



# EMPLOYMENT TRIBUNALS

**Claimant:** Aldi Celi

**Respondent:** Ilirian Ltd

**Heard at:** ET London South via CVP

**On:** 9 June 2022

**Before:** EJ Swaffer

## Representation

**Claimant:** In person, supported by Evert Robotham

**Respondent:** Ms Milo, Morgan Pearson Solicitors

# RESERVED JUDGMENT

1. The claimant was not an employee of the respondent.
2. It is not therefore necessary to decide on whether the claim for unfair dismissal for an automatically unfair reason was properly pleaded. The claims for unfair dismissal and breach of contract are not made out, and fail.
3. The claimant was not a worker.
4. The claim for unpaid wages is therefore not made out, and fails.

# REASONS

## Introduction

1. The respondent Ilirian Ltd is a limited company created on 2 June 2020 with a view to opening a coffee shop in Greenwich, London. The claimant and one other person, Mr Dritan Shullani, were named as directors and each held one share in the company. There was a third shareholder, Mr Rubin Berisha, who also held one share in the company. Mr Shullani and Mr Berisha are brothers. There were a total of three shares in the company. The claimant and Mr Shullani were listed as persons with significant control of the company. There is a memorandum on the file at Companies House dated 30 May 2020 which indicates that the claimant,

Mr Shullani, and Mr Berisha intended to form a company, and that they each intended to be a member of the company and to take at least one share. The claimant said he was the one that incorporated the respondent company.

2. The claimant states that he was employed by the respondent as a director. To support this claim, he produced a contract of employment between himself and the respondent dated 2 June 2020.
3. The respondent denies that the claimant was ever an employee. The respondent characterizes the agreement between the claimant and the respondent as a business partnership between the claimant, Mr Shullani, and Mr Berisha with a view to setting up the coffee shop.
4. The relationship between the claimant and Mr Shullani and Mr Berisha broke down towards the end of October 2020. The claimant states that this happened as a result of a shareholders' meeting on 24 October 2020, when he expressed his concerns at what he has described as his fellow shareholders' plans to employ an illegal immigrant at the coffee shop, and also to use the premises for illegal purposes. The respondent states that the relationship with the claimant broke down when Mr Shullani and Mr Berisha discovered that the claimant had not paid a company, Sublime Retail Display Ltd (Sublime), employed to refurbish the premises to be used as the coffee shop, contrary to an agreement between the three shareholders.
5. On 28 October 2020 the claimant ceased to be a director of the respondent, and ceased to be a person with significant control. He was unaware that this had happened. Mr Berisha was appointed as a director of the respondent the same day.
6. On 19 December 2020 the claimant made a claim for unfair dismissal, unpaid wages, and breach of contract.
7. On 4 March 2021 the respondent filed a response, resisting all claims on the basis that the claimant was not an employee; the respondent does not accept that the claim for unfair dismissal was properly pleaded.

#### Preliminary matters

8. The claimant was unrepresented, and gave sworn evidence. The respondent was represented by Ms Milo, who did not call any witnesses.
9. Apart from the response to the claim, the respondent did not provide any evidence to the tribunal in advance. The claimant provided documents numbered 1-23 and a final statement dated 6 June 2022, which were introduced in evidence.
10. At the outset of the hearing, the respondent applied for an adjournment of 4-8 weeks depending on court availability. I heard submissions from both parties about the adjournment. The respondent needed more time to prepare the case, particularly due to its complexity, including the financial evidence, and also due to the personal nature of allegations made by the claimant against a director of the respondent in relation to which separate legal advice was being taken. There was also some difficulty in accessing the necessary financial information as at present the respondent was unable to access the company's account.

