EMPLOYMENT TRIBUNALS

Claimants: **Miss R Johnson (1) and Mr T Forrest (2)**

Respondent: **Pub Solutions (South West) Ltd**

Heard at: **Exeter** **On: Friday 22 November 2019**

Before: **Employment Judge Matthews**

Representation:
Claimants: **In Person**

Respondent: **Mr A Mellis of Counsel**

RESERVED JUDGMENT

The Claimants were employees and workers of the Company within the meaning of section 230 of the Employment Rights Act 1996.

REASONS

INTRODUCTION

1. On 27 August 2019 Employment Judge R Harper listed these cases for a preliminary hearing. This Tribunal has only seen Miss Rebecca Johnson's claim form (pages 2-16 in the bundle – references are to pages in the bundle, unless otherwise specified). However, for the purposes of this Judgment it is assumed that there were two claim forms identical in all material respects save for the details personal to the parties. Certainly, Miss Johnson's and Mr Thomas Forrest's (the "Claimants") claims should be heard together as they give rise to common or similar issues of fact and law.

2. The Claimants' common case is that they were constructively unfairly dismissed, are owed holiday pay, were not paid the minimum wage and that there were breach of contract and health and safety issues.

3. The Respondent Company defends the claims. As a preliminary issue the Company says that neither of the Claimants was an employee or worker of the Company. This preliminary hearing was listed to deal with the issue of whether or not the Claimants are employees and, if so, what were their respective periods of service. Further, the parties agree that the subsidiary issue of whether or not the Claimants were workers may be relevant. The preliminary hearing was also listed to make further case management orders and clarify the issues as required.

4. The Claimants each gave evidence supported by a written statement. On behalf of the Company the Tribunal heard from Mrs Anita Ing (one of the Company's shareholders). Mrs Ing produced a written statement.

5. There was an agreed bundle of documentation.

6. The preliminary hearing was listed for a day. In the event, evidence and summaries took half a day. Rather than using the remaining time allowance to consider and give judgment, the Tribunal reserved judgment to better consider, in particular, the evidence.

7. In deciding this case, it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole.

FACTS

8. The Company's business is described by Mrs Ing as that of a public house management company. It operates from Plymouth with what appears to be a wide geographical spread of some 40 public houses under management.

9. **The Management Agreement**

10. The Claimants entered into a Management Agreement with the Company on 16 July 2018 (42-45). The Management Agreement concerned the terms and conditions on which the Claimants were to manage a public house at Castle Green in Taunton, Somerset called "The Winchester". It should be referred to for its full terms. However, the Tribunal takes particular note of a number of its provisions and, in some cases, of the evidence relating to how those provisions operated in reality.

11. The Claimants were jointly referred to as the "licensee" (42).

12. The licensee was granted (43 – clauses 1 and 2):

> *"permission to operate and administer"* The Winchester *"and to carry on the business there of a licensed victualler and general caterer."*
>
> It conferred *"upon the licensee a license only to occupy and use the premises and shall not create any permanent tenancy or estate in the premises."*

13. It was provided that the Company could determine the Management Agreement at any time although it would give one month's notice where possible (43 – clause 4). The Claimants could determine the Management Agreement on 28 days' notice (43 – clause 5).

14. The Claimants were to keep the premises and contents clean and tidy but the Company was responsible for repairs and maintenance (43 – clauses 6)i and 7)iii. It seems that what happened in practice is that the owners of The Winchester Arms, Ei Group plc ("Enterprise Inns") paid for works and any repairs to the fabric of the building and some other specified items the Company paid for any other repairs. Mrs Ing's evidence is that the Company held the premises on a tenancy at will from Enterprise Inns (WS 4).

15. The Company was to pay for electricity, gas, drainage and water, and a telephone for business use only (if the Company deemed it necessary) (43 – clauses 7)i and ii).

16. The Claimants were to take out their own furniture, personal belongings and third parties liability insurance (43-44 – clause 8). However, they were told there was no need to do this, it was never done and no-one on the Company's side appears to have checked the position.

