



# EMPLOYMENT TRIBUNALS

**Claimant:** Andrew Huntley-Jacobs

**Respondent:** Express Mortgage Services Limited

**Heard at:** Manchester

**On:** 22 May/10 June 2019

**Before:** Employment Judge Hoey (sitting alone)

## REPRESENTATION:

**Claimant:** Mrs P Fernandez-Mahoney (solicitor)

**Respondent:** Mr Byrne (solicitor)

# RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was not an employee of the respondent as defined by section 230(1) of the Employment Rights Act 1996. The claimant was a worker of the respondent throughout his engagement by the respondent as defined by section 230(3) of the Employment Rights Act 1996.

## REASONS

1. In a claim form presented on 24 August 2018 the claimant, commercial director of the respondent from 10 January 2010, seeks payment of the National Minimum/Living Wage. The claimant argued that he had not been paid at all since the start of September 2017 despite agreeing that he was to be paid a monthly sum. The respondent in its response form argued that the claimant is a statutory director and shareholder of the respondent and as an office holder he was neither an employee nor a worker and thereby not entitled to any payment.

2. The case called as a preliminary hearing and I was presented with a bundle amounting to 719 pages and it was agreed between the parties that the preliminary issue in this case was whether or not the claimant was an employee which failing a worker under the Employment Rights Act 1996.

3. While entitlement to the national minimum wage does not require employment status, another claim had been raised whereby this was an issue. That claim, with Tribunal reference number 2402294/19, had been stayed pending determination of this preliminary issue. Having heard evidence and submissions the parties sought a reserved judgment.

### **Findings of fact**

4. I heard evidence from the claimant together with Mr Rawson and Mr Hand (both directors), for the respondent. I make the following findings of fact based on the balance of probabilities from the evidence to which I was directed and the witness statements and oral evidence I read and heard. Reference to page numbers refer to the bundle before the Tribunal.

#### The respondent and its business

5. The respondent is a small company established on 1 July 2004 originally with two directors Mr Rawson and Mr Hand. The company obtained mortgages on behalf of clients.

#### The claimant joins the respondent

6. The respondent had a pre-existing relationship with the claimant and on 10 January 2010 the claimant became a shareholder and director of the respondent. Before joining as such the claimant had the opportunity to check the financial position of the respondent by checking its profit and loss and bank statement. The claimant had in essence carried out due diligence in respect of the respondent's financial status. He came to work for the respondent.

7. The claimant became an equal shareholder along with the other 2 director/shareholders as it was agreed that the three individuals would enter into business together in equal measure. There was no discussion about the employment status of the claimant (nor indeed the other directors). No written statement of particulars was accordingly issued to the claimant (nor released in compliance with the Companies Acts).

8. Mr Rawson and Mr Hand were Mortgage Advisors expert in dealing with the operational issues in this area of the business. The claimant was brought into the business to use his unique skill set within the commercial sphere and build a client database relationship, develop relationships with suppliers and lenders and design processes to deliver a mortgage call centre style business.

9. Each of the three directors paid a sum of money into the business to enable it to purchase leads. This was a significant 5 figure sum of money. This involved a significant degree of risk as there was no guarantee of any return on this investment. There were also director loans which were eventually repaid.

10. There was no requirement that the claimant (nor the other directors) work a specified minimum number of hours a week. This was a matter the directors agreed amongst themselves.

#### Hours and leave

11. When the claimant joined the business, a flexible working arrangement was agreed with him to enable him to carry out his childcare responsibilities. That necessarily resulted in the claimant having different hours from other staff and additional holidays.

12. The claimant would work from home as required and on occasion would work well into the evening, as did the other directors.

13. It was agreed that holidays would only be taken by each of the three directors where one of the number was in the office. This ensured there was at least one director to oversee staff.

14. Each of the directors took their own holiday entitlement and were not responsible to each other for this. The claimant took around twelve weeks holidays a year which was more than the other directors. This was due to the claimant's agreement reached with the respondent as to hours and his working pattern. There was no formal record of holidays taken by the 3 directors who were themselves responsible for their own annual leave.

#### Company property

15. The respondent provided the claimant with the equipment to carry out his role including a mobile phone and sim card for his iPad which was paid for by the respondent. The claimant was able to use the respondent's equipment for his personal use in addition to commercial use.

16. The claimant had a respondent email address.

#### The claimant's duties

17. The claimant was called Commercial Director to differ from the offer two Operational Directors. The claimant's main area of responsibility was to place the business in the best possible position commercially. To do so he was required to design, develop and maintain a suite of reports that became the respondent's information systems. These were produced daily, weekly and monthly and would analyse the business's performance. The claimant would update these reports.

18. The claimant was responsible for determining what areas of the business required his commercial input and he determined on a day to day basis what he would do in that regard.

19. The claimant was also responsible for a team of staff, the Technical Team. He would be involved in the development of that team and would be in control of the staffing required for that area. The claimant was also involved in disciplining staff, training and mentoring staff as required.

