Appeal No. UKEAT/0003/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 14 September 2018
At 10:30am

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

S D (ABERDEEN) LIMITED — APPELLANT

ROBERT WRIGHT and 18 OTHERS — RESPONDENTS

Transcript of Proceedings

RESERVED
JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	No appearance Written submission only by Mr Duncan Kerr for S D (Aberdeen) Ltd 441 Union Street ABERDEEN AB11 6DA
For the Respondents	Mr Stephen Miller Solicitor Advocate Clyde & Co 144 West George Street GLASGOW G2 2HG

SUMMARY

JURISDICTIONAL POINTS – CONTINUITY OF EMPLOYMENT

The Employment Tribunal had been faced with a dispute about whether the claimant was employed by one or more of a network of companies/business entities or was a self-employed contractor. The evidence illustrated that he had worked for more than one entity. Having decided that he had been an employee throughout the material period, the Tribunal concluded that the two relevant companies were associated employers for the purpose of sections 218(6) and 231 of the Employment Rights Act 1996. The respondents appealed.

Held :

(i) The respondents had been represented by someone who was a principal actor in both companies and who could have shed light on the legal structure and had failed to do so despite the argument having been put before the Tribunal by the claimant. *Schwarzenbach v Jones UKEAT/0100/15/DM* considered.

(ii) In those circumstances there had been sufficient material before the Tribunal about *de facto* control of both companies on which the conclusion about legal control had properly been reached.

(iii) In any event, the respondents had failed to address the Tribunal's alternative conclusion that one company had employed the claimant throughout the relevant period, which would have given him the necessary continuity of employment for the purpose of bringing the claim.

Appeal dismissed.

THE HONOURABLE LADY WISE

1. The claimant, Robert Wright, worked for an entity or entities trading as "AMPM", comprising "AMPM Leasing" and "AMPM Service Department" from 20 May 2014 until 23 August 2016 when his working relationship terminated. He brought complaints to the Employment Tribunal in Aberdeen, including one of unfair dismissal, against nineteen respondents in total, as he was unclear of the precise name and designation of the legal entity or entities for whom he had worked. All nineteen entities entered appearance and all were represented by Mr Duncan Kerr, described as a solicitor, but also a key figure in the claimant's working life. All respondents resisted the claim and contended that the claimant was not an employee of any of them and that he was a self-employed contractor. A preliminary hearing was fixed to determine (1) whether the claimant was an employee and if so (2) the identity of his employer.

2. In a detailed judgment dated 18 August 2017 the Employment Tribunal (Employment Judge N M Hosie sitting alone) determined that the claimant was an employee of the tenth respondent, Chiahealth Property Limited ("Chiahealth") between 20 May 2014 and 3 September 2015 and of S D Aberdeen Limited ("SD") the nineteenth respondent and an associated employer of Chiahealth from 3 September 2015 until 23 August 2016. Accordingly the tribunal found it had jurisdiction to hear the claim insofar as directed at those entities.

3. S D (Aberdeen) Limited has appealed the judgment, but on a restricted basis, namely against the finding that it was an "associated employer" of Chiahealth under section 231 of the Employment Rights Act 1996. The impact of that finding is that the claimant's length of service was preserved under section 218(6) of the 1996 Act. I note at the outset that the tribunal also

recorded that, even if it was in error about Chiahealth being the claimant's employer from May 2014, the decision would have been that he was employed from that time by SDL. No appeal was taken the finding that the claimant was an employee from 20 May 2014, a matter to which I will return. The claimant was represented by Ms A Hunter, Solicitor before the tribunal and on appeal by Mr S Miller, Solicitor Advocate. The respondent was represented before the tribunal by the said Mr Duncan Kerr. He continued to represent SDL on appeal, although intimated to the EAT that he did not intend to appear at the appeal hearing but wished to rely on a written submission. I will refer to the parties to this appeal as claimant and Chialhealth/tenth respondent, SD /nineteenth respondent as they were in the tribunal below.