17. Clauses 9 -12 read (44):

> *"9) The licensee will be responsible for the public house in accordance with the license granted to him, by the relevant licensing authority. The Licensee will carry on the business on his own account and will be responsible for the employment, payment and conduct of any staff he may engage and for any other incidental business expenses he may incur in this respect.*
>
> *10)The licensee will be self employed and shall be responsible for accounting to the appropriate authorities for all Income Tax, and National Insurance payments both in respect of any assessable profits arising from his operation of the public house and in respect of any PAYE or national Insurance applied to the earnings of his employees.*

> *11) For the purpose of complying with clause 11"* [presumably a reference to clause 10] *"the licensee agrees to register with the Inland Revenue for Schedule D tax, the department of Health and Social Security for class 2 National Insurance and where applicable to apply for and operate a PAYE scheme in accordance with the Income Tax and Social Security Regulations in respect of any staff engaged by the licensee to assist in the operation of the Public House. The licensee agrees to provide the evidence of such registration on request from the Company".*

18. From the above it will be seen that the Management Agreement envisaged that *"the licensee"* would obtain a license for the premises. In fact, neither of the Claimants did so and there is no record of the Company pressing on the point. Enterprise Inns nominated Ms Catherine Robinson (an Area Manager for the Company) as the keeper of the certified copy of the Premises Licence under section 57 of the Licensing Act 2003. Ms Robinson (as the "Designated Premises Supervisor"), in turn, authorised the Claimants and any other bar staff to sell or supply alcohol on the premises. Pages 55-58 should be referred to in this context.

19. Again, from the above, it can be seen that the Management Agreement also allowed for the Claimants to hire staff on their own account. The economics of the business made this impossible in reality, but the Claimants accepted that such hiring was contractually possible, provided that Ms Robinson was prepared to authorise any such staff who were to sell or supply alcohol (see paragraph 18 above).

20. Clause 12 read (44):

> *"In payment for his service in the operation of the public house referred to in the first schedule the licensee will receive the proportion of the weekly net sales designated in the Second Schedule. The balance shall be remitted to the company."*

21. The proportion of the net sales so designated was 15% (after VAT had been taken out of account), although this was varied during the life of this Management Agreement. The net sales for this purpose did not include takings from gaming machines from which the Claimants received no return. Under clause 17 (45), the Claimants were to have all expenditure first authorised by one of the Company's directors.

22. The way purchases, sales and the Claimant's "net percentage" seems to have been this. The Claimants were subject to "ties" familiar

in the public house trade. They were required to obtain all their wet stock from Enterprise Inns and snack and cleaning products from "JTS", a cash and carry operation. Other expenditure was authorised by the Company as needed. In essence, the Company provided the working capital for the business. Any surplus of sales over expenses was then divided up as provided for in the Management Agreement. Implicit in this, although not stated, was that the Company carried any losses unless (as was specifically provided in the Second Schedule (45)) there were cash or stock shortages. However, the Claimants did not benefit from any surplus resulting from a stocktake. The "welcome letter" sent by the Company to the Claimants when they started at The Winchester Arms throws light on the practical arrangements involved (81).

23. Clause 18 provided (45):

> *"The Licensee will reside on the premises in the accommodation provided. The Licensee must register with the local council for Council Tax and Business Rates. The Licensee is responsible for paying The Council Tax and Business Rates."*

24. Under clause 1)(c) of the Second Schedule (45) an unspecified security deposit was to be paid by the Claimants to the Company. The Claimants were told that they were not required to pay any such deposit and none was paid.

25. **Matters outside the Management Agreement**

26. The Company oversaw the Claimants' management of The Winchester Arms through what appear to have been roughly monthly site visits. The Claimants also appear to have received periodic visits from Enterprise Inns' employees. These were presumably about wet stock as well as the fabric of the premises. The Company's site visits were recorded by the use of a site visit form. These are at 61, 63, 64, 68 and 73. The layout, common to all the forms, records actions from the previous meeting distinguishing between those completed and outstanding. It records what was discussed and actions arising. To complete the picture the form has a detailed check list for each of the "Bar", "Cellar" and "Outside". "Bar" included "Marketing" and "Entertainment".

