

THE INDUSTRIAL TRIBUNALS

CASE REF: 3434/20

CLAIMANT: Natalia Balut

RESPONDENTS:

1. Competition Line (UK)
2. Andrew Michael
3. David Cheung
4. Tony Peacock
5. Joseph Ayre
6. Stephen Greene

JUDGMENT

The Tribunal unanimously found that the claimant was not at the material time employed by any of the respondents. The Tribunal therefore has no jurisdiction to determine her case. The claimant's claims are therefore dismissed in their entirety against each of the respondents.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Browne

Members:

1. Mr T Carlin
2. Mr A Kerr

APPEARANCES:

The claimant represented herself.

The respondents were represented by Mr G Cumiskey of Peninsula.

ISSUES TO BE DETERMINED

1. The claimant made a number of complaints against the first-named respondent, citing it as her employer at the material time; and individually against five named respondents in their capacity as employees of the first-named respondent.
2. The claimant's complaints in her original ET1 form comprised: Direct discrimination (including harassment) on the grounds of (i) sex; (ii) race/nationality; (iii) sexual orientation. The claimant further alleged: (iv) public interest disclosure detriment; (v) health and safety detriment; (vi) disability discrimination (including by harassment).

3. The respondents' case was that the Tribunal had no jurisdiction to determine any of those complaints, on the ground that she was not at the material time an employee of the first-named respondent; nor was she ever an employee of any of the remaining respondents.
4. The respondents further contended that the Tribunal did not have jurisdiction to determine aspects of the claimant's complaints because they were made outside the permitted statutory time limits.

AMENDMENT OF TITLE

5. The title of the first-named respondent was amended with the agreement of the parties on the first day of the hearing to "**Competition Line (UK)**".

SEX DISCRIMINATION

6. The claimant's case included acceptance that, whilst she was at the material time self-employed, the Tribunal could properly conclude that she was employed by the first-named respondent, for reasons which included what she claimed was a requirement for her to wear the first-named respondent's branded clothing while at work on its premises.
7. The relevant legislation is the Sex Discrimination (Northern Ireland) Order 1976, which sets out the criteria for bringing a complaint in employment and in other categories. In an employment case, the requirements are set out as follows:

Discrimination by employers

Applicants and employees

8 .—(1) It is unlawful for a person, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a woman—

- (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
- (b) in the terms on which he offers her that employment, or
- (c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her—

- (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
- (b) by dismissing her, or subjecting her to any other detriment.

(2A) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to subject to harassment—

- (a) a woman whom he employs, or
- (b) a woman who has applied to him for employment.

(2B) For the purposes of paragraph (2A), the circumstances in which an employer is to be treated as subjecting a woman to harassment shall include those where—

- (a) a third party subjects the woman to harassment in the course of her employment, and
- (b) the employer has failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(2C) Paragraph (2B) does not apply unless the employer knows that the woman has been subject to harassment in the course of her employment on at least two other occasions by a third party.

(2D) In paragraphs (2B) and (2C), “third party” means a person other than—

- (a) the employer, or
- (b) a person whom the employer employs,

and for the purposes of those paragraphs it is immaterial whether the third party is the same or a different person on each occasion.

RACE DISCRIMINATION

- 8. It was the claimant’s case that the respondents had treated her less favourably than other employees on the grounds of her nationality or ethnic background, in that she is from Eastern Europe.
- 9. The relevant legislation relied upon by the claimant is contained in the Race Relations (Northern Ireland) Order 1997. That legislation sets out the categories of scope of such conduct. As regards discrimination in employment, it states:

“Discrimination by employers

Discrimination against applicants and employees

6.—(1) It is unlawful for a person, in relation to employment by him at an establishment in Northern Ireland, to discriminate against another—

- (a) in the arrangements he makes for the purpose of determining who should be offered that employment; or
- (b) in the terms on which he offers him that employment; or
- (c) by refusing or deliberately omitting to offer him that employment.

(2) It is unlawful for a person, in the case of a person employed by him at an establishment in Northern Ireland, to discriminate against that employee—

- (a) in the terms of employment which he affords him; or
- (b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
- (c) by dismissing him, or subjecting him to any other detriment.

(3) Except in relation to discrimination falling within Article 4, paragraphs (1) and (2) do not apply to employment for the purposes of a private household.