The Tribunal's judgment

4. The judgment runs to some thirty seven pages, much of which relate to the central issue of the response given by the tenth and nineteenth respondents, that the claimant was self-employed either throughout the relevant period or at least prior to September 2015. Insofar as relevant to this appeal, the tribunal made the following findings in fact and on credibility:

> **"10. I also wish to record that I make these findings on the basis of my view that the claimant gave his evidence in a measured and consistent manner and presented, generally, as credible and reliable. However, in contrast, and as the claimant's solicitor submitted, Mr Kerr's oral evidence contradicted, to some extent, the terms of the ET3 response forms and indeed his own written submissions. When I considered this along with the lack of clarity created by the myriad of Companies and individuals involved in some way or another in the "AMPM business", their exact functions and responsibilities, I was driven to the view that his evidence had to be considered with caution and in some regards, was plainly not reliable**.
>
> **11. SD trades as "AM-PM Leasing" (see footnote to P31, for example).**
>
> **12. CPL trades as "AM-PM Serviced Apartments".**
>
> **13. Both businesses operate from the same premises at 441 Union Street, Aberdeen.**

14. **The claimant was introduced to Duncan Kerr, a Director of both Companies, by, Kirk Harrison a "business associate" who assisted Mr Kerr, on a consultancy basis, running SD and CPL. Mr Harrison's Affidavit was one of the respondents' productions (R2).**

15. **The claimant started to work for Mr Kerr in March 2014. He assisted him with the CPL serviced apartments. He worked on an ad hoc, informal, irregular basis; work was only offered when it was available; he did not have set hours; he was only paid for the hours that he worked; details of the payments which were made direct to the claimant's bank account were produced (P68); there were no deductions for income tax or national insurance; the claimant was not provided with a written contract of employment in respect of this work or with payslips in respect of the payments which were made to him.**

17. **As I understand the respondents' position, that ad hoc, informal arrangement subsisted and continued until September 2015 when the claimant moved to work with Mr Harrison and SD on the leasing side of the business. The claimant accepted that he had moved in this manner but he was unclear exactly when. He thought it was in September 2014. I was satisfied, on the evidence, that the claimant did move from working for CPL to working for SD, but in September 2015, as the respondents maintained, not 2014. My reasons for this are set out below.**

24. **The claimant remained in that role until he was dismissed on 23 August2016 at a meeting with Kirk Harrison and Duncan Kerr.**

25. **The claimant was never issued with a contract of employment and never received payslips. There was no evidence that he requested these or a P60 or that he made any enquiries about national insurance or PAYE deductions. However, the claimant continued to be paid by CML. There was a financial adjustment between SD and CML to take account of this (P37, page 183).**

27. **The claimant received a Christmas bonus of £250 on 24 December 2015 (P68, page 274).**

28. **Mr Kerr accepted that: *"with hindsight this should not have occurred and the complainer should have been remunerated by SD (Aberdeen) from September 2015. The reason was that SD paid the rent for the office and various other expenses that were really shared expenses between the two companies. The apartment company was therefore due the leasing company, usually in excess of £2,000 per month as its contribution towards shared overheads and an off-set was done each month with the sum paid to the complainer included in this off-set."* (P37, for example).**

31. **The claimant did not have a record of the days on which he was off work due to ill-health. However, when he contacted Mr Kerr on 12 April, 25 and 27 July 2016 to inform him that he was unwell (P.32, pages 172/173) he still received his full pay (P.68, pages 274/275).**

32. Further, on 29 March 2016 the claimant contacted Duncan Kerr and Kirk Harrison and requested to use a *'holiday day'* as he was unwell (P47) and he was paid in full for that day (P.68, pages 274/275)".

5. At paragraphs 67 – 70 the tribunal recorded the claimant's solicitor's submissions in relation to the issue of associated employers in the following way:

"67. The claimant's solicitor went on in her submission to say this:

"Mr Harrison and Mr Kerr carry out the day-to-day running of both AMPM Leasing (SD) Aberdeen Ltd) and AMPM Apartments (currently Chiahealth Property Limited). It cannot be clear as to when they were wearing the hat of "Chiahealth Property Ltd" or "SD (Aberdeen) Ltd". For both were involved with the entirety of the 'AMPM business' to some extent, the reality was that Mr Kerr dealt with the serviced apartments and Mr Harrison dealt with the leasing. The majority of the factors outlined above point to Mr Harrison. Looking at the picture broadly, it is submitted therefore that the claimant's employer was SD (Aberdeen) Ltd."

