Case No: EA-2020-000123-BA (previously UKEATPA/0126/20/BA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 December 2021

Before :

HH JUDGE SHANKS

MR H SINGH

MR D G SMITH

- -

Between :

Bradley Rainford	**Appellant**
- and -	
Dorset Aquatics Limited	**Respondent**

- -
- -

Mr G Whitehouse (instructed by Kernon-Kelleher) for the **Appellant**
Mr D Brown (instructed by DAS Law) for the **Respondent**

Hearing date: 18 November 2021

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

The claimant (Bradley) and his brother (Ben) were the co-directors of and 40/60 shareholders in the respondent which was a small family company. Bradley worked as site manager at a company site. The brothers were each paid an equal "salary" agreed between them (latterly £1,500 per month) and had PAYE and NI deducted/paid in respect thereof, but the EJ found that this was done on the advice of company accountants for tax reasons without any positive input by either brother. They also agreed between them on the amount of dividends to be paid at the end of the year in accordance with their shareholdings. There was no written employment contract or other record relating to Bradley's status.

In June 2018 a dispute arose and in due course Bradley brought employment tribunal claims for unfair dismissal, notice pay, unlawful deductions and holiday pay. The EJ decided at a PH that he was not an employee or otherwise a worker for the purposes of s 230 of **ERA 1996** and that his claims were therefore unsustainable.

The EAT rejected Bradley's appeal which was brought on three grounds:

(1) Although there is no reason in principle why a director/shareholder of a company cannot also be an employee or worker, it does not necessarily follow that simply because he does work for the company and receives money from it he must be one of the three categories of individual identified in s 230(3);

(2) It had been open to the EJ to find that Bradley had a right to substitute another to act as site manager in his place based on Ben's evidence at the hearing that he would have no problem with that and notwithstanding that the issue never arose in practice;

(3) The EJ had not made the error of regarding Bradley's status as a director and/or shareholder as being mutually exclusive with status as an employee. The level of Bradley's control over the company and the fact that he shared with Ben in the risk as to the company's success were referable to his status as a director/shareholder and not directly relevant to the question whether he was an employee or worker but they formed part of the "backdrop" and had not had any significant influence on the EJ's decision.

Overall, the EJ's conclusion that Bradley was not an employee or worker was one of fact based on relevant factors and was not perverse.

JUDGE SHANKS:

Introduction

1. This was an appeal against a reserved judgment of Employment Judge O'Rourke sitting in the Bristol employment tribunal which was sent out on 16 January 2020 following a preliminary hearing. The judge found that the appellant was neither an "employee" nor a "worker" for the purposes of section 230 of the **Employment Rights Act 1996** and that his claims against the respondent company for unfair dismissal, unpaid wages, notice pay and holiday pay were therefore unsustainable.

2. The appeal hearing was held remotely, with the associate in a court room at the Rolls Building but all other parties to the proceedings elsewhere; there was no objection to this and it was plainly in the interests of justice. We thank both legal representatives for their clear and concise submissions.

Facts

3. The appellant, Bradley Rainford, and his brother Ben were co-directors and shareholders of the respondent company, Dorset Aquatics Ltd, which did landscape work and made water features in the Dorset area. The company had been entirely owned by their father. It was later shared 50/50 between the father and Ben. After the father's retirement in 2013, Bradley became more involved with the company, having previously done work for it on an ad hoc basis, and in mid-2015 he became a director and took 40% of the shares, with Ben holding the remaining 60%; Ben's larger shareholding reflected the fact that he had lent the company money.

4. The judge found that the company was a typical family-run business with " … a lack of contractual documentation and paperwork, over-dependence on personal relationships and … attendant risks of disagreements." There was no written contract or documentary record relevant to Bradley's claimed status as an employee or worker and no evidence was given of any relevant oral agreement between the parties.

5. Bradley's evidence (which does not seem to have been in dispute) was that the company normally had between two and four employees in addition to him and his brother. The judge found that there was a clear difference in status between the brothers on the one hand and these employees on the other.

6. The brothers decided on the split of work between themselves. Bradley worked predominantly as site manager at a longstanding landscaping project which the company was carrying out at Newlands Manor. He also took on responsibility for marketing the company and its website and social media; it was his choice to take on these tasks. He decided on his own hours of work and there was no control by Ben or the company over how he carried out the work at Newlands Manor. He took holidays when he wished subject only to co-ordinating with Ben.