20. He was also responsible for monthly financial reports, business planning and forecasting. The claimant negotiated with suppliers and developed the business processes and improvements.

21. The claimant was also responsible for staff reviews and pay awards generally and developed certain introducer relationships.

22. The claimant took an active role in running the business and in generating additional revenue through improved productivity.

23. The three directors initially worked together in the respective areas with decisions being taken consensually. Daily operational decisions would be taken by each of the three directors and each director had authority to bind the company.

24. The claimant was initially involved in marketing of the business and composed emails and blogs and also redeveloped the respondent's website.

25. The claimant introduced a new Management Information System to monitor sales and devised a monitoring process for the respondent's advisors.

26. The claimant also produced sales team's performance management information and produced monthly management account and liaised with external accountants.

#### Matters relating to the claimant

27. The claimant had no insurance in place covering his work. He and the other directors were covered by the respondent's general policy of insurance.

28. The claimant featured on the respondent's internal phone list and attended work related social events.

29. The claimant had authority to bind the respondent and was the main signatory and contract with some external providers.

#### Developing the business

30. The business grew from the three directors to around ten or eleven additional staff.

31. It was clear that the purpose of the business was to generate revenue with a view to ultimate sale of the business and realisation of value. The directors were seeking to place the business in the best possible place to secure a return on their investment by securing a favourable sale in due course.

#### Pay

32. Initially as each director had an equal shareholding it was agreed that directors would receive income by way of dividend.

33. The directors wished to seek a return upon their investment and took accountancy advice from an accountant. In September 2005 at page 75 advice was sought which continued into 2016 (pages 79 to 83).

34. The 3 directors agreed that from July 2016 the directors would receive a “salary” of £650 which would be paid separately from any dividend and paid via the PAYE system (see pages 398 and 434).

35. The accounts of the respondent showed directors being paid salaries (pages 722, 735 – 746) which are set out separately from staff wages.

36. The three directors agreed to pay themselves this salary to ensure that their position in respect of state pension was preserved.

37. As this sum was paid via PAYE, P60s were issued. Tax was accounted for at the end of the financial year until the revenue system changed.

38. This decision was taken after having received advice from the accountants which also noted (at page 75) that the minimum wage could have an impact upon payment (as could the law on auto-enrolment). The directors did not seek legal advice about this issue and proceeded on the basis of the accountancy advice they had taken.

39. The three directors agreed that the £650 would be paid and reflected around 20 hours per week worth of work. Initially there was reference to the 3 directors working around 15 hours a week on the business. See page 85.

40. That sum was paid to each director irrespective of the actual hours worked and irrespective of their individual performance or outputs. It was a fixed fee subject to the directors’ discretion as to whether it be paid or not.

41. One of the reasons for delaying the introduction of the “wage” was to ensure the business was placed in the best possible light, financially, with a view to eventual sale. How the directors chose to pay themselves (and how this was accounted for) affected how the profitability of the respondent’s business looked which was a key driver for the directors.

42. There was no contractual obligation upon the respondent that required the respondent to pay the claimant. This was a matter that the directors themselves could determine (including whether and if so in what way they remunerated themselves).

#### Suspending the payment

43. In September 2017, at page 92, each of the three directors decided consensually to suspend payment of this sum due to there being insufficient funds and an impending Corporation Tax bill.

44. That message stated: “After assessing the company’s accounts and pipeline of business with regard to the impending corporation tax bill, unfortunately we will have to suspend the £650 a month director wage”.

45. There was no agreement when this was to resume, if at all.

#### Difficulties emerge

46. As the business developed, difficulties with regard to the business's performance emerged. This created friction amongst the directors and the relationship amongst the 3 directors was fractious. There were often inflammatory and heated exchanges amongst the 3 parties. These are evidenced in emails from page 50 to 66.

47. On 21 January 2015 Mr Rawson sent an email to the claimant stating that no one director had authority to overrule the other directors. The directors were in business together and did not see each other as more senior than the other. They sought to agree matters consensually but animosity developed amongst the three directors as did mistrust.

48. In or around July 2017 the claimant suspended Mr Rawson from the business. At page 322 reference is made to Mr Rawson having breached his duty as "an employee". He was subsequently dismissed with a P45 being issued but that was later retracted following upon the carrying out of a disciplinary process involving an appeal and the involvement of solicitors.

49. The correspondence between Mr Rawson and the respondent proceeded on the basis that Mr Rawson was an employee.

50. Subsequently Mr Rawson and Mr Hand were concerned that the claimant was not spending as much time in the business and that he was using time for personal use.

51. The claimant used the respondent's equipment (including its computer) to carry out his personal activities. Notwithstanding that, there was no evidence the claimant had ceased working as such or that his output had changed.

52. The claimant (and the other directors) considered it acceptable to use the respondent's equipment for personal use. The issue was Mr Hand's and Mr Rawson's perception that the claimant was spending too much time on his own activities and not those of the respondent.

53. The claimant was suspended on 4 May 2018 and at page 338 the letter states that he was being suspended "as a director and as an employee".