11. The claimant resisted the application, arguing that this was a tactic by the respondent, and noting that there was a notice of intention to strike out the respondent on the register at Companies House. He also said that the respondent had been aware of the claim for a significant period of time.
12. I adjourned to consider the application. I did not grant the adjournment, as I accepted the claimant's submissions that the respondent had already had significant notice of the claim. In reaching my decision, I noted that the claim was made on 19 December 2020, and the response submitted on 4 March 2021. In my view, the respondent had had sufficient time to obtain any evidence or information that it may have wished to provide the Tribunal. On this point, I noted that the Tribunal had written to both parties on 8 March 2022 with case management orders, with which the respondent had not complied and to which the respondent had not responded. On the same day, details of the date and time for the hearing were sent to both parties, and again the respondent had not contacted the Tribunal to request a postponement. I was also mindful that notice of compulsory strike off of the respondent was given on 3 May 2022. In making the decision to refuse the application to adjourn, I considered the overriding objective, which requires me to deal with cases fairly and justly. I was satisfied that proceeding today was compatible with the overriding objective, in particular the need to avoid delay in so far as was compatible with proper consideration of the issues. I was not persuaded that the Tribunal would be in any different position after an adjournment, given the respondent's lack of participation to date since the response to the claim.
13. Given the time it had taken to hear the submissions about the application to adjourn, I decided that there would only be time to deal with the issue of whether the claimant was an employee today. One factor in the time that it took to hear the submissions about the application, and which arose again once the substantive hearing began and Ms Milo was cross-examining the claimant, was the difficulties presented by the claimant who repeatedly made comments about the respondent's representative and her firm. These remarks were objected to by Ms Milo, who explained that there had been other correspondence between the claimant and her firm, which she described as threats and accusations in relation to her firm and the respondent. I warned the claimant several times about the seriousness of the statements he was making, on oath, and the need to consider the potential consequences very carefully. The claimant persisted in making the comments as he was giving evidence, and at one point emotions became heightened and I adjourned the hearing. When we resumed, I suggested to the parties that I would lead with asking the claimant questions, and leave Ms Milo to follow up with any outstanding issues. I advised the claimant that I would require short answers from him, and stop him if he went beyond the scope of my question in his reply. If I had to intervene three times, I would move on to the next point. This approach proved effective, and we were able to conclude the hearing.
14. After the adjournment for lunch, Ms Milo informed me that she had sent two emails to the Tribunal and the claimant over the lunch break containing statements from the respondent's accountant and Sublime. The claimant confirmed that he had received the emails and statements, and I adjourned briefly so that I could read them. These two statements were introduced in evidence.
15. The issues I needed to consider today were as follows:

- a. Was the claimant an employee of the respondent within the meaning of section 230 Employment Rights Act 1996?
- b. Was the claimant a worker of the respondent within the meaning of section 230 Employment Rights Act 1996?

### Findings of Fact

16. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the bundle of documents provided by the claimant. Details of some undisputed facts are included here as relevant background to my decision.
17. The claimant and one of the directors of the respondent, Mr Shullani, had known each other for many years. Mr Shullani and Mr Berisha decided to open a coffee shop. In May 2020 Mr Shullani approached the claimant to join the business. Premises were identified, which were beneath the flat where Mr Berisha was living; the respondent states that this was before the claimant was invited to join the business. I do not consider the timing material to my decision.
18. The respondent company was incorporated on 2 June 2020. It was agreed that the claimant, Mr Shullani, and Mr Berisha would each have a third share in the respondent. The respondent states that the intention was that the three shareholders would each contribute a third of the cost of setting up the business, and ultimately share the profits once it began trading.
19. The claimant said there was a meeting with his fellow shareholders some time before 2 June 2020. He said that one of the other shareholders took notes of the meeting. No such notes were provided in evidence. The claimant said that they agreed his terms and conditions of employment during that meeting, including dealing with employment contracts, and his monthly salary of £4,500 was agreed. I note that the respondent company was not incorporated at the time the claimant states that the meeting took place, but accept that the three intended shareholders may well have met before the respondent company was incorporated to discuss the business they planned to set up.
20. The claimant drafted his own contract of employment which was dated 2 June 2020, specifying a monthly salary of £4,500. He signed the contract both on his own account, and on behalf of the respondent. He said that he mentioned the contract to his co-director Mr Shullani about three days after the company was incorporated, and said he told Mr Shullani what was in the contract after he had signed it. In evidence he said "I was employed by myself". The claimant said that the salary of £4,500 was agreed as it was part of his business plan, which was agreed before the respondent company was formed. He said that it was planned that he would pay tax on the salary through the payroll.
21. I note that the respondent's accountant states that there is no record of the claimant in the respondent's employment records, which he describes as "a complete file of employment records". I also note that the accountant states that there is no record of the claimant on the respondent's payroll database or HMRC returns; however, I am mindful that these payroll records only date from November 2020, after the relationship between the

claimant and the respondent broke down in October 2020. I do not find that this second statement assists in my determination of whether the claimant was an employee of the respondent. I note that the claimant was not listed in the file of the respondent's employment records; whilst it is not clear when that file began and whilst not a determinative factor in my decision in this case, I find that it is likely that the claimant should have been included on the list if it were intended that he was an employee, given his evidence about his employment status, that he had recruited all the other employees, and was responsible for the legal duties in relation to setting up the business. In my view this would have included the record of the respondent's employees.