27. The site visit form at 61 was completed by Mrs Robinson for the site visit on 29 August 2018. Mr Forrest's evidence is that, during this visit, he had to get authorisation to vary opening ours, which could not be varied without agreement. (See also the Company's Response in these proceedings – paragraph 10(1) – 30). During the same visit Ms

Robinson told the Claimant that their "net take" (the Tribunal's words) would be calculated gross of VAT whilst the Claimants were operating the kitchen. This seems to have amounted to a unilateral rise.

28. Ms Robinson carried out a further site visit on 19 September 2018. The site visit form is at 63. It records that the Claimants had stopped selling hand pulled beer because they were not selling enough of it and were selling bottled beer instead. Mr Forrest's evidence is that they were instructed to do this by Ms Robinson although they did not think it was a good idea. The form also shows a level of detailed supervision. It notes that the outside side door needed a cleaning and oil containers and rubbish needed moving.

29. There was a further site visit by Ms Robinson on 4 October 2018. The site visit form is at 64. From this it appears that the Claimants needed the Company's authorisation to run entertainment events. Required actions included giving the toilets a good clean and sweeping outside.

30. On 18 October 2018, the Claimants gave the Company 28 days' notice (66).

31. On 23 October 2018 Ms Robinson paid a further site visit, the form being at 68. The kitchen had closed so the Claimant's "net take" was adjusted back down to the former basis excluding VAT. Again, this appears to have been unilateral. There were instructions to clean the outside and deep clean the toilets.

32. The Claimants were asked by Enterprise Inns to stay on until 10 December 2008, which they did.

33. On 14 November 2018 Mr Gareth Hunter, who had taken over from Ms Robinson as the Company's Area Manager, made a site visit. The form is at 73 and includes detailed leaving tasks.

APPLICABLE LAW

34. Section 108(1) of the Employment Rights Act 1996 (the "ERA") provides as follows:

> *"**108 Qualifying period of employment***
>
> *(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."*

35. Section 230 of the ERA, so far as it is applicable, provides as follows:

> ***"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.*

36. Although a fluid and developing area of law, the basic principles in relation to the status of "employee" are well established. There must be a contract. If there is a contract, it cannot be a contract of employment unless the "irreducible minimum" exists. This comprises an obligation to do work personally, mutuality of obligation and control to a sufficient degree. In relation to the obligation to undertake work personally, where it is asserted that a document does not describe the true relationship between the parties, it is for the tribunal to decide what the true relationship is. The tribunal will look to the reality of the arrangements between the parties. So, for example, a written term purporting to permit the use of a substitute does not preclude the conclusion that a contract of employment exists when, in practice, the right was not exercised. In relation to control, it is not necessary for the work to be carried out under an employer's actual supervision and control where the working is remote but the employee must be ultimately subject to the employer's orders and directions. If the "irreducible minimum" exists it is necessary to stand back and look at the whole picture.

37. As far as the status of worker is concerned, the legal position is also fluid but the basics well established. If an individual is working under

a contract of employment, the individual is a worker as well as an employee. If the individual is not working under a contract of employment but under any other contract to do or perform work personally, the individual may be a worker. A genuine right of substitution will normally mean there is no obligation of personal service and, therefore, there can be no worker status. However, a right of substitution only with the consent of the other party to the contract is not inconsistent with personal performance.

38. The Tribunal was referred to Hall (Inspector of Taxes) v Lorimer [1994] 1 WLR 209, Staffordshire Sentinel Newspapers Ltd v Mr E Potter UKEAT/0022/04/DM and Pimlico Plumbers Ltd and another v Smith [2018] ICR 1511.

CONCLUSIONS

39. It is sometimes the case that a party will seek to categorise a relationship as one of self employment rather than employment to secure the fiscal and other benefits this can bring. In some cases, both parties pursue that objective, at least at the outset. In this particular case it is more likely that the Company sought that result and the Claimants simply accepted it. In any event, in such cases the provisions of the contract entered into can look very strained when it comes to what happens in practice. In the Tribunal's view this is what happened here. There is some evidence pointing towards the arrangement being a sham. For example, it was envisaged that one of the Claimants would become the licensee of the premises (see paragraph 17 above). The Company does not seem to have taken any action when that did not happen. There were provisions requiring the Claimants to take out insurance and pay a security deposit, which the Company clearly had no intention of enforcing (see paragraphs 16 and 24 above).