68. In the alternative, it was submitted that in May 2014 the claimant was initially employed by CPL and having regard to <u>Bearman</u> the position changed in September 2014 when the claimant moved to the "Leasing Business", or failing that, when he began the role as Custom Services Manager in 2015.

69. It was submitted that as CPL and SD are 'associated employers' under s.231 of the Employment Rights Act 1996, the claimant's length of service was preserved under s.218(6).

70. Finally, the claimant's solicitor said this by way of conclusion:
"It is submitted that the Respondents have deliberately chosen to set up their business arrangement in an opaque manner. The Respondents should not be allowed to take advantage of the obtuse arrangements, and the lack of evidence produced by them to clarify those arrangements, in order to escape liability.
The Claimant submits that he was an employee.
In light of all of the circumstances of the case, the Claimant's primary position is that he was employed by SD. Failing this, the Claimant submits that he was initially an employee of CPL, but by the time of his dismissal he had become an employee of SD, an associated employer …."

6. Mr Kerr was permitted to lodge a detailed written submission after the conclusion of the preliminary hearing. That written submission did not respond to the claimant's submission on associated employers. The claimant's solicitor was then given an opportunity to respond to those submissions. That response included the following as recorded by the Tribunal :

"103. The claimant's solicitor also made the following submissions in her reply:

"Contradictions to the ET3s"

The ET3 submitted on behalf of CPL (P4) states at page 48, para. 3:
"Robert Wright was a self-employed contractor, providing services to CPL and SD, but was paid by, and had his service dispensed by CPL and quite clearly they are the only respondent he could possibly think employed his services …
However, in the ET3 submitted by SD (P10) there are the following averments:
"This company has never employed Robert Wright. Robert Wright provided services as a self-employed contractor and payments for this were made to CPL.
CPL are the correct and only respondent here. See their reply and submissions."

104. She further submitted that in a letter to the Employment Tribunal which was copied to the claimant's solicitor on 28 March 2017 (P18, Duncan Kerr, as agent for SD, stated that:

"We have never employed Robert Wright. He was a self-employed contractor who provided services to us via CPL.

We should not even be a respondent in this case."

105. It was submitted that the respondents had changed their position in that they now alleged that the claimant worked solely for SD. This, it was submitted demonstrated that the respondent's evidence was not credible.

7. In the "Discussion and Decision" section of the judgment, the question of employee status is addressed in some detail and, as already indicated, that is no longer challenged. Towards the end of that section the tribunal made the following conclusions about the claimant's personal service and mutuality of obligation:

"**129. I was satisfied that for the claimant's part, from 20 May 2014 he obliged himself to perform the work given to him whilst on the part of CPL and then SD in turn, impliedly, there was an obligation to give him the work to do, and, expressly, pay him for doing so. The claimant worked exclusively for CPL and SD.**

132. Accordingly, I conclude that for the period from May 2014 to 23 August 2016, when the claimant was dismissed this was not a situation where CPL and SD in turn could simply use the claimant as and when they required him. I therefore regard the contract, unwritten as it was, to involve the required mutuality of obligations."

8. Turning to the issue of control, the tribunal concluded as follows:

> **"134. I was satisfied, in the present case, that in the period from May 2014 to 23 August 2016 the claimant worked under the directions and instructions, first of all primarily of Mr Kerr when he worked for CPL in the period from 20 May 2014 to 3 September 2015 and thereafter primarily on the instructions of Mr Harrison when he worked for SD in the period from 3 September 2015 until his dismissal on 23 Augusts 2016. However, the working relationship between Mr Kerr and Mr Harrison and the relationship between the two Companies was apparently so close that from time to time he took instructions from either of them, whether he was working for CPL or SD. For example, even after he started to work for SD in September 2015, ostensibly as directed primarily by Mr Harrison, he continued to have significant contact with Mr Kerr by way of text messages and clearly, he felt obliged to intimate that he was going to be late for work due to the traffic or due to ill health (P32)."**

The financial arrangements were dealt with at paragraph 137 – 140 and include acceptance of the evidence that regular weekly payments were made to the claimant by CPL throughout. The tribunal found (at paragraph 149) that the issues for determination were not easy to resolve given the absence of any contractual documentation whatsoever and the confusing business relationship between Chiahealth and SDL which operated from the same premises and carried out a balancing exercise between them in relation to expenses. The Employment Judge's conclusion is given at paragraph 153.