22. The claimant told me that he also drafted a contract of employment for Mr Shullani at around the same time as he drafted his own, also on a monthly salary of £4,500. This contract was never signed by Mr Shullani. I note that there were times after the contract had been drafted when Mr Shullani was in the UK. It is not clear why he did not sign the contract.
23. The claimant states that it was agreed that his salary would start to be paid when the business began trading, and that he would be paid for the months in which he had not been paid when the business was being set up. He said that that other staff he had recruited were paid when they began to work, including one member of staff employed "from day one" to design coffees. An employee who started work in July 2020 was paid £2,000; the claimant said this was because there was an "obligation" to pay employees". Nevertheless, he himself was not paid at this time.
24. The respondent states that it was never agreed that the claimant would be an employee, and that it was always a business partnership. It describes the claimant's claim that it had agreed to pay him a monthly salary of £4,500 as "illogical... for a coffee shop that had not yet opened at the time".
25. On 23 June 2020 the claimant signed the lease for the coffee shop premises in his capacity as director of the respondent.
26. The claimant said that in July 2020 he invested between £20,00-£25,000 in the business from his savings. I did not receive any documentary evidence in relation to this payment. The respondent states that the claimant only invested £2,000 and that the two other shareholders invested £70,000. I did not receive any documentary evidence in relation to these payments.
27. The claimant had full responsibility for setting up the business. He had full authority to make all decisions, and he did not need to seek the agreement of his fellow director when making any decisions. When I asked him to describe the type of tasks he was able to do on his own without supervision or approval, he said that he employed staff for the coffee shop, including checking their right to work in the UK and drafting their contracts. He dealt with all the legal and regulatory requirements of setting up a business, including applying for PAYE, setting up a payroll and liaising with accountants, and dealing with health and safety requirements.
28. The other two shareholders played little or no part in the setting up of the business; the claimant said that they were often both away in Albania during this time, or more focused on other things. He also said that he

remained in touch with them both daily via a WhatsApp group chat, and that he received lots of thanks from both shareholders. He told me that he worked “24/7 non-stop” for the respondent. He said that he reported “only to shareholder meetings as I’m a director”, and said “I worked for myself as a director”. At no point did the shareholders question any of the steps the claimant took to set up the business, or his right to take those steps. He made many decisions alone, including the daily running of the business, interviewing new staff, dealing with health and safety matters, dealing with the council, applying for an alcohol licence, carrying out background and right to work checks for potential new employees, and signing contracts of any nature. He was responsible for the legal affairs for the business. The only thing he did not do alone was plumbing, as Mr Shullani had plumbing skills.

29. When I asked about what approval he needed from the other shareholders to act, the claimant said there was “nothing” for which he needed their approval. He “could do exactly as I wanted, when I wanted, how I wanted”. It was “up to me when and for how long I worked”.
30. When I asked for information about the claimant’s consultations with the other shareholders, he said that he would update them on any serious decisions he made on behalf of the respondent company. He said he could “take decisions as I wished, and informed the shareholders what I was doing”.
31. I asked the claimant whether he took any holiday during his involvement with the business. He said he did not as the other shareholders were away. He asked to take a week’s holiday on one occasion, but this was not agreed as one of the other shareholder’s wives was due to give birth at that time. He said the decision not to take holiday at that time was “based on common sense”. The claimant said that there were no other things that he had wanted to do in relation to the business that he had not been able to do, and said that he could take time off from the business if he wanted to.
32. The claimant states that the relationship between him and the respondent broke down during a meeting with fellow shareholders on 24 October 2020, prior to the coffee shop opening. The claimant states that he was told during this meeting that Mr Berisha wanted to employ his wife in the coffee shop too as she was attractive and this would help with business. The claimant questioned whether the woman in question was his fellow shareholder’s wife, and was also concerned about her immigration status and whether she was able to work in the UK. Additionally, the claimant states that he believed that his fellow shareholders planned to use the coffee shop for illicit purposes. This led to a disagreement, and the claimant left the meeting stating that he did not wish to be involved in such a venture.
33. The respondent’s account of events is different. They state that the relationship with the claimant broke down as he failed to pay monies he had agreed to pay towards the cost of refurbishing the premises. In particular, the respondent states that the claimant had agreed to pay Sublime some £15,900. They state that he did not pay the sum, and the works were unfinished. The respondent states that the disputed payment with Sublime which led to the end of the business partnership was to be paid by the claimant as his investment in the business. Sublime state that

