# Does the fact that an employee works shifts at two franchises which trade under the same name mean that they are employed by both? No, says the EAT in Aftala Norfolk Ltd T/A Papa John's Pizza et al v Read UKEAT/0233/18/JOJ

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## Facts

1. The two Respondents are pizza restaurant franchises, trading as Papa John's, in 2 locations in Norwich, one on Plumstead Road (the 1st Respondent) and one on Colman Road (the 2nd Respondent). They are both limited companies and separate legal entities. The Claimant for the most part worked her shifts at the 1st Respondent, and on occasion she was sent to work in the 2nd Respondent's premises. Following her dismissal, the Claimant brought claims for direct discrimination on the grounds of her pregnancy (dismissal), outstanding holiday pay and failure to pay the NMW.

2. There was no contract of employment and scarce documentation pertaining to the Claimant's employment, and thus nothing which set out whom the employer was. However, the dismissal letter was sent by the 1st Respondent.

3. Mr Anton, a Director and shareholder of the 1st Respondent (but with no legal connection to the 2nd Respondent), gave evidence at trial. He alleged that he did not know that the Claimant was pregnant, despite the fact that the dismissal letter stated that the dismissal was *"…. nothing to do with you personally or any of your health circumstances"*. It was found that this was a reference to her pregnancy. Furthermore, during cross-examination, Mr Anton stated that *'I did not dismiss her just because she was pregnant'*, which the tribunal found was fatal to the defence of the claim for discrimination.

4. The Claimant was found to have been dismissed on the grounds of her pregnancy. It was also found that the Claimant had not been paid NMW and that she was owed holiday pay. The tribunal found that the Respondents were jointly and severally liable for the awards

made. This finding was made on the basis that '*it appears at various times the claimant was employed by both'.* The judgment of the tribunal did not go into any further detail as to this conclusion, such as setting out their findings as to the dates on which she had been employed by each Respondent.

5. The 2nd Respondent appealed the finding in relation to joint and several liability. HHJ Richardson requested that the Tribunal provide further information as to the basis of this decision. The response was:

   *The unanimous decision of the Employment Tribunal was on a number of occasions the claimant was sent to the Colman Road Shop in Norwich to work which was run as a separate company by the Second Respondents and therefore at various times and dates must have been employed by the Second Respondents. The Tribunal repeats its general reasoning, given the lack of any contract of employment for the Claimant and indeed any provided to any members of staff, the company records so far as they exists, were frankly unhelpful and the Tribunal repeats reference to paragraph 9 of its reasoning in the Judgment. It is therefore impossible given the lack of record keeping by either company to give dates*

6. The EAT concluded that the Tribunal had clearly erred in law in holding both Respondents jointly and severally liable without seeking to explain precisely how an obligation arose on the part of the 2nd Respondent and why it was not possible to apportion the time during which the Claimant worked for each Respondent. However, as it had always been the Respondent's case that the Claimant worked for it, and the dismissal letter was written by Mr Anton and sent by Mr Shaw, both of the 1st Respondent, there is only one possible answer to the question which of the Respondents was responsible for the dismissal, the subsequent injury to feelings and the agreed holiday pay

## Comment

7. A helpful reminder that when it comes to the question as to who the correct employer is, the employment relationship needs to be critically analysed, looking at factors such as who had the overall control, who paid the salary and who had the power to dismiss. In situations in which the documentary evidence detailing these matters is scarce or non-existent, the parties must put their mind to the factual realities of the situation. Providing services for an organisation on occasion is insufficient to find an employment relationship, and in circumstances such as this where an employee is effectively 'lent' to a sister organisation, they will remain an employee of the lending organisation. Employers need therefore be

cautious in lending out employees as, whilst they are working elsewhere, the employer will remain liable for them, and if the borrowing organisation subjects the employee to bad treatment or an unsafe workplace, the employer will be opening themselves up to liability in this regard.



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