



EMPLOYMENT TRIBUNALS

Claimant: Miss W Phillips
Respondent: MNE Accounting Ltd
Heard at: Midlands (East) Region – Hybrid Hearing
On: 13 July 2021 and 28 August 2021
Reserved to: 14 September 2021
Before: Employment Judge Blackwell (sitting alone)

Representation

Claimant: In person
Respondent: Mr Ali of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The Claimant was not an employee of Sigma Accounting Solutions Ltd and therefore she does not have the qualifying period of service to bring a claim for unfair dismissal pursuant to Section 108 of the Employment Rights Act 1996.

REASONS

I heard evidence from Miss Phillips and Miss Truman for the Claimant and from Mr T Emmony for the Respondent. There was an agreed bundle of documents.

Introduction

1. The hearing resumed part-heard from 13 July 2021. I was able to record the following as agreed findings of fact.

1.1 Since the foundation of Sigma Accounting Solutions Ltd (Sigma), Miss Phillips has been the only shareholder, having 100% of the shares.

1.2 There was no written contract of employment as between Sigma and Miss Phillips.

1.3 RSB Accountancy Practice Ltd ceased to trade in 2018.

1.4 Sigma purchased the premises at Hempshaw Lane, NG6 8PF.

2. Orders were also made as to disclosure and the submission of supplement evidence which led to a revised bundle of documents and a supplemental statement from Mr Emmony.

3. Miss Phillips shortly before the hearing made complaints about the late preparation of documents and the submission of a skeleton argument by Mr Ali, who replaced Mr Flood in representing the Respondent. As to the late submission of documents, Miss Phillips confirmed that nonetheless she was properly prepared to proceed. As to the skeleton argument, I informed Miss Phillips that it is perfectly normal for skeleton arguments to be presented on the first day of the hearing and, in any event, I gave Ms Phillips time to consider the contents of Mr Ali's document. Miss Phillips also objected to the use of a summary of her earnings prepared and submitted by Mr Flood at the first hearing. I indicated I would accept it as a summary of material already within the bundle unless Miss Phillips challenged it, which she did not.

4. I heard evidence from Miss Phillips herself and a former colleague, Miss Truman. For the Respondent, Mr Emmony gave evidence and there was an agreed bundle of documents and references to page numbers in that bundle.

The issue

5. It is for the Tribunal to determine whether Miss Phillips was an employee of Sigma Accounting Solutions Ltd and/or **whether she has the qualifying period of service to bring a claim for unfair dismissal.**

6. It was common ground that if Miss Phillips was not an employee of Sigma, then she did not have sufficient qualifying service to bring a claim against the Respondent.

The law

7. Employment Rights Act 1996
"230 Employees, workers etc.

(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."*

8. As to the status of employee, there is a plethora of case law. A number of cases were cited to me by both parties but both cited the case of ***The Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld [2009] EWCA Civ 280***. At paragraph 26 of the Judgment of Rimer LJ is the following:

“What is a contract of employment?”

26. The logical starting point is a reminder of the essentials of a contract of employment. MacKenna J provided a well-known summary in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [\[1968\] 2 QB 497](#), at 515:

"A contract of service exists if these three conditions are fulfilled. (i) 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. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

..."

9. Lord Justice Rimer went on to approve MacKenna J's reference to control as follows:

"... the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done."

10. Lord Justice Rimer went on to consider the line of authorities beginning with ***Lee v Lee's Air Farming Ltd [1961] AC 12*** which Miss Phillips cited to me in her closing submissions and which established that as a matter of principle, the sole and controlling director a limited company can be an employee of that company.

11. At paragraph 78 of ***Neufeld***, Rimer LJ went on:

"78. Having dealt with that aspect of the *Bottrill* guidance, Elias J then said this:

"98. How should a tribunal approach the task of determining whether the contract of employment should be given effect or not? We would suggest that a consideration of the following factors, whilst not exhaustive, may be of assistance:

(1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee: he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.

(2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he is practice able to exercise real or sole control over what the company does (*Lee*).

(3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes ([*Connolly*]).

(4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.

(5) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para. 96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.

(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (*Fleming*). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.

(7) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the *Lee* approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.

(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that that fact alone will ever justify a tribunal in finding that there was no contract in place. That would be to apply the *Buchan* test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve these doubts one way or another."

The appeal tribunal held that the employment tribunal's conclusion that the claimant was not an employee was well open to it on the facts.

Conclusion on and summary of the applicable principles”

12. At paragraphs 88 – 90:

“88. We respectfully agree with the essence of the factors referred to by Elias J in paragraph 98 of his judgment although we add a comment on four of them. Mr Tolley criticised his first factor as amounting to a suggestion that the mere production of a written contract purporting to be a contract of employment will shift to the opposing party the burden of proving that it was not a genuine such contract. We doubt if Elias J was intending to refer to a legal burden. In cases where the putative employee is asserting the existence of an employment contract, it will be for him to prove it; and, as we have indicated, the mere production of what purports to be a written service agreement may by itself be insufficient to prove the case sought to be made. If the putative employee's assertion is challenged the court or tribunal will need to be satisfied that the document is a true reflection of the claimed employment relationship, for which purpose it will be relevant to know what the parties have done under it. The putative employee may, therefore, have to do rather more than simply produce the contract itself, or else a board minute or memorandum purporting to record his employment.