it stopped working for the respondent for a time in Autumn 2020 as it had received two payments amounting to 65% of the cost of the project. Sublime also stated that it had not received a payment of one third of the cost of the project from the claimant.

34. The claimant states that he paid £12,709.52 from his personal account to Sublime, providing an email from Cashplus dated 6 August 2020 confirming payment. The respondent disputes this was a payment from the claimant's own personal account. The email from Cashplus is addressed to the claimant at what appears to be a personal email address and does not include the name of the respondent. It is not possible to determine from the evidence provided whether the money paid to Sublime was from the claimant's personal account as he states, or from elsewhere as submitted by the respondent. However, I do not consider the account from which this payment was made to be material to my decision.
35. The claimant states that he was offered £10,000 by Mr Shullani to walk away from the business; he also said that he agreed with Mr Shullani that if he was paid £21,000 within 10 days he would walk away, but the money was not paid on 8 November 2020 as he expected. He referred to a later settlement offer via ACAS which did not accept as he said the sum did not cover the amount he had lost. He said that he had received texts and an apology from Mr Berisha; he did not provide the texts or his responses to the texts to the Tribunal as many were in Albanian.

#### Relevant law

36. In order for the claimant to continue to pursue his claims of unfair dismissal and breach of contract, he must establish that he is an "employee" of the respondent as per section 230(1) Employment Rights Act 1996. It is not sufficient for him to establish that he is a "worker" of the respondent as per s230(3)(b) Employment Rights Act 1996, which is a less onerous hurdle to overcome.
37. An "employee" is defined in s230 as follows:
- (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)
    - a. *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.*
38. The case of *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance [1968] 2 QBD 497* identified the principal requirements for an individual to be considered an employee. They are firstly control, secondly, mutuality of obligation and thirdly that there are no terms of the relationship that are inconsistent with the existence of an employment relationship.
39. Given that this is a case involving the employment status of a company director, I have also considered *Secretary of State for Trade and Industry v Bottrill 1999 ICR 592* which established that it was possible for a company director with a controlling shareholding to be an employee, that each case should be considered on its own facts in accordance with the

principles of employment law, and that one issue was likely to be whether any employment contract was a sham, and if not, whether it gave rise to an employer/employee relationship. I also referred myself to *Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635*, *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor 2009 ICR 1183*, and *Rainford v Dorset Aquatics Ltd EAT 0126/20*.

40. The claim for unpaid wages would require the claimant to be a “worker”. Section 230(3) Employment Rights Act 1996 defines a “worker” as *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 any other 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.*

41. To be “worker”, an individual must show that there is an express or implied contract with the “employer”. In this context I have considered the cases of *Autoclenz Ltd v Belcher and ors 2011 ICR 1157*, *Uber BV and ors v Aslma and ors 2021 ICR 657*, and *Pimlico Plumbers Ltd and anor v Smith 2018 ICR 1511*.

## **Employment status – Employee**

### Control

42. I find that the claimant was not under the control of the respondent during his work for the business. Control can take many forms, practical, legal, direct, and indirect. I find that the claimant was not under control in any of those areas, either in terms of what he did for the business or how he did it. The claimant was very clear in his evidence that he was responsible for all decision making in the business, and that he did not need to obtain approval or authorization from the other shareholders prior to making any decision in relation to the business. This included: recruiting employees, dealing with legal responsibilities, signing a lease on premises, when he worked and what hours; on his own evidence he was not subject to supervision. The single incident when he did not do as he wished was in relation to taking holiday when a fellow shareholder’s wife was due to give birth. He described not taking leave as a “common sense” decision, rather than a refusal of annual leave by an employer. This is not sufficient evidence of control to make the relationship between the claimant and the respondent one of employer and employee.
43. I find that the claimant’s contract is of limited assistance in establishing whether he was under the respondent’s control, given that he drafted it himself, signed it both in his own personal capacity and on behalf of the respondent, and only discussed it with his fellow director several days after he had written and signed it.