9. The effect of the tribunal's conclusions meant that it required to consider the issue of associated employers which it did in a short separate section which is in the following terms:

> "1**54. I was satisfied that CPL and SD were associated employers in terms of s.231 of the 1996 Act. I did not understand this to be disputed by Mr Kerr. He had control of both Companies, after all. That was why, for example, CPL was able to make regular payments to the claimant, not only in respect of the period when he worked for them but also in respect for the period when he worked for SD and the claimant continued to take instructions from Mr Kerr even after he became an employee of SD.**

155. Accordingly, in terms of s.218(6) of the 1996 the claimant had continuity of service from May 2014 when he moved from CPL to SD in September 2015. This means, of course, that the claimant had a period of two years' continuous employment which is required to enable him to bring an unfair dismissal complaint.

156. In arriving at this view, I was mindful of the documentation from Companies House that CPL was a dormant Company at the relevant time (P72). However, I heard no explanation as to why that was so; CPL paid the claimant's weekly wages throughout; Mr Kerr's evidence was that this was a *"a mistake"* as, according to him, CPL was operating at that time and had plenty of work and its Accounts were now up to date. However, even if I am in error in finding that CPL was the claimant's employer at that time, I would have found favour with the submissions by the claimant's solicitor that the claimant was employed by SD from May 2014. It could not have been any of the other respondents. That, of course, would still mean that the claimant has the requisite qualifying service to bring his unfair dismissal complaint and to pursue his other complaints as an employee.

Procedure and submissions at the appeal hearing

10. Mr Kerr, for the respondent, chose not to appear and present the appeal at the hearing, but to rely on a written submission. He did not lodge any list of authorities nor does the core bundle contain any of the productions available to the tribunal, nor some of the standard required documents such as the original ET1. It was not brought to my attention in advance that Mr Kerr was not going to appear, nor had that apparently been intimated to Mr Miller for the claimant. However, I advised Mr Miller that it was my intention to proceed with the appeal hearing on the basis of Mr Kerr's written submission and his own skeleton argument and oral submissions as that appears to have been the course suggested by Mr Kerr albeit not intimated to his opponent. I indicated that I would give due consideration to the written submissions lodged by Mr Kerr. That proposed course was acceptable to the respondent's side.

11. Mr Miller then made submissions in support of his skeleton argument and to some extent in response to Mr Kerr's written submission insofar as it was directed to the restricted issue under appeal. He referred to the ET1 lodged by the claimant in the tribunal and particularly

paragraph 1 of the Paper Apart to that form which states in terms that the claimant's position was that the various companies and individuals that he cited as respondents were, so far as he was aware, interlinked. Mr Miller emphasised that the only issue under appeal, following a request from the EAT to the Employment Judge to provide details of what he had relied upon for his conclusion Mr Kerr had control of both companies was the issue of whether that matter had been admitted expressly or impliedly and also what inferences could be drawn from the evidence.

12. Mr Miller relied on a clear absence of challenge to the claimant's express averment about the companies being linked in a legal sense and also the failure to answer the submission made by the claimant's representative at the hearing even where an opportunity for detailed written submissions was given to the respondent thereafter, albeit with some hesitation on the part of the Employment Judge. This was a case in which there was a general lack of transparency about the way in which the two companies involved organised their business. That lack of transparency despite the opportunity to give evidence and submissions about the structure of the companies was a material factor resulting in the tribunal being entitled to reach the conclusion that it did.