54. The claimant also submitted a grievance in connection with a claim for wages which the company regarded as a legitimate claim saying that he would be paid what he was due by way of "wages".

#### Internal policy application

55. While not explicitly stating that the respondent's internal policies applied to the directors, the claimant applied the disciplinary procedure and the respondent regarded the claimant's grievance as a grievance. There are no written policies that specifically apply to the directors.

#### Claimant calls himself "self employed"

56. The claimant called himself “self-employed” in his mortgage application on 16 March 2017. He believed mortgage lenders treated people who had more than 25% shareholding in a company as self-employed.

57. At page 535 the claimant completed a tax return stating that he was self-employed. This had been prepared by an accountant who said the claimant was self-employed which the claimant signed.

58. The claimant’s tax returns were completed on the basis the claimant was self employed.

#### Issues in relation to control

59. The respondent was not required to apply the disciplinary or grievance (or any other policies) to the 3 directors (in contrast to the position in relation to employees).

60. The claimant allocated tasks but was not “taking direction” in the sense of being controlled by the other directors. The claimant was clear as to what he wished to do and had been given clear autonomy and control over his sphere of activity from the other directors.

61. Managing, training and mentoring staff was part of the claimant’s duties which was necessary to maximise productivity of staff (and thereby improve the respondent’s financial position). That also applies to his role in relation to fixing bonuses and pay rises.

62. The fact staff came to the claimant for advice was indicative of the claimant’s expertise and not evidence the respondent controlled the claimant in some way.

63. The claimant’s flexible working arrangement and holiday position demonstrated the control the claimant had in relation to his work and the limited control exerted by the respondent in relation to the claimant.

64. Meeting clients and third parties was not a requirement as such of the claimant’s role and in any event it was part of his job. It maximised the value of the business. There was no evidence of the respondent controlling the claimant in this regard.

65. The fact the claimant had a work email address, title of Commercial Director, had property of the respondent (which he used for his personal use too) and featured in the internal phone directory was not evidence of a sufficiency of control but enabled him to carry out his role.

66. The fact the claimant could delegate his functions to others demonstrated the control the claimant had as did the fact he was responsible for the Technical Team.

#### Other relevant facts

67. One of the other directors received statutory paternity pay in 2017.

68. The directors were not allowed to work for any other organisation and they could not provide a substitute to carry out their functions.

69. Article 82 of the respondent's articles of association of the company state that a director shall be entitled to such remuneration as a company may by ordinary resolution determine.

## The Law

### Worker

70. A worker is defined under section 230(3) of the Employment Rights Act 1996 as "an individual who has entered into or works under a contract of employment or any other contract whether express or implied and (if express) whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for the other whose status is not by virtue of that contract that of client or customer of any profession or business undertaking carried on by the individual".

71. In order to become a worker there must be an obligation personally to provide work. The person for whom the work is done must not be a client or customer of a business run by the individual. One case suggested that one should look at the dominant purpose of the relationship to determine whether it is to provide personal services (see **James** 2007 IRLR 296). The Supreme Court has decided that the test is whether the contract provides that services be provided by an independent contractor or under the control of the "employer" (See **Jivraj** 2011 IRLR 827).

72. The Employment Appeal Tribunal has noted that the introduction of worker status extended protection of the law to an intermediate class of worker between employee and those truly self employed suggesting that the same issues are to be considered as are examined in determining employment status but that "the boundary is pushed further in the worker's favour" (**Byrne** 2002 IRLR 96).

### Employee

73. An employee is defined at section 232 of the Employment Rights Act 1996 as an individual who has entered into or works under a contract of employment, namely a contract of service or apprenticeship, whether express or implied, whether oral or in writing. Determining whether a contract of service exists or not has been the subject of many years of litigation.

74. The current position is to consider the entirety of the relationship - the multi factorial or multiple test as initially set out in **Ready Mixed Concrete** 1968 2QB 497. This case noted that there requires to be an agreement by the individual to provide their own work and skill in return for wage or remuneration (personal service). The organisation requires to have a sufficient degree of control over the individual. Finally the other provisions of the relationship should be consistent with the relationship being one of employment.

75. In **Hall** 1994 ICR 218 the Court of Appeal confirmed that this is not a mechanical exercise but instead the Employment Tribunal must paint a picture from



the accumulation of all the relevant facts and then standing back viewing the matter from a distance to make an informed qualitative appreciation of the whole relationship. That case noted that not all factors are of equal importance nor should they be given the same weight.

76. The essential ingredients in an employment relationship are firstly that a contract exists (express or implied), that there is an obligation to work personally, that there is sufficient “mutuality of obligations” for the duration of the relationship (ie that both parties are under legal obligations towards each other) and that there is a sufficient degree or framework of control by the employer.

77. The Court of Appeal in **Quashi** 2012 EWCA Civ 1735 stated that the absence of any obligation to pay for services (whether express or implied) would mean that there would be no employment relationship.

78. The Court in **Knight** 2014 IRLR 605 confirmed that there can be a contract of employment in place even where one of the parties does not insist upon payment of wages due – provided wages are due.