### Mutuality of obligation



44. For a contract of employment to exist, there must be an “irreducible minimum” of obligation on each side, often described as a “wage/work bargain”. This has been explained in *Ready Mixed Concrete* as “*the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master*”.
45. I am not satisfied that there is such a mutuality of obligation in this case. The claimant did not receive any payment during his time with the business, and the respondent denies that it ever agreed to pay him a salary. Again, the written contract of employment is of limited assistance, for the reasons expressed above. The claimant was unable to point me towards any other evidence beyond the contract that the respondent had any obligations towards him to indicate that there was a mutuality of obligations in this case. I accept the respondent’s evidence that the basis for the agreement between the claimant and the respondent was a business partnership in which they would each share both the costs of setting up the business, and any resulting profits. This plan to share start-up costs and profit does not amount to mutuality of obligation for the purposes of this claim.

#### Employee relationship

46. The claimant clearly performed many tasks in setting up the business, as described above. However, I find that those tasks were not performed as a result of him being an employee of the respondent. The claimant had an interest in performing the tasks in order to establish the business, and therefore for it to start trading and then hopefully to begin to generate profits which could then be shared between the shareholders. There is no evidence that he was paid for performing those tasks, which he performed as and when he perceived was necessary, of his own initiative, and with no oversight or control by the respondent. I find that there was no evidence of any consequences should he not perform those tasks, beyond a likely delay in the eventual commencement of business trading and therefore in it hopefully becoming profitable. I find that the many tasks carried out by the claimant in setting up the business are not sufficient to establish that they were performed under a contract of employment, but rather that they were performed with the aim of establishing a business venture with the other two shareholders, with the ultimate hope of sharing in the profits of the business.

#### **Conclusions**

47. I do not find that there was a contract of employment between the claimant and the respondent, and therefore I do not find that the claimant was an employee of the respondent. In reaching this conclusion, I have looked beyond the provisions of the contract of employment document submitted by the claimant, at the reality of the relationship between him and the respondent. I find that the relationship can best be considered as a business agreement between the three shareholders, with a view to setting up the coffee shop. This relationship would involve sharing in both the costs of setting up the business, and then in any profits once it began trading. Whilst it is clear that the claimant did virtually everything that was

needed to set up the business, I do not find that he did those things in the capacity of an employee of the respondent. I find that he did what he did with the aim of ensuring that the business in which he had a third share had the best chance of being ready to trade, and therefore of making a profit. In particular, I find no evidence that the claimant was under the respondent's control as he went about the many steps necessary to setting up the business, or that there was any mutuality of obligation between the claimant and the respondent, or that there was an employer/employee relationship. There was no clear obligation for the claimant to carry out the many tasks he performed personally, and I find that this was a practical decision on his part due to his fellow shareholders being overseas and again his wish for the business to be set up so that it could begin trading. I find that there was no employer/employee relationship between the claimant and the respondent. The claimant was able to act entirely of his own initiative, as and when he wished including his choice to work "24/7", with no oversight, for which he received no payment and was in fact expected and expecting to contribute to the costs of setting the business up, and without any consequences should he not perform the tasks he did, apart from in relation to possible delay in the business starting to trade and therefore a delay in any chance of it becoming profitable. I find that the claimant acted as he did not in the context of an employer/employee relationship, but with a view to establishing a business in which he had had a third share, and from which he hoped to share in the profits in due course.

48. For all these reasons, I do not find that that the claimant was an employee of the respondent due to the absence of control. If I am wrong on this, the factors discussed above indicating employee/non-employee status tip in favour of him being a non-employee.
49. For similar reasons to those set out above, I do not find that there was any other contract between the claimant and the respondent, and therefore I do not find that the claimant was a worker.

Employment Judge Swaffer  
01 August 2022

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