7. The expectation as between the brothers was that they would both generate and execute enough work to sustain the company and its profits so as to pay their employees and each of their incomes. They were both free to do other work outside the company and Bradley sometimes worked with his partner in her hair salon. The judge also found based on Ben's evidence at the hearing that he would have had no difficulty with Bradley substituting someone else to do the site manager work at Newlands Manor, although in practice this issue

never arose.

8. So far as money was concerned, Bradley and Ben agreed that they were each to be paid equal monthly "salaries" which they fixed from time to time based on how much the company could afford; by July 2018 the salary payments were £1,500 a month gross. These payments were made regardless of how many hours had been worked. Income tax under PAYE and national insurance was paid in respect of them and "wage slips" were issued; the judge found that this was done simply on the advice of the company accountants for tax reasons and that neither brother had any positive input on the issue. The brothers also agreed and paid themselves dividends based on their respective shares in the company at the end of the year.

9. Because of personal differences between them, Bradley wrote to Ben at the end of June 2018 stating that he had "decided to take a step away from Dorset Aquatics" and stating that, although he had brought in the same level of income to the company as Ben:

> **"I feel like an employee, with equal, if not less respect given to me as given to any other member of staff. My 'input' to the Company is that of a director, with all the benefits of a labourer."**

Thereafter he excluded Ben from the company bank account for a period. He also continued the work at Newlands Manor until October 2018 and invoiced the clients for that work through his partner's company.

10. Bradley's solicitors wrote to the company's solicitors on 26 July 2018 stating:

> **"… to help clarify matters we can confirm that our client is currently**

> **employed by Dorset Aquatics Ltd … as a Director and that he commenced employment on 18 May 2013 … and was until 24 July 2018 a Statutory Director of the Company."**

On 21 August 2018, following a complaint that the company was no longer paying the monthly salary the company's solicitors stated in correspondence that Bradley had chosen to absent himself without "permission/approval" and that his absence was therefore unauthorized and therefore had no entitlement to payment of salary. Bradley's solicitors replied thanking them for confirmation that he remained an "employee of the Company".

11. In due course Bradley brought his claims against the company in the employment tribunal. The company responded by saying that he had never been an employee or worker and could not therefore maintain the claims.

The judgment

12. The judge set out the terms of section 230 of the **Employment Rights Act 1996** and reminded himself of the well-known three-stage test for the existence of a contract of employment in the **Ready-Mixed Concrete** case [1968] 1 AllER 433. He made findings of fact which are reflected in the paragraphs above and drew his conclusions in relation to employment and worker status on the basis of those facts at paras 14 and 15 respectively of the judgment, concluding that Bradley was neither an employee nor a worker.

The relevant law

13. Section 230 of **ERA** says this:

> **(1) In this Act "employee" means an individual who has entered into or works under … a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service … whether express or implied and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" … means an individual who has entered into or works 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 another party to the contract whose status is not by virtue of the contract that of client or customer of any profession or business undertaking carried on by the individual …**

14. It is important to note that in this case there was no evidence of any relevant express contract, whether written or oral. If there was a contract of employment or other worker's contract between Bradley and the company it was therefore necessarily one that was implied from the conduct of the parties and any other relevant circumstances. The decision about whether such a contract should be implied is one of fact for the employment tribunal. It follows that in general an appeal of this nature can only succeed if the decision is "perverse" or the tribunal has taken irrelevant factors into account or ignored relevant factors in deciding whether the relevant type of contract is to be implied.

15. As we say, the judge referred in his judgment to **Ready Mixed Concrete**; we do not consider it necessary to repeat any of the well-known passages from that case here. However, it is unfortunate that the judge was apparently not referred to other directly relevant case law which we have been shown, in particular **Clark v Clark Construction Initiatives Ltd** [2008] ICR 635 (EAT, Elias J), **Secretary of State v Neufeld** [2009] EWCA Civ 280 and **Dugdale v DDE Law Ltd** (unreported, EAT, HHJ Richardson, 4.7.17). We were also referred to **Carmichael v National Power plc** [1999] ICR 1226 (HL), **Autoclenz v Belcher** [2011] UKSC 41, **Clyde & Co v Bates van Wilkelhof** [2014] UKSC 32 and **Uber v Aslam** [2021] UKSC 5 relating to more general issues.