79. Even if the above essential elements are present, the Tribunal must then still look at all the relevant factors that exist in the relationship and decide if the relationship is one of employment or not. Relevant factors would include whether or not the claimant was an integral part of the business, whether he provides his own equipment or staff, the degree of financial risk taken and the ability to profit from sound management and responsibility for investment and management.

80. The label applied by the parties is relevant (especially if the legal status of the relationship is ambiguous – **Massey** 2007 IRLR 902). Similarly the way in which the parties treat themselves, such as how they tax their earnings is a relevant factor. These factors would go into the balance and are not decisive.

#### Illegality

81. It is an established principle of public policy that a contract that is illegal in its form or, in certain cases, in the way it is performed would not be enforced by an Employment Tribunal. The authorities in this area require a consideration as to what the party knew as to the illegality and whether or not there was a misrepresentation as to the position. The Supreme Court has also stated that proportionality should be considered before refusing to enforce the provision – see **Patel** 2017 AC 467.

#### Ultra vires and company’s actions

82. Where a director of a company is to be paid by the company, the company should provide its consent. This principle emerged from the cases of **Guinness** 1990 and **Ball** 2017 and will depend upon what the company’s constitution (the articles) say. The court has confirmed in **Duomatic** 1969 2 Ch 365 that it may be possible to infer consent from the actions of the parties to such a position.

#### Submissions

For the claimant

83. The parties provided detailed written submissions and authorities. What follows is a summary.

84. The claimant contends that the claimant was an employee at all material times. The solicitor for the claimant noted that regulation 28 of the National Minimum Wage Regulations 1998 creates a presumption that a claimant is a worker where the minimum wage is sought. Thus, the starting point is that the claimant is a worker and it is for the respondent to rebut this.

85. The claimant's solicitor argues the legal tests in relation to employment are satisfied for the material times during each of the eight years whereby a contract was in existence.

86. In relation to control, the claimant provided twenty specific examples as to the ways in which control was exerted:-

- (1) The claimant was subject to disciplinary procedures (page 338);
- (2) The claimant raised a grievance in connection with his unpaid wages and this was treated as such (page 716, page 347);
- (3) The claimant took direction from the other directors – he was allocated tasks including financial reporting and forecasting and reporting to the other directors;
- (4) The claimant was involved in disciplinary proceedings for staff, for example Mr Rawson sought the view of the claimant in relation to potential disciplinary issue (page 248);
- (5) The claimant dealt with performance issues for staff informally (page 254);
- (6) The claimant trained and mentored staff;
- (7) The claimant had final say on bonus allocation for staff and pay rises (page 293);
- (8) Staff would approach the claimant if they had issues for example with regard to work issues (page 183);
- (9) The claimant agreed flexible working arrangements with the respondent;
- (10) It was agreed between Mr Hand and Mr Rawson and the claimant that at least one of them would be in the office at one time (page 84);
- (11) The claimant would be asked to meet with third parties on behalf of the respondent and attend meetings which were paid for by the respondent;

- (12) The claimant attended meetings with prospective clients and intermediaries on behalf of the respondent;
- (13) The claimant had a work email address;
- (14) The claimant had title of Commercial Director which underlines his operational role within the organisation;
- (15) The claimant had responsibility for the technical team;
- (16) The claimant would attend work related social events;
- (17) The claimant had authority to bind the respondent and was the main signatory and contract with external providers;
- (18) The respondent provided tools and equipment to carry out the work including mobile phone and sim card;
- (19) The claimant was listed in the internal telephone directory the same as other staff members;
- (20) The claimant delegated tasks to other staff members.

87. The claimant's solicitor maintained there was sufficient mutuality of obligation as the claimant had a number of operational aspects to his role which he required to work and he was unable to refuse to do so. It was disputed that the claimant did not contribute to the business at all and indeed some of the evidence from the respondent suggested that each of the directors were initially working around 15 hours per week (page 85).

88. There was a clear obligation on the claimant to do work and to be paid for it. The absence of a payment does not by itself prohibit there being an employment relationship.

89. The parties conducted their relationship clearly believing there to be a contract of employment in place. This was clear in connection with the advice given by the Accountant in connection with payment (page 714) and in connection with the payment of the "wage" seen at page 92. The claimant's grievance and the respondent's response made reference to the wage and it was submitted as example evidence this was a salary (page 347).

90. While the respondent argues the intention was that none of the directors be employees there was clear evidence as to the contrary. Thus, Mr Rawson's suspension in July 2017 (page 322) shows that he was understood to be an employee. That letter makes reference to breach of his duties as employee and that he would "paid a salary in the normal way". Open correspondence between the respondent and Mr Rawson's solicitors also suggests that the understanding was that Mr Rawson was an employee (page 326).

91. Reference was also made by Mr Rawson to the ACAS code and the process that would ordinarily be carried out by an employee. At no stage was any issue

raised with Mr Rawson's belief that he was being an employee or the £650 being regarded as salary. The claimant also relied on the fact that when he was suspended it was specifically stated that he was suspended as an employee (page 338). His grievance was also regarded as an employment issue (page 347). It was argued that there was clear personal performance required by the claimant and that was in addition to him holding the office of Director.