89. We consider that Elias J's sixth factor may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced into writing. This will obviously be an important consideration but if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim. In both cases under appeal there was no written service agreement, but the employment judges appear to have had no doubt that the parties' conduct proved a genuine employment relationship.

90. As for Elias J's seventh and eighth factors, we say no more than that we regard them as saying essentially what we have said above in our "never say never" paragraph.”

Findings of fact

13. Since the foundation of Sigma Accounting Solutions Ltd (Sigma), Miss Phillips has been the only shareholder, having 100% of the shares.

14. There was no written contract of employment as between Sigma and Miss Phillips.

15. RSB Accountancy Practice Ltd ceased to trade in 2018.

16. Sigma purchased the premises at Hempshaw Lane, NG6 8PF.

17. In May 2003, Miss Phillips incorporated Sigma and began work with that Company in December 2003. Miss Phillips worked hard to build up the Company and was successful in attracting new clients. Employees were recruited, including a Mrs Baines who remained with the Company for a number of years, she was also Company Secretary.

18. In October 2011, Sigma purchased the business of R S Burton Ltd (RSB) which ran alongside Sigma. There were four Directors of RSB, including Miss Phillips and Mrs Baines.

19. As recorded above, Sigma purchased premises at Hempshill Lane in April 2013

20. In late 2013, Miss Truman joined Sigma.

21. In 2018, the business of RSB ceased to trade and its remaining clients were transferred to Sigma. At this time, it seems that the Company had five individuals working for them, including Miss Phillips and Miss Truman.

22. On 6 March 2020, Miss Phillips sold Sigma to MNE and became an employee of MNE as Head of Tax and Financial Accounting. She resigned with immediate effect on 5 October 2020.

23. As to working practices at Sigma, I accept Miss Phillips' evidence supported by Miss Truman as to the following:-

23.1 Miss Phillips was paid via PAYE in the same way of all employees.

23.2 Miss Phillips did not unilaterally make all the management decisions; Miss Truman described it as a collegiate or socialist approach to management.

23.3 In relation to the procedure of booking holidays, Miss Phillips adopted the same procedure as the others.

23.4 Miss Phillips always worked from Sigma premises and used Sigma equipment.

24. In the Asset Purchase Agreement by which MNE acquired the assets of Sigma, two employees were listed - see page 86. At page 88, Miss Phillips warranted that Sigma had no other employees.

25. Miss Phillips negotiated a new contract of employment which begins at page 93. At paragraph 1 of that contract is the following heading:-

"1. Date of Commencement of Employment: 2 March 2020

No other period of employment with this Company or any previous employer counts towards your period of continuous employment."

26. Miss Phillips took legal advice about the contract of employment (see pages 735 – 740) and at no stage did either she or solicitors acting on her behalf raise the issue of continuity of employment.

27. In relation to Miss Phillips' remuneration whilst at Sigma, the following is evident:

27.1 She was remunerated in the majority by way of dividends.

27.2 Her pay fluctuated significantly and did not correlate with hours worked and for many months she received no pay or only nominal pay.

28. Miss Phillips made a number of loans to the Company in order to keep it afloat. She also said in cross-examination that in respect of the wages she was owed by Sigma, she expected to receive recompense for such arrears out of the sale price of Sigma to MNE.

Conclusions

29. I fully accept that Miss Phillips at all times believed herself to be an employee of Sigma. I further accept that she ran Sigma in a collegiate way and consulted about major decisions and also in relation to recruitment. She told me that she wore two hats, namely as owner of the Company with a duty to ensure that it stayed afloat and her second hat was as an employee who carried out both client work and managerial and regulatory functions.

30. She also explained that the failure to identify herself as an employee at the time of the sale to Sigma and the failure to raise the issue of continuous employment was as a consequence of a lack of advice from solicitors representing her. Whilst I found Miss Phillips to be generally a straightforward witness, I find it surprising that she did not query with those advising her her own position, particularly given that she gave a warranty in that regard. I bear also in mind that Miss Phillips is a qualified accountant of many years of experience.

31. The difficulty that Miss Phillips faces given that there was no written contract of employment is to establish the terms of an oral contract. She asserts that her hours were 37½ hours per week with core hours between 10 am to 4 pm and working the rest on a flexible basis to fit in with health issues and sleep apnoea. However, that is not consistently reflected by the evidence in the bundle. Further, as I found above, Miss Phillips' remuneration fluctuated and there were many months when she was not paid at all.

32. Having regard in respect of the guidance set out above at paragraph 78 of the **Neufeld** judgment, it is clear that Miss Phillips did pay tax and national insurance as an employee. I also find that in reality, notwithstanding the collegiate management style, the ultimate control was with Miss Phillips because were it not so viability of Sigma would have been at risk. As to working hours, the evidence does not reflect Miss Phillips' assertion of a 37½ hour week.

33. It is also clear that at times of financial weakness, Miss Phillips went without pay and did make loans to Sigma.

34. Neither fact is consistent with a contract of employment.

35. I also put weight on the fact that the majority of Miss Phillips' remuneration was paid by way of dividend and dividends are referable to shareholding, not to the contract of employment.

36. I therefore conclude on balance that Miss Phillips was not an employee of Sigma and therefore does not have sufficient continuity of employment to bring a claim of unfair dismissal applying Section 108 of the 1996 Act.

Employment Judge Blackwell

Date: 22 September 2021

JUDGMENT SENT TO THE PARTIES ON

23 September 2021

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C. Hamilton

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