13. It was important that the appellant could have sought to adduce new evidence at any stage, either before the tribunal or on appeal. He would have required to meet the test for introducing fresh evidence had he done so but as he had made no application there was simply nothing to consider. Accordingly, all that could be relied on in consideration of the appeal was the primary evidence of the actings of the parties that was before the tribunal, the absence of contradictory evidence led by the respondents and an under contested assertion in the claimant's submissions about the employers being associated.

14. It was noted that, even if Mr Kerr could overcome all of the difficulties in the way in which the appeal had been presented and could somehow persuade this tribunal that the Employment Judge had erred as a matter of law in reaching the conclusion that he did on associated employers, it would make no practical difference to the outcome. As was identified by the sift Judge (Laing J) at paragraph 2 of the sift decision, the grounds of appeal do not include any challenge to the tribunal Judge's alternative finding that, if the employers were not associated, he would have found that the claimant had sufficient continuous service with SD as set out in paragraph 156 of the judgment. The respondent had been put on notice by the sift Judge that there was an apparent deficiency with the appeal and Mr Kerr had never sought to resolve that. Had he done so, and if there was perceived to be any issue with the reasoning of the Employment Judge in relation to that alternative conclusion, this tribunal could have resolved any perceived difficulty by remitting to the Judge for further reasons on that conclusion. In all the circumstances Mr Miller submitted that the appeal should be dismissed and the matter remitted back to the tribunal for the full hearing that the Employment Judge had anticipated would take place.

15. Mr Kerr lodged two sets of written submissions in connection with this appeal although no skeleton argument for the hearing itself. In essence, his position is to the effect that the two companies SDL and Chiahealth were separate. His written submissions purport to offer certain information about those companies but that information was not led in evidence before the tribunal. On the legal issue that is the subject of this appeal, his written submission is to the effect that the Employment Tribunal had erred in concluding that Chiahealth and SD were associated employers. He contended that his submissions to the tribunal had made clear that the two companies were distinct operations and that the Judge's conclusion that he controlled both of them was incorrect. He asserted that the Tribunal was wrong to record that he was a Director of both companies.

16. The written submission emphasised the role of Mr Kirk Harrison in running the business of SDL. These include findings that the claimant was primarily directed by Mr Harrison when he started to do leasing work for SDL and that he was under the direction and instructions primarily with Mr Kerr when he worked for Chiahealth and thereafter worked primarily on the instructions of Mr Harrison. Mr Kerr contends that the Employment's Judge's conclusion that the companies were associated has no basis in fact. He makes a detailed submission about the date on which the claimant started working (in a physical sense) for the leasing business, but that is not an issue under appeal and there is no cross appeal.

18. Mr Kerr also referred in his written submission to section 231 of the Employment Rights Act 1996 and what he described as a "strict definition" of what associated companies are. He cited no case authority at all in support of his argument. His legal submission, as I understand it, is to the effect that control must be interpreted as voting control and that any *de facto* influence however strong, is not sufficient.

Discussion

18. The relevant provisions of the Employment Rights Act 1996 ("ERA 1996") in relation to the issue of continuous employment by associated employers include sections 218 and 231.

Section 218 makes a provision for a change in the identity of a person's employer. It is in the following terms:

> *"(6) if an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer –*

(a) the employee's period of employment at that time counts as a period of employment with the second employer, and

(b) the change of employer does not break the continuity of the period of employment."

The expression "associated employer" for the purpose of section 218(6) is then defined by section 231 which provides:

"For the purposes of this Act any two employers shall be treated as associated if –

(a) One is a company of which the other (directly or indirectly) has control, or –
(b) Both are companies of which a third person (directly or indirectly) have control: and
"associated employer" shall be construed accordingly."