(4) Paragraph (2) does not apply to benefits, facilities or services of any description if the employer is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public comprising the employee in question, unless—

- (a) that provision differs in a material respect from the provision of the benefits, facilities or services by the employer to his employees; or
- (b) the provision of the benefits, facilities or services to the employee in question is regulated by his contract of employment; or
- (c) the benefits, facilities or services relate to training.

(5) Paragraphs (1) and (2) do not render unlawful any act done by an employer for the benefit of a person not ordinarily resident in Northern Ireland in or in connection with employing him at an establishment in Northern Ireland, where the purpose of that employment is to provide him with training in skills which he appears to the employer to intend to exercise wholly outside Northern Ireland.”

10. As regards the claimant’s complaint of detriment arising from what she claimed was a protected disclosure, the relevant legislation is contained in the Employment Rights (Northern Ireland) Order 1996.

Meaning of “protected disclosure”

67A. In this Order a “protected disclosure” means a qualifying disclosure (as defined by Article 67B) which is made by a worker in accordance with any of Articles 67C to 67H.

Disclosures qualifying for protection

67B.—(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding sub-paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of paragraph (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within sub-paragraphs (a) to (f) of paragraph (1).

Disclosure to employer or other responsible person

67C.—(1) A qualifying disclosure is made in accordance with this Article if the worker makes the disclosure in good faith—

- (a) to his employer, or
- (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.”

11. The Tribunal noted that all of the relevant legislation required a person bringing such a complaint for consideration by an industrial tribunal of such complaints against the respondents therefore was first required to establish that they were an employee or a worker.
12. Article 3 of The Employment Rights (Northern Ireland) Order 1996 defines such status in the following terms:

“Employees, workers

3.—(1) In this Order “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 Order “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 Order “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.

(4) In this Order “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.

(5) In this Order “employment”

- (a) in relation to an employee, means (except for the purposes of Article 206) employment under a contract of employment, and
- (b) in relation to a worker, means employment under his contract;

and “employed” shall be construed accordingly.

(6) This Article has effect subject to Articles 67K and 70B(3); and for the purposes of Part XV so far as relating to Part VA or Article 70B, “worker”, “worker's contract” and, in relation to a worker, “employer”, “employment” and “employed” have the extended meaning given by Article 67K.”

13. The claimant’s contract with the first named respondent was as that of a personal trainer. She previously was employed by the first named respondent as a personal

trainer from November 2016 until September 2017. Her complaints in this case do not include that period of employment.

14. The claimant returned as a personal trainer on 1 March 2019, but the respondents' case is that her return was in a self-employed capacity as a personal trainer ("PT"). The agreement, signed on 6 March 2019 by the claimant, between her and the first named respondent stated: "The relationship of the PT to [the first-named respondent] will be that of independent contractor and nothing in this Agreement shall render him as an employee, worker, agent or partner of [the first-named respondent] ...".
15. The signed agreement also contained confirmation from her that she was registered as self-employed and that she already had personal public liability insurance. It also contained details of the rent the claimant would pay to the first-named respondent for use of its premises in order to conduct her business. It also was the case that the claimant confirmed in evidence that she never received any payment from the first-named respondent for performance of her personal training work.
16. There also was documentary evidence of the claimant's tax returns to HMRC, in which she self-identified as being self-employed.
17. The claimant, whilst not challenging the evidence as to the contents of the agreement, invited the Tribunal to find that she was employed by the first-named respondent. She stated that she was expected to wear the first-named respondent's branded clothing while present at its premises as a personal trainer. She also was expected to attend team briefings. It was denied in evidence by the first-named respondent that the claimant had to wear branded clothing, and her attendance at team meetings was expected only to keep her up to date with information about the club.
18. The Tribunal concluded that the claimant had failed to establish that she was anything other than self-employed; the evidence in that regard was quite clear, and much of it was confirmed by the claimant.
19. The Tribunal therefore concluded that the claimant had failed to establish in any of her complaints that she qualified under the relevant legislation to come within the scope of the Tribunal's jurisdiction. The Tribunal therefore has no jurisdiction to determine any of her complaints. Her complaints are therefore dismissed in their entirety against all of the respondents.
20. The claimant is still entitled to make an application for preparation time costs, as set out in the record of the Preliminary Hearing dated 20 January 2022.

Employment Judge:

Date and place of hearing: 31 January to 4 February 2022, Belfast

This judgment was entered in the register and issued to the parties on: