ran out but if it had been completed it seems inevitable that it would have referred to the respondent. The Employer PAYE reference number however is the same number shown for K3 BT Ltd (120/GB08036).

Submissions

27. Both parties made oral submissions based on the authority they referred me to, explained below and Mr Williams also provided me with written submissions.
28. Mr Williams pointed to the degree of control exercised by the respondent over the claimant and to her integration in the respondent’s business, managing as she did Group employees and working on group projects. He suggested that the fact K3 BT Ltd is named on the contract is merely a matter of administration and that it was the clear intention of the parties was that the claimant was employed by the respondent at all times.
29. In suggesting that this is the reality of the relationship, Mr Williams pointed to the fact that handbook and other documents refer to the respondent. He went on to make submissions based on control and integration and suggests that although the contract of employment is the starting point, application of the control test and the integration test supports the claimant’s case that the parties intended that the respondent be her employer. Mr Williams suggested that nothing in the evidence that is consistent with it being K3 BT Ltd which controlled the claimant and which company paid the claimant soul not be regarded as determinative. Mr Williams added that if the claimant’s case about her employment from 2014 is not accepted, then her from her promotion at the end of 2019 “she was certainly employed by R from this time onwards”. I note however that in relation to that latter point, as Mr Dennis pointed out in his submissions, that is, however, a different case from the one set out in the claim form which is presented on the basis that the claimant had always been employed by the respondent.
30. Mr Dennis argued that applying the guidance in the Clark case below, the conclusion must be that the claimant’s employer was K3 BT Limited. He submitted that although as might be expected in a corporate group there was evidence of the claimant participating in group benefit schemes such as the pension and the bonus and the claimant being dealt with by a group HR, the key contractual documents and letters, for example about variation to terms, show a consistency of approach that the claimant was employed by the respondent’s subsidiary. He argued that the fact that it was always the claimant’s understanding that she was employed by K3 BT Ltd is shown in her text messages when she acknowledged the risk of redundancy and referred to the possibility of moving to the respondent.
31. He highlighted that the claimant’s case was not that the contract in this case was a “sham” and he argued that the claimant’s case as evidenced in her claim form which refers to control and integration is based on a flawed approach to the law. Those are tests relevant to whether an individual has the status of an employee. Here the question is whether there is evidence that despite the express contractual terms in place there was evidence that the parties had in fact intended that the claimant be employed by a different legal entity. He highlighted that if I were to be

my conclusion I would have to be able to identify when that change had been affected and by what legal mechanism.

The Law

32. The relevant statutory provisions which fall to be determined in this case are as follows:

33. The statutory definition of 'employer' in the Employment Rights Act 1996 s 230(4) is this: "In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed".

34. In the Equality Act, under section 83(2) "Employment" means—
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;...."

35. Perhaps unusually, the parties are agreed that there is one key authority which I need to refer to in this case. That is the case of Clark (appellant) v Harney Westwood & Riegels and others (respondents) UKEAT/0018/20/BA, UKEAT/0019/20/BA, UKEATPA/0576/19/BA, in which the then President of the EAT, Mr Justice Choudhury, reviewed the authorities in this area and provided a helpful list of issues which a tribunal would have to be consider when determining the issue of the correct employer.

36. In that judgment Mr Justice Choudry identified the following principles that are relevant to the issue of identifying whether a person, A, is employed by B or C para:

"[52] In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:

a. 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: Clifford at [7].

b. However, 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. This will require a consideration of all the relevant evidence: Clifford at [7].

c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: Bearman at [22], Autoclenz at [35].

d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then 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: Bearman at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?

e. *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: Dynasystems at [35].*

[53] To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed.

Discussion and my conclusions

37. In my deliberations I found it useful to work though the guidance so helpfully set out by Mr Justice Choudry.
38. As the parties agreed, the starting point must be the claimant's contract of employment. I accept that this is case where there is dispute which can be determined solely by looking at the documents.
39. The facts in this case do suggest that the way employees worked, were managed, and organised across the Group was somewhat fluid. There seems to have been little regard to the underlying employment documents. The question for me was whether this indicated an intention at the start or indeed later, on the part of the parties, for there a different contractual arrangement from that set out in the contract.
40. In her claim form, her witness statement and in Mr William's submissions, some weight appears to have been attached to the fact it is said that K3 BT Ltd was simply "a payroll company" put in place simply for the administration of pay. I have not however been presented with any authority for a suggestion that this is something which, in itself, enables the tribunal to look behind the terms of the contract nor indeed was a presented with any evidence that K3 BT Ltd was simply an empty shell used purely for the purposes of paying staff. Indeed the fact that the respondent purchased a software component product from the subsidiary before administration suggests that was not the case.
41. The claimant in this case clearly provided services to the respondent and undertook activities on its behalf. I agree with Mr Williams that the fact this group of companies seemed to pay little heed to matters of strict corporate governance somewhat muddies the waters. Letters were sent to the claimant which appear to be letters from her employer, such as the covering letter with the P11D which were sent on the respondent's notepaper. Letters were sent on K3 BT Ltd letterhead and I accept were sent on behalf of that company but it is unfortunate it is not

clearer in what capacity the writers of these letters are writing to the claimant. At times the respondent does appear to be identified as the employer, as in the handbook and in some HR correspondence and in documents relating to benefits. It is surprising that terms such as “employer” in these contexts were not used with more precision. That is unfortunate and it is consistent with the claimant’s description of an organisation run on in practice as a single legal entity made up of divisions. However, I do not find that in itself means there was an intention on the part of the parties that the claimant be employed by the respondent. I found it significant that there was a consistency in some key aspects – in the contract of employment itself, in the payslips, in the tax forms and that letters about variations to terms of employment, other than in relation to pay reviews, were sent on the letterhead of the company which had been identified as the employer, not the respondent’s letterhead. There is a consistency that the employing entity is described as K3 BT Ltd and no evidence that the claimant ever queried or challenged that if it did not reflect her understanding of the reality of the parties intentions. That supports a conclusion that the parties did act throughout the relationship, although not entirely consistently or seamlessly, as if the employer was K3 BT Ltd and not the respondent. That is supported by the fact that the claimant recognised that her employment would only continue after the administration if her employment was moved to the respondent. Whilst I appreciate comment was made in a text message and was perhaps something of a throw away comment made by the claimant as she tried to find out what was going on, it is nevertheless compelling evidence that the claimant did not believe that she was employed by the respondent and that was what the parties had always, or recently, intended.

42. Finally, I asked myself if the correct position was that the respondent was the claimant’s employer was there evidence from which I could when that had occurred and by what legal mechanism. It was not suggested by the claimant that there had been a transfer of her employment under TUPE and there was no evidence of a novation of the 2014 contract. In other words, there was no evidence before me from which I could conclude how the legal position argued by the claimant had arisen after she signed the contract of employment with K3 BT Ltd.
43. In the circumstances I found that the claimant was employed by the legal entity which would become K3 BT Ltd in accordance with the terms of the contract she signed on 8 July 2014 throughout her employment. As she was not employed by the respondent her claims against it must be dismissed.

Employment Judge Cookson
Date 7 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
8 March 2022

FOR EMPLOYMENT TRIBUNALS