92. The claimant's agent also noted that the claimant did not have his own insurance cover and that when he was suspended it was clearly regarded as an employee.

93. The claimant also refers to having received a P60 with the other directors which shows the tax being paid as an employee which also similarly shows another director receiving statutory paternity pay which is only available to employees.

94. The failure by the company to make a contract of employment available for inspection simply showed that the company had failed to consider that matter.

95. There was no suggestion of illegality in the relationships since the parties simply conducted their relationship in a way that maximised the tax position.

96. The claimant argued that the suggestion from the respondent's witnesses that the claimant was not carrying out his activities was not credible and that ultimately the claimant carried out the work provided to him.

97. In relation to the company having the power to employ the claimant as a Director, the claimant distinguished the cases of **Guinness supra** and **Ball supra** relying on the case of **Duomatic supra** to show that it is possible to consent to paying directors a salary where such agreement is reached. In this regard agreement was reached whereby the parties clearly knew together that they were being paid a salary and agreed themselves to suspend the salary. There was clear agreement that the three individuals would receive the relevant sums in question.

98. In any event the articles of association specifically state that the company may enter into arrangement with any director for the provision of services.

99. Finally, the respondent cannot contract out of its liability to pay national minimum wage.

100. In short, the claimant argued the claimant was an employee which failing a worker.

For the respondent

101. The respondent's solicitor argued that the payment paid to the claimant was in fact a small director's fee which made no distinction in relation to any hours worked or individual performance. This had been agreed following tax advice and was not wages. It was a director's fee irrespective of how the parties labelled it. The respondent argues the claimant is now seeking to resile from his earlier agreement with regard to that position with a view to claiming national minimum wage.

102. The respondent's agent referred to the control which the claimant had and relied upon the twenty factors to which the claimant had referred as evidence of the high level of control which the claimant had, thereby demonstrating he was not in fact an employee or worker at all – he was in reality in business collectively with his two fellow directors. The claimant was in control of his own sphere and was a business owner not an employee. He had high level control and autonomy.

103. The claimant joined the business after exercising due diligence and contributed a significant sum. These factors point to the relationship being one of office of director and not employee or worker.

104. The respondent's solicitor also argued that the absence of a written contract is itself a significant factor showing that he was not an employee. The parties did not consider their relationship to be one of employment as otherwise they would have complied with the legal requirement to provide a written statement and have this available for inspection as required.

105. The respondent's solicitor also suggested that the tone of the emails between the parties and the language they used went way beyond what employees would be permitted to do and say. The clear tenor of the relationship and the way in which the parties conducted themselves towards each other showed that these were office holders and not employees or workers. No one person was in control.

106. Reference is made to Harvey's Employment Encyclopaedia which suggested that in connection with border line cases where the label applied by the parties may be relevant (and could tip the balance). The respondent's solicitor suggested this case was on all fours with **Parsons** 1979 IRLR 117. Here, as in that case, there was no oral or written contract, the company did not produce a contract of service and the wages for employees were accounted for separately from director salaries. In that case the director was found to be self employed.

107. The respondent's solicitor also argued that there was a lack of personal service by the claimant as he spent little time working on the respondent's business and spent a large amount of time on his personal interests.

108. He also argued that the true relationship between the parties despite the label applied by them and despite reference to the employment status was in fact one of genuine self-employment. Each party took a degree of financial risk and the own responsibility for the success of the business.

109. While the solicitor initially argued that absent express consent to employ a director such a contract would be void, he accepted that the **Duomatic supra** case allowed there to be an inferred agreement where this was clear.

110. Finally the respondent's solicitor argued the relationship was tainted with illegality and should not be enforced on public policy grounds given the claimant had treated himself as self employed and gained the benefits of self employed status and was now arguing he should get the benefits of being employed. Reference was made to **Payne** 2008 IRLR 500.

## Decision and reasoning

## Contract

111. The first issue I require to determine is whether or not there is a contract in existence between the claimant and the respondent. This is not a case where there was a service agreement or any express provision. In my view it is clear that there was an implied contract in place between each of the 3 directors and the respondent.

112. When the claimant joined the respondent, while the parties did not expressly advert to employment status, they clearly entered into a verbal agreement as to the terms of the relationship. Those terms developed as the relationship progressed, for example with regard to how the parties were to be remunerated and what each director was responsible for. The absence of a written agreement does not prevent there being a clear implied contract, which is what I find existed in this case.

## Personal service

113. The next question is whether or not the claimant was required by virtue of that agreement to provide his personal service. It was not disputed that the claimant was under an obligation to provide his personal service. Each of the directors had their own responsibility.

114. The claimant required to provide his commercial acumen to develop and improve the respondent's business. He could not delegate performance of his role. There was no evidence of him ever having done so. The whole point of engaging the claimant was to benefit from his unique skill set and experience. There was therefore an obligation upon the claimant to provide his personal services to the respondent.

