Case: 1807539/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Nicholls**
Respondent: **SD Civil Engineering Limited**

AT A HEARING

Heard at: **Leeds by Skype for Business On: 26th June 2020**
Before: **Employment Judge Lancaster**

Representation
Claimant: Mr A Beard
Respondent: Mr P Maratos

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was Skype for Business (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 518 pages together with a supplemental 31 page bundle provided by the Claimant, together with the witness statements and the Claimant's skeleton argument.

JUDGMENT

1. The Claimant does not have the necessary continuity of service to bring a complaint of unfair dismissal. That part of the claim is struck out.
2. The claim for holiday pay accruing in the period April to August 2019 will continue.

REASONS

1. This was a preliminary hearing to determine the issues as to the Claimnt's employment status and continuity of employment. The decision was reserved and written reasons are therefore now provided.

Background facts and chronology

2. The Claimant commenced employment with a company KDH Publications Limited ("KDH") on 10th October 2011, a new company which had been incorporated only a month before. That is the only written contract of employment which there is in this case.

3. Mr Sean Davis held a 50 per cent shareholding in KDH.

4. The Claimant was paid by KDH from 31st October 2011 until 30th September 2012. It appears that at about that time KDH in fact ceased trading, although the Companies House records show that there were in fact no director's resignations at that time and it was not finally dissolved until April 2015.

5. Both before and after the receipt of his final wage slip from KDH in September 2012 the Claimant submitted invoices in his own name to the Respondent. SD Civil Engineering Limited is a company incorporated in March 2011, owned by Mr Davis and his wife and which, it is not disputed, he controls.

6. The invoices prior to September 2012 were not ever paid directly to the Claimant personally. They appear to represent an internal accounting exercise between the two companies to reflect the fact that the Claimant was in reality now doing work exclusively for the Respondent and his salary was being charged to it by KDH. There is, however, no evidence of any actual cross-funding taking place.

7. There was no formal termination of the contract with KDH, and no P45 was ever issued. In the ET1 The Claimant asserts that his employment with the Respondent began on 1st October 2012.

8. The personal invoices which were generated by the Claimant to the Respondent after September 2012 are in identical format to the earlier ones in the same fixed amount (£1200.00), and which can therefore be taken to represent a mechanism for making payments at his continuing level of salary.

9. The common understanding of the Claimant and Mr Davis was, however, that any direct engagement by the Respondent, rather than on a "secondment" from KDH, was to be treated from then on as being on a self-employed basis. It was the Respondent's avowed practice not to employ anybody apart from Mr and Mrs Davis except on national minimum wage rates.

10. The Claimant thereafter made his own tax arrangements as a self-employed person. It may well be, however, that he did not fully appreciate the implications of this and certainly at the end of that first year of working in this way he was faced with an unexpected tax demand for some £900.00. It may be that in these circumstances Mr Davis then met that liability on behalf of the Claimant, the evidence is inconclusive.

11. Thereafter arrangements were made by agreement between the Claimant and Mr Davis for him to register with the construction industry CIS scheme, under which the Respondent then deducted tax at source. This is of course still an express acknowledgement that he was being treated a s self-employed.

12. I am satisfied, having adjourned the decision to allow further written submissions on the point, that registration under the CIS scheme does not give rise to any possible question of illegality as it does not, in fact, involve any representation that the Claimant was actually working on site as a construction worker -which he was not, at least not until 2019- rather than that he was working for a company in the construction industry.

13. On 5th August 2014 the Claimant and Mr Davis, as equal shareholders and co-directors formed the company Vagbahn Limited. This was an entirely separate

business involved in the sale of automobile parts (the name is constructed from "Volkswagon Audi Group" and "autobahn"). It was the Claimant as director who was the point of contact with the company accountants and who signed of the company accounts.

14. Between May 2018 and March 2019 the Claimant was paid as an employee of Vagbahn and received wage slips. His tax return for that year therefore records that he received income from both employment and self-employment, whereas previous returns had shown only profit from self-employment. The accountants record his "leave date" with Vagbahn as being 12th April 2019.