16. From **Clark** and **Neufeld** (see: paras [79] to [90] in particular) we take the following propositions in relation to the question whether a director/shareholder is also an employee of a company (which are likely to apply equally to the wider concept of "worker"):

(1) There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee, even if the person has total control over the company;

(2) Whether the shareholder/director is an employee is a question of fact for the tribunal;

(3) In cases where matters have been dealt with informally it may be a difficult question as to whether the correct inference is that the shareholder/director was truly an employee;

(4) In considering the issue it will be necessary in particular to consider how the parties have conducted themselves, what they have actually done and how they have been paid;

(5) Where the conduct of the parties is inconsistent with the existence of a contract of employment or is in some areas not governed by such a contract, that will be an important factor pointing away from a finding that the shareholder/director is an employee;

(6) It follows that the lack of any written employment contract or other record thereof, is likely to be an important consideration;

(7) The fact that the shareholder/director has control of the company or that his personal investment in it will stand to prosper with the company will be "part of the backdrop" but will not *ordinarily* be relevant to the issue and can and should therefore be ignored (see: **Neufeld** para [86]).

(It is right to say that there are many references in **Clark** and **Neufeld** to an issue which can (perhaps rarely) arise in this context as to whether or not a company or an agreement is a "sham". This issue simply does not arise in this case: no-one has suggested that the company was any kind of sham and there was no written agreement which could even arguably be a sham.)

17. Other relevant propositions of law we draw from the authorities are these:

(1) The primary underlying question in all these cases is one of statutory, rather than

contractual, interpretation; the relevant statutory purpose of the **Employment Rights Act 1996** and other employment legislation is the protection of workers who are vulnerable because they are in a relationship of subordination and dependence towards their employers; and a "touchstone" of subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned (see: **Uber** per Lord Leggatt JSC at paras [69],[71] and [87]);

(2) It is open to an employment tribunal to take account of the "subjective" views of the parties as to their obligations and status in ascertaining the terms of any agreement between the parties (see: **Carmichael** per Lord Hoffman at p1234 D-H.)

(3) A genuine right of substitution is inconsistent with an obligation to perform personal services; if there is such a right it does not matter if it is used in fact (see: **Autoclenz** per Lord Clarke JSC at para [19]).

(4) The payment of "salary" with payslips and PAYE/national insurance deductions is a relevant factor which would point towards employment but is by no means decisive in itself; and it may be of little significance if, in a case like this, it is organized entirely by a company accountant for tax reasons without any particular awareness on the part of the putative employee and covers only a small part of the total payments to a shareholder/director (see: **Dugdale** at paras [23] and [47]).

The grounds of appeal

18. There were four grounds of appeal allowed through by Choudhury P at a preliminary hearing on 28 January 2021. Grounds 1-3 relate to the decision on Bradley's employee/worker status. Ground 4 raises a discrete point.

19. ***Ground 1*** asserts that once the judge had found that Bradley provided services " … to [the company] for which he was paid a salary" and that the "arrangement was not a sham" it was incumbent on the judge to find that his relationship with the company was either that of an employee, or a "limb (b)" worker or a self-employed contractor working for a client or customer. The judge found (clearly rightly) in para 15(b) that the company was not Bradley's client or customer so it must follow, says Mr Whitehouse, that Bradley was the company's employee or worker.

20. There is no doubt that Bradley carried out work for the company and that he received money (including some which was described as salary) from the company but it does not follow that the work and payments were necessarily referable to one of the three types of contract referred to in section 230(3); whether they were referable to a contract of employment or worker's contract between him and the company still had to be decided by the judge. As the **Dugdale** case shows, it is possible for working shareholder/directors receiving payments from a company to organize their relationship through the company's corporate structures without individual contracts of employment (see: para [39] in particular); that possibility must be present in the case of a very small company owned and run by two brothers like the one in this case, as it was in **Dugdale**.

21. Mr Whitehouse relied in particular in this context on the statement of Lady Hale at para [31] in **Clyde & Co v Bates van Winkelhof** [2014] UKSC 32 to the effect that employment law distinguishes between three types of people, namely employees, the self-employed who

work on their own account for clients or customers and "limb (b)" workers. That is certainly so; but that employment law categorization does not mean (and we do not understand Lady Hale to be suggesting) that every individual who does any work for another person and receives money must necessarily come within one of the three categories.

22. ***Ground 2*** is that the judge erred in law in that he should not have "implied into the agreement between the parties" a term allowing substitution, given that the issue of substitution was never likely to arise in practice. Again, there is something of a misconception underlying the way the point is put: there was no "agreement" into which a term allowing substitution was to be implied; the very agreement itself and its terms were all necessarily matters of implication.