## Mutuality of obligations

115. The next question is whether there is sufficient mutuality of obligations. Given there is a contractual relationship in existence between the parties there is obviously legal obligations binding both parties but I need to consider whether or not the parties were under legal obligations towards each other for the duration of their relationship.

116. This is not clear cut. I note that the Court of Appeal held in **Quashie supra** that the absence of an obligation on the employee to pay for services could defeat a claim the individual was an employee. In this case there was no overriding obligation on the respondent to pay the claimant as such. The parties wanted a return on their investment and eventually decided to supplement their dividends by the paying of a low basic wage but it was clear that each of the directors accepted there was no obligation that *required* the respondent to pay them for the services they rendered by way of a salary.

117. Indeed the parties agreed that the small sum that they paid themselves as a wage would be suspended until the parties agreed this would be resumed (when they considered the company was in a position to pay them).

118. This differs from the position as set out in **Knight supra** where the Court notes that just the fact one party chooses not to take a salary does not mean the relationship cannot be one of employment.

119. The way in which the parties conducted themselves with regard to payment is an important consideration in this case and in my opinion is a significant factor to be taken into account in determining whether the relationship really is one of employment. The mutuality of obligations that exists in this case is limited.

120. There is, however, an obligation on the claimant to work for the respondent and carry out his commercial activities and to that very limited extent I find that there was mutuality of obligations.

### Control

121. The authorities make it clear that there requires to be sufficiency of control on the part of the employer in relation to the individual. In other words the individual needs to be subject to the employer's director and order. In this case the level of control over the directors was very limited. I say so because it was clear that there was no clarity as to the level of output required from each of the directors, including the claimant. Whilst each of the directors understood they would each work around 15 and then 20 hours a week on the business, there was very clear and wide discretion afforded to each individual to determine what, if any, work was done.

122. There was no requirement that any of the directors would work a specific (or indeed any) number of hours – this was a matter for each individual. The fact the other 2 directors had a perception that the claimant was not working sufficient hours and did little to deal with the issue initially evidences this point.

123. There was no suggestion that the company could insist the claimant carry out a particular task if he decided against it. Each of the directors was given clear authority in their area of the business. While decisions were taken consensually, where possible, it was clear that each director did have autonomy. The comment that no one director can override the other is emblematic as to how the directors saw the relationship working – they would each work in their respective area and seek to grow the business.

124. I find that there was very limited control by the respondent over the claimant (and indeed the other directors). They were in business together with a view to maximising income. They were each given their own responsibility and power and essentially able to get on with it themselves without the involvement of any of the others, who had no real power to interfere. I accept decisions would normally be taken by agreement but the individuals did not regard each other as having “control” over them and there was no evidence that they regarded themselves as under the control of the company as such. They were all working together.

125. I find that there was therefore insufficient control within the relationship between the claimant and the employment for this to be an employment relationship. There was an absence of even a general framework of control. The claimant clearly believed that he had responsibility for the large number of areas for which he took

control. He was the ultimate arbiter in respect of those areas and he decided what happened.

126. I did not consider the 20 examples given by the claimant's solicitor as being evidence of a sufficiency of control that would give rise on balance to an employment relationship. I preferred the respondent's solicitor's submissions that these factors in fact demonstrated that the claimant was, by and large, himself in control and not subject to the respondent's direction or order. This was a question of sufficiency of control rather than control *per se*. I require to make a judgment from the factors as a whole.

127. Dealing with each of the points raised by the claimant's solicitor in summary:

- a. I do not accept the claimant was "subject" to the disciplinary procedures as such. The parties may well have applied them but that was in exercise of their discretion. There is no evidence that the respondent was required to apply such policies to the 3 directors (in contrast to the position in relation to employees).
- b. The same reasoning applies in relation to the grievance process.
- c. The claimant did allocate tasks but he was not "taking direction" in the sense of being controlled by the other directors. The claimant was clear as to what he wished to do and had been given clear autonomy and control over his sphere of activity.
- d. The claimant did discipline staff but this was part of his role and does not evidence control by the respondent.
- e. Managing, training and mentoring staff was part of his duties and clearly necessary to maximise the productivity of staff. That did not evidence control by the respondent but was evidence of the claimant's power over his area of operation. This also applies to his role in relation to bonuses and pay rises.
- f. The fact staff came to the claimant was indicative of his expertise not evidence the respondent controlled the claimant in some way.
- g. His flexible working arrangement and holiday position demonstrated the control the claimant had in relation to his work.
- h. Meeting clients and third parties was not a requirement as such of the claimant's role and in any event it was part of his job since it maximised the value of the business. There was no evidence of the respondent controlling the claimant in this regard.
- i. The fact the claimant had a work email address, title of Commercial Director, had property of the respondent (which he used for his personal use too) and featured in the internal phone directory was not evidence of a sufficiency of control but enabled him to carry out his role.
- j. The fact the claimant could delegate his functions to others demonstrated the control the claimant had as did the fact he was responsible for the Technical Team.