15. Vagbahn was ultimately not at all successful, even after some diversification of the work undertaken. It appears fairly clear form the contemporaneous emails that the immediate reason for its demise was that Mr Davis decided to withdraw his financial support, but that it was the Claimant who was primarily engaged in the process of closing it down. After 12th April 2019 the Claimant resumed working directly for and being paid by the Respondent. He was again treated a self-employed and paid under the CIS scheme. He resigned as a director of Vagbahn on 22nd May 2019 and the company was dissolved on 23rd July 2019.

16. The Claimant stopped working for the Respondent on 28th August 2019.

Conclusions as to continuity of service

17. I am satisfied that the period from May 2018 to March 2019 represents a break in any continuity of employment with the Respondent from 1st October 2012.

18. I do not need to resolve the dispute of fact as to who it was who initiated the commencement of payments through Vagbahn. It is not material.

19. The Claimant, it matters not for what reason, knowingly and voluntarily began receiving payments as an employee and stopped receiving self-employment income. He clearly intended that that change in circumstances, where he acted in a dual capacity as an employed and statutory director of the employer company, should create a legal relationship. He now had created an expectation and an entitlement to be paid through the company payroll. That is sufficient, even without his having issued himself with a written contract or a statement of terms and conditions, to provide clear evidence of at least an implied contract of employment. There is no automatic bar upon a shareholder, even a majority shareholder, being or becoming an employee under a contract for service and that is what the Claimant elected to do.

20. Vagbahn also cannot therefore properly be regarded as merely a payroll company for the Respondent. The payment of wages as an employee through Vagbahn was consciously and deliberately a completely different arrangement to the way the Claimant had been paid through the Respondent (and indeed to the way he would resume being paid after April 2019). In no sense did Vagbahn simply become the vehicle for payment of a salary by the Respondent, where no such salary had ever been agreed or paid previously. The enforceable obligation arising in this case was solely that as between the Claimant and Vagbahn.

21. The presumption of continuity of employment in section 210 (5) of the Employment Rights Act 1996 does not apply where there has been a change of employer (section 218 applies the provisions of this part of the Act only to employment by one employer, except in specified circumstances).

22. The principal issue in this case is, therefore, whether or not Vagabahn and the Respondent are associated companies within the meaning of section 218 (6) and 231 of the Employment Rights Act 1996.

23. That is did a third person, Mr Davis, directly or indirectly have control of both companies. As it is not disputed that he controlled the Respondent the sole question is whether he also controlled Vagbahn. Control means legal control: that is control by the majority of votes attaching to shares, exercised in general meetings of the company — *Secretary of State for Employment v Newbold and anor 1981 IRLR 305, EAT*. That is however to be understood as practical and not merely theoretical control: *Tice v Cartwright 1999 ICR 769, EAT*. Whilst this appreciation of the nuanced realities of particular situations has led to a number of decisions in respect of the situation where control may be effected by a group of persons that is not the situation here.

24. Practically and legally Mr Davis as a single individual did not control Vagbahn. He was an equal shareholder with the Claimant, and could not outvote him. There is no reason to find that the Claimant was to be regarded as merely the nominee of Mr Davis, who could therefore direct his vote. There was certainly no binding agreement between them to the effect that the Claimant would vote in accordance with Mr Davis' instructions. This was from the outset a joint venture where the Claimant thereafter took an active part in the management of the company's affairs, even though any financial investment was that of Mr Davis.

25. The decision in *Schwarzenbach and anor t/a Thames-side Court Estate v Jones EAT 0100/15* does not assist the Claimant's argument. There is in this present case no ambiguity or lack of transparency in the identification of the legal control by way of shareholding. I do not therefore need to have regard to any considerations of "de facto" control as an aid to establishing where the "de jure" (legal) control in fact lies.

26. Vagbahn is not therefore an associated company of the Respondent and the 11 month period of employment with Vagbahn breaks any continuity there may have been.