19. The authorities relating to these provisions and in particular the interpretation of associated employer in section 231 were all summarised helpfully by HHJ Eady QC in **Mr U and Mrs F Schwarzenbach trading as Thames-Side Court Estate v Mr D Jones UKEAT/0100/15/BM** in 2015. Paragraphs 14 – 26 of that Judgment explore the practical difficulties of adopting an overly strict approach to the issue of control in this context. HHJ Eady QC cites the following passage from **Zarb & Samuels v British & Brazilian Produce Co Limited [1978] IRLR 78** where Phillips J observed **;-**

" *... it seems to us that the expression 'has control' ....is dealing essentially with practical rather than theoretical matters, and that the words are satisfied, if it is shown that in fact one person has control, or that a group of persons acting together, if that be the case, have control ; ...It will be necessary for the ...Tribunal to look at all the circumstances which the parties may be able to put before them as to the way in which the control of the two companies has in practice been exercised...."*

As it happens no issue of group control arises in the present case. The single issue in the present appeal is whether there was sufficient in the evidence or by implied admission for the tribunal to draw the inference that Mr Duncan Kerr had legal control of both companies, Chiahealth and SD. The case of **Schwarzenbach** is a good example of a tribunal being able to draw such an inference where respondents had chosen not to shed light on the issue of ultimate legal control. Accordingly, while voting control rather than mere *de facto* control is required for the purpose of section 231, it seems to me to be clear that evidence of *de facto* control can properly be used to draw an inference of voting control if the respondent has an opportunity to clarify the legal position and fails to do so.

20. It is noteworthy that this appeal has never been characterised by Mr Kerr as being restricted to an argument about associated companies, but it is clear from the decision of the sift Judge and following the preliminary hearing before the EAT that this was the only issue for discussion at a full hearing. The appeal passed the sift on the basis that the terms of the Judgment were at least arguably insufficient to clarify the basis for the inference on legal control drawn by the Judge. On 6 August 2018 the Employment Judge then confirmed that the issue of associated employers had first been raised in submission and that the respondent's representative Mr Kerr had been given an opportunity to lodge written submissions in response and had not challenged the assertion made. The Judge also narrates briefly his reasons for reaching the conclusion that he did and the particular aspect of the evidence (payments regularly by Chiahealth to the claimant even although the claimant was working for SD) on which he had relied.

21. I have narrated all of the evidence, submissions and reasoning in the judgment that could have a bearing on this issue and have taken into account also the reference to the Judge's note mentioned above. In my view, the correct starting point for the analysis, as Mr Miller identified, is the claimant's ET1. Consideration requires to be given as to what case he presented on the issue of the relationship between the various respondents that he had cited. The claimant raised the difficulty of knowing who his employer was in law in the ET1 and identified in particular the following as a preliminary issue:

"The claimant does not know which entity is his employer. The claimant has not been issued with any written documentation which specifies who his employer is, a contract of employment or any payslips. The directors of the respondents are directors of numerous companies that appear to the claimant to be interlinked. The claimant has complied with the requirement under Employment Tribunals Act 1996 s.18A. The respondents (or one of them) (hereinafter referred to "the respondent") are called upon to specify the employing entity which was a party to the claimant's employment contract."

Thus the claimant offered to prove that, while he had no clear knowledge of which one had employed him, the respondents were, in a legal sense, interlinked. The respondent produced no documentation that would have permitted the tribunal to make clear findings as to ownership. The claimant produced such documentation as he had or could obtain. It was never in dispute that Mr Kerr controlled Chiahealth. What was left to consider was the legal control of SD. It is important to reiterate that the central issue before the tribunal was whether the claimant was an employee or a self-employed contractor. While the legal identity of the employer was a secondary issue, the focus of Mr Kerr's evidence and submissions to the tribunal was that the claimant was a self-employed contractor paid by Chiahealth.

22. I turn to consider the relevant points made on behalf of the respondent in Mr Kerr's submissions in the appeal insofar as directed at the issue of control. To the extent that Mr Kerr sought to introduce new material without making any application for fresh evidence, far less

justifying that by reference to the established test in **Ladd v Marshall 1954 3 ALL ER 745**, I have not had regard to that aspect of his submission. There are in essence two identifiable but related aspects to the restricted appeal. The first issue is whether the Employment Judge was entitled to conclude that Mr Kerr did not dispute the claimant's submission that Chiahealth and SD were associated employers, in other words whether his silence amounted to an implied admission to that effect. The second issue is whether, if any implied admission is insufficient on its own to justify the conclusion reached, whether there was sufficient in the evidence to draw the necessary inference of legal control.