128. In short I do not find a sufficient framework of control existed on the part of the respondent with regard the claimant to make him an employee. There was some control but in sufficient in my opinion to render him an employee. These factors (and



the existence of some degree of control) are, however, relevant in determining whether or not the claimant is a worker, to which I shall return below.

Balancing the factors on the round

129. While I find an absence of a sufficiency of control, which would otherwise defeat the argument the claimant was an employee, I shall go on to consider the other factors and what I would have decided had there been sufficient control. This consideration is also relevant in determining whether the claimant was a worker (or in fact whether the respondent has provided enough evidence to rebut the presumption that he is a worker). The lack of sufficiency of control does not by itself prevent the claimant being a worker since the full relationship requires to be considered.

130. No one factor is conclusive and that I require to assess the relevant factors within the relationship and step back and make a qualitative assessment of the nature of the relationship given the facts.

131. In my view having done so I would have concluded that there are a number of significant factors which would defeat the argument that the claimant was an employee (but not that he was a worker in the circumstances).

132. It was clear that the activities the claimant had to carry out were significant. He had a large amount of responsibility for the commercial area of the business. That in itself, however, is neutral since an employee could well have such a responsibility as much as anyone else engaged for those reasons whether as a senior employee or as a self employed individual.

133. One of the important considerations was the degree of financial risk taken by the claimant (and the other directors) combined with the opportunity each had to profit from sound management of business affairs. In this case each of the directors contributed a 5 figure sum to generate leads. This is inconsistent with employment status and is emblematic as to how the parties saw their relationship, which was as individuals working together to generate profit. There was a large degree of risk in that investment.

134. The way in which the parties paid themselves is also significant. The parties were not paid "wages" in the same way as the other staff in the company were. They sought accountancy advice to maximise their pension entitlement and ensure they achieved the most tax efficient status. The correspondence showed this was with a view to ensuring the business was placed in the best possible way for eventual sale.

135. Each of the directors together agreed to pay a nominal salary just as each of the directors together agreed to suspend payment of that sum because the financial position of the business could not sustain payment. That is not consistent with employment status. The individuals have total autonomy as to how profits are distributed amongst themselves and how (and whether) such sums are paid.

136. While I do not accept the respondent's solicitor's submission that the way in which the parties chose to structure their relationship is decisive, it is a very powerful factor that suggests the relationship was not one of employment on the facts of this

case. There is no obligation to pay the claimant for the work he did under the contract he had with the respondent. This is close to the position in *Quashie* where the court held the absence of an obligation to could defeat the argument the individual was an employee but I accept there are differences in this case.

137. The sum they chose to pay themselves bore no relationship to the work done nor their contribution. That is a relevant consideration. It was a fee since the sum was chosen to maximise the pension position. It was not remuneration for work carried out irrespective of what label the parties applied to it or how it was taxed.

138. This is different from the parties deciding to delay payment of wages which would otherwise fall due (such as the position in the **Knight** *supra* case). In this case the parties have the power and discretion to decide whether to pay themselves wages at all. They could (and did) decide not to pay wages and rely on dividends as their income.

139. There are a number of factors which do support the relationship being that of employment and I have considered these carefully. The claimant's solicitor's submissions set these out and I have taken them into account.

140. It was clear that the parties used the word "employee" in relation to each other in certain cases. They did in some cases apply this label to their relationship. This was often used where a dispute arose. I also take into account that procedures were followed that would be followed by employees such as the grievance procedure and appeal process. Nevertheless this was the way in which the parties dealt with the disputes that existed did not substantively alter the nature of their relationship. This is a factor that is placed into the balance.

141. I require to look beyond the label used. The parties may well have regarded themselves as employees and conducted themselves as such but in reality I do not find that their relationship was actually an employment relationship at all. I accept the respondent's solicitor's submission that the parties (and their advisers) did not properly consider the legal characterisation of their relationship and simply applied the label of "employee" and the incidents thereof. It is not surprising this issue was not raised as it was not relevant at the time in question. I require, however, to look at the totality of the relationship.

142. A similar point (from the opposite side) exists in relation to the fact the claimant called himself "self employed" in his tax returns and on his mortgage application. These are factors that go into the balance but in my view are not decisive. This point did support the position that the claimant was prepared for that label to be applied to his position and that the claimant considered himself self employed at least for some purposes.

143. The fact that no written statement was issued is evidence of the fact that the parties did not consider the issue of employment relationship. The same applies in relation to the absence of placing a copy of the contract in a place that complies with the company law. I prefer the claimant's solicitor's submission that this simply shows the parties did not apply their mind to this obligation, rather than it showing evidence of specific intention of the parties' desire to create a particular relationship.

144. The fact they paid themselves a wage (for the reasons set out above and subject to the limitations set out above) necessarily resulted in tax being due and a P60 being generated. But that is only one factor which needs to be balanced against the other (and in my view more significant) parts of their relationship.

145. The fact one of the directors received a benefit that is due to employees (paternity pay) does not tip the balance in this case in relation to the claimant.