40. **Were the Claimants employees of the Company?**

41. Applying the tests, the starting point is that there was a contract. It was the Management Agreement dated 18 July 2018.

42. Did the Management Agreement, in the context of what happened in practice, reflect the irreducible minimum?

43. A main plank of the argument put on behalf of the Company is that there was no requirement for the Claimants to work personally for the Company. In particular, there was a right of substitution. It is clear that the Management Agreement made provision for the Claimants to employ staff (see paragraph 17 above). That, however, is not an express right of substitution. Further, what happened on the ground

and other provisions of the Management Agreement point in a different direction. For the detail reference should be made to paragraphs 18 and 19 above. However, in short, the Claimants could not employ staff to serve drinks, far less a substitute, without Mrs Robinson's permission as Designated Premises Supervisor. Any suggestion that a substitute could have performed the Claimant's functions without that permission was illusory in practice. That is reinforced by the fact that any hiring was economically impossible given the performance of The Winchester Arms. The Tribunal also notes that the Claimants were required to reside at the premises, which seems inconsistent with meaningful substitution (see paragraph 23 above). There was no express right of substitution, permission was required and there was no substitution in practice. The practical requirement was for the Claimants to do the work personally.

44. Mutuality of obligation in this context can be seen as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform it. Here the Management Agreement specified the work (running The Winchester Arms) and the Claimants were required to do so, although they could give 28 days' notice (see paragraph 13 above). Putting it another way, the Claimants were not free to leave at any time and do alternative work.

45. Turning to the degree of control, there are pointers in both directions. This was an arrangement that, in effect, involved remote working and it must be seen in that context. Whilst it is true that the Claimants had some influence over the business in the sense that, if they worked hard at it the turnover from which their "net take" came might go up, there was a lot of detailed supervision (see paragraphs 26-29, 31 and 33 above).

46. In conclusion, in the Tribunal's view the "irreducible minimum" is made out in the contractual arrangements between the parties when viewed in the context of what happened on the ground.

47. That being the case, the tribunal must stand back and look at the picture as a whole. The Tribunal's view of this is that it is a "sanity check". There are factors that point in both directions.

48. Pointers towards there being no employment relationship include:

    - The Claimants are described as a "licensee" (paragraph 11 above).

    - The Claimants were given "permission to operate" The Winchester Arms (see paragraph 12 above).

- There were detailed provisions effectively stating that the relationship was one of self employment and that it was to be taxed on that basis (see paragraphs 17-19 above).

- Council tax and business rates were for the Claimants' account (see paragraph 23 above).

49. Pointers towards there being an employment relationship include:

    - The Company (and Enterprise Inns) were responsible for repairs (see paragraph 14 above).

    - The Company paid for services (see paragraph 15 above).

50. Some pointers go both ways. It is argued on behalf of the Company that it was the customers who paid the Claimants, not the Company. That, however, was not the case. The net turnover belonged to the Company save that the Claimants were allowed their financial reward in the form of a share of it (see paragraphs 20-22 and 31). That was neither a profit share nor a wage. Rather, it was something akin to sales commission that could point either way in considering whether or not there was an employment relationship. Telling, however, is that it was twice unilaterally varied by the Company. In addition, almost all expenditure needed the Company's approval and/or was through tied sources. The fact of the matter is the Claimants received their financial reward from money that belonged to the Company from which they were permitted to make a deduction.

51. Overall the pointers are not of great assistance in looking at the picture as a whole. That is probably because the Company put some effort into making them point to a self employed relationship. However, it is the Tribunal's view that this was a construct on the part of the Company. The arrangement between the parties was dressed up to look like the Claimants were self employed when, on the tests applied and in context, they were in reality employees.

52. **Were the Claimants workers?**

53. As the Claimants were employees of the Company, it follows they were also workers.

54. **What was the Claimants period of service?**

55. The Claimants started work for the Company on 18 July 2018 and their employment ended on 10 December 2018. The Claimants do not have the two years' service required for them to bring a complaint

under section 94 ERA unless they fall into one of the exceptions specified in sub sections (2)-(5) of that section.

56. The Tribunal has made Orders concerning the further disposal of this case.

Employment Judge Matthews

Date: 5 December 2019

Judgment sent to parties: 10 December 2019

FOR THE TRIBUNAL OFFICE