23. I have reached the conclusion that the Employment Tribunal did not fall into any error of law in this case. An appropriate submission was made in relation to section 231 of the Employment Rights Act 1996 which the tribunal was bound to consider. That submission was made before either party knew whether or not the tribunal would determine that the claimant had been employed throughout or had been a self-employed contractor at least for some of the material period. There had a considerable amount of evidence about when the claimant's working pattern had changed so that he was working mostly under the direction of Mr Harrison and SD on the leasing side of the business rather than reporting only to Mr Kerr on the Service Department side. It was apparent from that issue in the evidence that consideration would require to be given to the question of whether, if he was employed, the claimant had worked for more than one of the cited respondents. The Employment Judge required to navigate through what he described as a confusing picture of the relationship between the respondents involved and it is clear that he was not assisted in that by Mr Kerr. I have concluded that there was, having regard to all of the material before the tribunal, sufficient evidence of *de facto* control to permit the conclusion reached on legal control of both companies. That material included at least the following:

- The claimant was dismissed at a meeting with both Mr Kirk Harrison and Duncan Kerr (para. 24).

- The claimant continued to be paid throughout the period in May 2014 – August 2016 by Chiahealth, notwithstanding that his day to day work had changed such that he carried out tasks for SD from September 2015.

- The two companies Chiahealth and SD operated from the same premises at 441 Union Street, Aberdeen.

- Mr Duncan Kerr acted for both SD and Chiahealth in the tribunal and appeared to be able to speak to the financial transactions for both companies as a principal actor (e.g. paras 28 and 30).

- The tribunal found that Kirk Harrison "assisted Mr Kerr on a consultancy basis" (para. 14). There was accordingly no evidence that Kirk Harrison had any legal control of either company.

- When the claimant was off work due to ill-health in April and July 2016 (when working for SD) he reported that to Mr Kerr.

- Chiahealth was listed as a dormant company with Companies House until 2015 and dormant accounts signed by Duncan Kerr confirmed that.

- Mr Kerr referred in submissions to "the AMPM Business" which included both Chiahealth (AMPM Apartments) and SD ("AMPM Leasing") and also to "the reorganisation of the staff " (of AMPM) in September 2014 or September 2015.

- Mr Duncan Kerr also submitted to the tribunal (paragraph 96) that it was only "with hindsight" that it was accepted that the claimant should not have been remunerated by Chiahealth throughout.

- In their ET3 responses both Chiahealth and SD separately identified Chiahealth as the only possible employer during the whole period. In particular, Duncan Kerr, although apparently as agent, stated for SD that "we" have never employed Robert Wright and that "we" should not even be a respondent in this case. Before the tribunal it was suggested by Mr Kerr that the claimant had worked solely for SD at least from September 2015.

- The tribunal found that there was an extremely close working relationship between not just Mr Kerr and Mr Harrison as individuals but also between the two companies Chiahealth and SD (para. 134).

- The tribunal concluded that the reason Chiahealth was able to make regular payments to the claimant even when the claimant was working for SD was that Mr Kerr had control of both companies.

- Save in respect of the date of the move to the SD side of the business, Mr Kerr was found not to be a credible or reliable or reliable witness.

24. The respondent in this case chose not to co-operate without the identification of the issue of legal control of and relationship between the two companies, that legal relationship having been put in issue by the claimant at the outset. This was, frankly, astonishing, given Mr Kerr's representation of all of them. As an actor in the business and as someone described as a solicitor (whether on the practising role or not) he must be taken to have considered whether any conflict of interest arose as between Chiahealth and SDL and concluded that there was not. It is clear

from the Judgment that the respondents all "spoke with one voice", namely that of Mr Kerr. In my view there was sufficient in the evidence, submissions and other material before the tribunal to raise an inference of two companies in question both being under the legal control of a third party individual, namely Duncan Kerr. As the representative of both those companies, Mr Kerr would have been able to contest that any such inference should be drawn. He did not do so. By the time he sent lengthy written submissions to the tribunal after the hearing he was aware that a precise legal submission had been made about Chiahealth and SD being associated companies for the purposes of section 231 of the 1996 Act and he had chosen not to respond to it. He offered no evidence to the tribunal that contradicted the inference that he had legal control of both companies. Mr Harrison did not give evidence but there are findings as I have indicated that support a conclusion that his direction of the claimant's work was a managerial one and not in any sense as a legal owner of the business. Finding in fact 14 is unassailable in this respect.