146. The way in which the parties carried out their work is also relevant. Each of the directors was able to decide how many hours they would work and when (if at all) they would work and whom they would instruct or hire to do such work. This supports the argument the claimant was not an employee.

147. I also accept the respondent's solicitor's submission that the way in which the directors treated and communicated with each other on a day to day basis is relevant. Their language and general approach shows that they each considered themselves as equal authorities (which they were) and thereby were in control of their (and the company's) destiny. They did not see themselves as being subject to the normal limitations of an employee (in terms of the trust and confidence one would expect to see in existence in dealing with fellow employees). In other words they did not treat themselves (nor indeed the other directors) as employees of the respondent.

148. In short, I have concluded that the claimant was not an employee of the respondent during his engagement in light of the factors of the relationship and my assessment of them in light of the evidence I heard given the legal test. I find that he was not an individual who worked under a contract of employment. The essential ingredient of sufficiency of control was absent and in any event, standing back to assess the relationship and balancing all of the factors and making an informed and qualitative assessment of all the relevant factors, results in my finding that the relationship was not that of employment.

#### Worker

149. I am satisfied, however, that the claimant was a worker. I have found that there was a contract between the claimant and the respondent whereby the claimant would be obliged personally to provide his services. It is also clear from the discussion above that the claimant was not in business in his own account and the respondent was not his client or customer. The dominant purpose of the relationship was that the claimant provide his commercial expertise to the benefit of the respondent.

150. While not under sufficient control of the respondent to be an employee, the relationship was such that the claimant was controlled to an extent by the respondent to satisfy the legal test to be a worker. I apply the reasoning in **Byrne supra** and **Jivraj supra** (which was been upheld recently in the **Pimlico** 2018 IRLR 872 and **Uber** [2018] EWCA Civ 2748) find that the claimant was a worker. Although the way the relationship worked in practice resulted in my finding he was not an employee, the factors and balance are such that I find he was a worker.

151. I considered the **Parsons supra** case to which the respondent's solicitor referred. While this case has similarities with the case under consideration, I do not consider it to be directly in point. In that case the only issue was whether the claimant (a director in a family business) was an employee. There was no oral or written contract, no evidence was kept (as required under company law) and wages were accounted separately for the directors. That case did not address whether or not the test for worker status had been satisfied and indeed was determined in 1979, before the current authorities set out the test for worker status, which I must apply.

152. The points relied upon by the claimant's solicitor as evidence of control set out above, while not leading to a sufficiency of control with regard to employment status, provide strong reasons why the claimant satisfies the definition of worker as interpreted by the authorities. He was clearly obliged to provide his services on a personal basis and was not doing so genuinely in business on his own account.

153. The respondent's solicitor's submission that the level of work carried out by the claimant and his significant responsibilities result in the claimant being an office holder (and not worker) are not, in my view, sound. Those specific factors – the claimant's involvement and control and his operational duties and his decision-making functions and powers – all show that the claimant was personally required to provide his services to the respondent and that he did so as a worker. This was not akin to an office holder situation given the evidence I heard.

154. I accept the respondent's solicitor's submissions that the directors were in business together and had the power to hire staff and gain from sound investment etc but I do not consider this defeats the argument that the claimant was a worker given the totality of the relationship and the way in which the parties carried out their business as a whole.

155. I require to apply the legal tests and note that the boundary is pushed further in favour of the worker (in comparison to the legal test for an employee). I stand back and assess the evidence qualitatively and make an informed decision as to whether the constituent element of worker status have been satisfied. In this case I am satisfied the claimant was a worker for the duration of his engagement.

Company had given the power to employ a director

156. Had I been required to determine the issue, I would have found there to be no constitutional bar to the company employing and paying directors. This is not a relevant consideration in determining whether the claimant was a worker.

157. I preferred the claimant's solicitor's submissions in this matter. I reject the suggestion that the case of **Guinness supra** and **Ball supra** would have rendered the relationship void. The **Duomatic supra** case demonstrates that it is possible for implicit agreement to exist. The respondent's solicitor accepted that this may be so, particularly, as here, where the shareholders and directors each knew exactly what was being agreed (paying the directors a wage) and no one disagreed. The absence of a formal minute of that decision would not in my view result in the decision being *ultra vires*. Each of the directors consented to the payment and would have been in full agreement as to the position adopted in full knowledge of the consequences.

No illegality

158. I reject the respondent's solicitor's submission that the relationship is tainted with illegality. The parties took independent taxation advice and conducted themselves in a way which they considered beneficial. There was no express misrepresentation or attempt to conceal any illegality. There was no illegality in the way the relationship was formed or implemented. The contract was not tainted with illegality and there is no bar on the enforcement of the contract.

Summary

159. In all the circumstances therefore I find that the claimant was a worker of the respondent throughout his engagement by the respondent. He satisfied the legal test as set out in section 230(3) of the Employment Rights Act 1996 as interpreted by the courts. He did not satisfy the definition of employee as set out in section 230(1).

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Employment Judge Hoey

Date: 17 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
19 June 2019

FOR THE TRIBUNAL OFFICE