Facts and conclusion as to employment status

27. Between September 2012 and May 2018 I accept the Claimant's evidence that despite being treated as self-employed, he was in fact fully integrated into the Respondent's business, described as office manager and regarded by clients and customers as part of the management team. I accept that he worked full-time for the Respondent keeping normal office hours and that he did not receive any significant income from his activities as a DJ or in selling on ebay such as to suggest that he required the flexibility of being self-employed in order to accommodate these other interests. Similarly the fact that he was also a director of a company formed to manage property he owned is not at all inconsistent with his being an employee of the Respondent. There was, of course, no substantial change in role when he ceased to be an employee of KDH assigned to work for the Respondent under the direction of Mr Davis

and started being paid gross at exactly the same rate but upon submission of personal invoices direct to the Respondent.

28. I accept the Claimant's evidence as to the types and level of work which was entrusted personally to him, that he attended courses that the Respondent paid for in connection with his work and that he was authorised to use the company bank card. The obligation imposed upon the Claimant was therefore to work for the Respondent in a highly responsible and trusted position but under the ultimate direction of Mr Davis, in return for which he was paid a regular weekly sum, described as a "wage".

29. Although the Claimant had a great deal of autonomy that was because of the level of seniority within the Respondent's business. As Mr Davis conceded in evidence: "He was the office administrator..everything you can do on a computer from an office chair; I'm the one who went out on site and on the tools..He was "the office guy"; he was everything in that office; he made the decisions in that office."

30. Although initial registration with HMRC as self-employed and later under the CIS scheme is suggestive of the fact that he was not an employee it is not conclusive and, on balance, taking into the account the various factors identified in the relevant authorities (particularly of course — *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*) I find that during this period the Claimant was an employee of the Respondent.

31. However that deemed employment necessarily ended when, as I have found, he entered in to a separate contract of employment specifically with Vagbahn. Although I accept that throughout this 11 month period the Claimant continued to provide office administration for the Respondent the agreement which he had entered into with Vagbahn is wholly inconsistent with his now being an employee of the Respondent.

32. In April 2019 there must have been an agreement that the Claimant would again be paid by the Respondent under the CIS scheme, the arrangement which had ceased in May 2018. Whether or not this is properly described as the Claimant "applying for a job with the Respondent" is not, in my view material: it certainly marked a new and separate phase in the legal relationship. It is, of course, on the face of it confirmation that the common understanding between the parties was that once more the Claimant would now be treated as self-employed.

33. Also the nature of the work now undertaken by the Claimant was not the same as it had been in the period from 2012 to 2018. The Claimant's role was no longer that of the integral office administrator – and indeed that alleged diminution in responsibility would have formed the basis of the constructive unfair dismissal claim had it gone ahead. Although he continued to do some office based tasks such as the production of the latest version of the company portfolio his self-description within that document as the key administrative contact for the company was, in reality, becoming increasingly inaccurate.

34. In this period the Claimant's position is much more readily identifiable as that of a labour-only-subcontractor of the type usually associated with payment under the CIS scheme. He was primarily working as a labourer on a site in the Midlands. He had also in January 2019 received his CSCS certificate (admittedly paid for by the Respondent

and at a time when he was employed by Vagbahn) which meant that after his resumption of work directly for the Respondent he was now health and safety qualified to work in construction.

35. In this context the fact that the Claimant was registered under the CIS scheme becomes a highly relevant factor pointing the Claimant not being an employee. He was however working exclusively for the Respondent , as directed by Mr Davis, and was not solely working on site. He also continued to be paid a set weekly amount, with only an addiitonal allowance to cover travel away from home.

36. On balance I therefore conclude, having regard also to the contextual background afforded by the earlier period of employment up to 2018, that in the period April to August 2019 the Claimant was again an employee of the Respondent.

37. In any event he was a worker providing services personally for the Respondent as defined by section 230 (3) of the Employment Rights Act 1996.

38. The only claim in respect of this 4 month period which is pleaded in the ET1 Is in respect of accrued holiday pay up to termination. As this appears be simply a matter of calculation the parties must seek to agree the matter and notify the Tribunal in writing no later than 28 days from the sending of this judgment whether the claim is now withdrawn on settlement or identify any remaining issues that require determination at a final hearing.

EMPLOYMENT JU DGE LANCASTER

DATE 23rd July 2020