25. In all the circumstances, particularly given Mr Kerr's dual role as both an actor in the businesses of Chiahealth and SD and their representative, I am satisfied that the Employment Tribunal did not err in relying on an implied admission by Mr Kerr that those companies were associated employers. Even if Mr Kerr's actings at the time could not be characterised formally as an admission, there was in any event sufficient material, including that that I have listed, from which an inference of legal control of both companies by Duncan Kerr could be drawn.

26. I return to an issue mentioned at the outset, namely that the grounds of appeal do not take issue with the Employment Judge's alternative finding that, had he not concluded that the two companies were associated employers, he would have found on balance that the claimant had been employed by SDL throughout. As Mr Miller pointed out, despite the clear steer from the sift Judge that this was an issue, no amendment to the grounds of appeal was ever proposed. Accordingly, I can entertain no argument in relation to any fall-back position that SDL could

not, in the alternative, have been the claimant's employer. The lack of transparency about the interaction between the two companies was compounded by unchallenged evidence that Chiahealth had been a dormant company until about 2015. That information did not sit easily with Chiahealth having remunerated the claimant throughout the period of his employment. Standing the very close working relationship between the companies identified by the Employment Judge and his reference (at paragraph 156) to there being no possibility of any of the other respondents being the employer, it is not immediately apparent on what basis an argument might have been run that the claimant was an employee of Chiahealth throughout. In any event, the matter not having been pursued in this appeal it is not one that I require to determine.

Disposal and expenses

27. For all of the reasons given above, I consider that no error has been identified in the tribunal's determination of the issue of associated employers in this case and I will dismiss the appeal. At the appeal hearing, Mr Miller made an application for expenses contingent upon dismissal being the outcome. He did not suggest that anything turned on the lack of appearance by Mr Kerr at the appeal hearing because that had been intimated to this tribunal albeit not Mr Miller himself. The basis on which he would, in the event of success, seek expenses was the lack of focus on the merits of the restricted appeal, particularly from the date on which the Employment Judge clarified the information on which he had reached that conclusion. There was according to Mr Miller, no excuse for Mr Kerr not focusing the issue on the application of the law to the fact in relation to the single issue under appeal. On 13 August 2018 Mr Miller had written direct to Mr Kerr intimating that, in the event that the appeal was dismissed he would

present an application for expenses on the basis of unreasonable conduct in persisting with the appeal in the light of the Employment Judge's comments in his note of 6 August.

28. Mr Miller relied on rule 34 of the Employment Appeal Tribunal Rules 1993 (as amended) and the general power to make an Expenses Order. He clarified that he was relying only on unreasonable conduct in conducting the proceedings in terms of rule 34A. However, he considered that a wasted costs order could be made in terms of rule 34C against the respondent's representative Mr Kerr. There was significant concern about the "web of companies" involved such that it may not be sufficient to make an order against SD. Mr Kerr was the respondent's representative and his reasonableness had to be tested by the standards of the reasonable advisor, regardless of whether he was currently in practice as a solicitor. He ought to have known from the decisions following sift and after the preliminary hearing in April 2018 that a scope of appeal was restricted and could only relate to alleged error of law. Mr Miller sought expenses from either 6 August 2018 or perhaps some period such as seven days thereafter by which time intimation of intention to seek expenses had been intimated. There had been considerable expense in the appeal proceeding for the claimant and the case still requires to go to a full hearing in the tribunal. I am unable to consider this application for expenses without giving Mr Kerr an opportunity to respond to it and give reasons why any such Expenses Order should not be made. Accordingly, in pronouncing the order dismissing this appeal, I will direct the Registrar or her representative to send a formal notice in terms of rule 34(5) to Mr Kerr that the expenses application, including a wasted costs order, has been made and to give him an opportunity to respond to that.