23. In any event, as the **Carmichael** case makes clear, in deciding what was and was not agreed between the parties in this kind of case it is open to an employment tribunal to take into account views expressed by the parties themselves which are relevant to the nature of their relationship and any agreement between them. Ben's answer in the course of the hearing in relation to substitution was therefore something the judge was entitled to take into account, just as the judge was entitled to take account of Bradley's statement in his letter at the end of June 2018 that he was being made to feel like an "employee" (and, by implication, did not consider himself to be an employee). It is true that the judge found that the question of substitution was not one that arose in practice; but, as we say above, if there is a genuine right, the fact that it is not used is irrelevant.

24. ***Ground 3*** complains that in making his decision on the employment issue the judge took into account factors referable to Bradley's positions as statutory director and minority shareholder. In his comments following the preliminary hearing Choudhury P stated that

the point as developed before him was more focused: it was that the judge had erred in treating Bradley's status as a director and/or shareholder as being mutually exclusive with status as an employee and he considered that this point was arguable given the terms of para 14(e) of the judgment.

25. As set above, it would certainly be an error of law to suggest that a person cannot be both an employee of a company and a director/shareholder. But we see no reason to think that the judge approached matters in that way. And it does not mean that Bradley's status as a director and shareholder and indeed his family relationship with Ben were completely irrelevant in the exercise of deciding whether he was an employee or worker of the company or that the judge could not have any regard to those matters. As we read para 14(e) of the judgment all the judge was saying was that in this case the extent of Bradley's "integration" into the company's business, which is a factor which is commonly considered in deciding whether someone is an employee, was "next to irrelevant" given that his putative employer was a two-brother family business, in which he was one of the brothers, so that he was inevitably going to be highly integrated. In the circumstances we think it was open to the judge to give the "integration" factor next to no weight in this case.

26. Mr Whitehouse also referred in this context to paras 14(b) and 15(c) relating to the question of "control" and to para 15(d) relating to "risk".

27. In relation to "control" it is, we think, important to distinguish between, on the one hand, the control exercised by a shareholder/director of a company over that company, which is generally irrelevant (see: **Neufeld** para [86]) and, on the other, the control (or lack of it) exercised by the employer over what work the employee/worker does and how, when and where he does it under the (putative) contract, which is of central relevance to the question

whether there is a contract of employment (see: **Ready-Mixed Concrete**) and, perhaps to a lesser extent, a "limb (b)" worker's contract. It is right to say that in his conclusion on the evidence at para 13(d) and in para 14(b) the judge refers to matters that seem to come within the former concept of control, in particular the fact that Bradley set the rate of his pay and dividends with his brother and that he later took control of the company bank account. To that extent the judge may have been taking account of irrelevant matters. However, we think that he was nevertheless undoubtedly justified in the overall conclusion that the company exercised "little or no control" over Bradley's work and that he was entitled to have regard to the control Bradley exercised over the company as part of the "backdrop" in this case, and we do not think that this amounts to a material error which would have had any significant influence on the overall outcome.

28. It is also right to say that at para 15(d) of the judgment in the context of considering whether Bradley was a worker the judge said: "Unlike genuine workers (and indeed employees), the claimant shared complete risk with his co-director and shareholder as to the success, or otherwise, of the Company". Again, that indicates that the judge may have been taking account of something irrelevant. However, it was certainly part of the "backdrop", it does not appear in the list of factors relating to Bradley's employee status in para 14 and it is hard to see what it would have added to the judge's conclusion on worker status given his finding at para 15(a) that there was no strict requirement for personal service. In the circumstances we do not consider this to involve a material error which had any significant influence on the outcome either.

29. We therefore reject grounds 1-3. Although the judge did not have the benefit of being referred to the case law we refer to above and the judgment is not perfectly expressed, we are unanimously of the view that he took into account the relevant factors and that the

decision was plainly open to him on the facts, ie not perverse. We therefore dismiss the appeal in relation to the judge's decision that Bradley was neither an employee nor a worker.

30. ***Ground 4*** relates to the judge's statement at para 15(f) that any worker relationship concluded at the end of June 2018 and complains that he gave no reasons for it. In light of our conclusions on the main issues as to whether Bradley was an employee or worker at all this is irrelevant. But in any event we accept Mr Brown's submission that it is plain that the judge reached his view on the basis of what Bradley had said in the letter we refer to at para [9] above.

Outcome

31. For all these reasons we dismiss the appeal.