



EMPLOYMENT TRIBUNALS

Claimant

Mr J Allen

Respondent

**v Secretary of State for Business,
Energy and Industrial Strategy (1)
Leads Online Limited (2)**

Heard at: Leeds by CVP

On: 4 April 2022

Before: Employment Judge O'Neill

Appearance:

For the Claimant: Mr T Kenward of Counsel

For the First Respondent: Mr P Soni - representative of the Secretary of State.

For the Second Respondent: No appearance

JUDGMENT

The claimant has failed to show that he was employed under a contract of employment and therefore all his claims for payments from the National Insurance Fund under Sections 166 and 182 Employment Rights Act 1996 fail and are dismissed.

REASONS

Purpose of the Hearing

1. To determine whether the claimant is entitled to a redundancy payment and other payments (notice pay, holiday pay and arrears of wages) from the National Insurance Fund on the insolvency of the second respondent.
2. The Claimant claims to be entitled to such payments on the basis of having been employed by the Second Respondent.
3. The First Respondent has refused to make the payments in issue with the reason given that it was not satisfied that the Claimant was an employee of the Second Respondent.

Law

4. The relevant statutory provisions are as follows

a) Employment Rights Act 1996 section 166(1)

“(1) Where an employee claims that his employer is liable to pay to him an employer’s payment and either—

- (a) that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or*
- (b) that the employer is insolvent and the whole or part of the payment remains unpaid the employee may apply to the Secretary of State for a payment under this section”.*

b) Employment Rights Act 1996 section 182(1)

“(1) If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

- (a) the employee’s employer has become insolvent,*
 - (b) the employee’s employment has been terminated, and*
 - (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,*
- the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt”.*

c) Employment Rights Act 1996 section 185

“In this Part “the appropriate date” —

- (a) in relation to arrears of pay (not being remuneration under a protective award made under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992) and to holiday pay, means the date on which the employer became insolvent,*
- (b) in relation to a basic award of compensation for unfair dismissal and to remuneration under a protective award so made, means whichever is the latest of—*
 - (i) the date on which the employer became insolvent,*
 - (ii) the date of the termination of the employee’s employment, and*
 - (iii) the date on which the award was made, and*
- (c) in relation to any other debt to which this Part applies, means whichever is the later of—*
 - (i) the date on which the employer became insolvent, and*
 - (ii) the date of the termination of the employee’s employment”.*

d) Employment Rights Act 1996 section 230

“(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing....

(4) In this Act “employer” , in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment” —

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment ...”.

e) Section 54 National Minimum Wage Act 1998 defines employee in similar terms.

5. The second respondent has referred me to a long list of cases, namely: Neufeld, Knight, Auto Klenz, Ready Mixed concrete, Nethermere, Eaton, Fleming, Rainford, Dugdale and Rajah. Full Citations are given in Appendix 1 below.
6. In addition the claimant has referred me to Bottrill, Clark and Nesbitt and Regeling and Paggetti. Full Citations are given in Appendix 1 below.

Evidence

7. I had before me an agreed bundle of documents paginated and indexed and running to 244 pages.
8. In addition, I had before me a schedule of loss and written submissions of the claimant.
9. The claimant was the only witness. He produced a written statement, which was adopted and taken as read. He was cross-examined by Mr Soni and answered questions from me and was re-examined by his Counsel.

Findings

10. Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.
11. Leads Online Limited (the second respondent(R2)) was incorporated on 29 April 2016.At the outset the Claimant was the sole director and shareholder of the

Company. Two other workers were engaged later on, but they were not directors or shareholders.

12. R2 is insolvent having entered into a creditor's voluntary liquidation on 7 December 2021. The claimant ceased working for the company on 31 October 2021.
13. The company provided services to various clients including design work, creating websites and social media management. The claimant was a graphic designer and immediately began working in the business of the company from 29 April 2016. The claimant was a hands-on director in that the product of the company was the product of his own work as a graphic and website designer, seeking new customers and managing the business. The claimant was in essence a one-man band.
14. The claimant was not issued with a written contract of employment. There was no Board minute or memorandum setting out the arrangements under which the claimant would be working. The only evidence the tribunal has as to the existence of a contract and its terms is the evidence of the claimant himself and to the HMRC documents, payslips and company accounts to which he was referred.
15. Employment Rights Act 1996, Part I sets out a requirement on a employer to issue a statement of employment particulars covering the key terms of employment. The absence of such a document does not defeat a claimant's claim to be employed under a contract of employment. However, even if those terms are not written down one would expect the parties to the contract to be clear as to what those key terms are. The claimant was not clear about a number of key terms.
16. The key terms under section 1 ERA 1996 are normal working hours, holiday arrangements and pay, incapacity and sick leave, pension arrangement notice, discipline and grievance matters, pay and the intervals at which remuneration is to be paid.
17. The claimant's evidence was that he was not aware that he had to have a contract of employment, the claimant gave no evidence as to the arrangements for sick leave or pension, the disciplinary and grievance procedures. No terms were set as to the notice period and he now relies on statutory notice as an implied term. No terms were set as to holiday arrangements and the claimant says he now relies on the statutory arrangements as an implied term. The claimant's evidence was unchallenged to the effect that he was required to work a 48 hour week.
18. He did not decide on a particular salary, he assumed that the business would operate in the same way as had a previous company of which he had been a director and he assumed he would take would take a minimal salary. In cross examination, he said that from 2016 to 2019 he was receiving a monthly salary equivalent to the national minimum wage (NMW). On examining the bank statements and wage slips and P 60s that proved to be incorrect and the

claimant was being paid considerably less than the NMW and not at a regular monthly interval.

19. His tax return for the year 2016 to 17 shows a salary of £7595, for 2018 to 19 . It shows £8424, for 2019 to 2020 shows £8632 and in the year 2020 to 2021 the figure is £9500. As at 2021 the claimant's weekly wage for 48 hours at national minimum wage would have been £427.68. That would produce an annual figure of about £22,200.00 or about £1850.00 per month , which was more than twice the wages shown on the wage slips produced in the bundle. Pay is probably the most critical term in an employment contract and it is incredible that the claimant did not know the particulars of his arrangements as to pay as an employee, if such a term existed.
20. An examination of the company bank statements reveals that when the company took on a second worker that person was paid a regular monthly salary which can be seen on the books as a regular payment of wages. In contrast the payments to the claimant were at irregular intervals and for irregular amounts, and according to the claimant covered wages, expenses and the repayment of loans, he says he made to the company. It was impossible to discern from the bank statements, how much on each occasion represented wages or expenses or the repayment of loans.
21. The claimant has produced P 60s, and HMRC tax account and payslips which purport to show that he is an employee. Such documents are not conclusive of employee status but I have given them some weight as to the intentions of the company and the claimant.
22. Because the claimant was the sole director and shareholder he was in a position to control how much money he took and how he took money out of the company, his options included dividends and directors fees and loans as well as salary. In the years to 2019, when according to his HMRC records his salary was well under £10,000.00, the company accounts reveal that he drew £34,500, £59,000 and £59,000 by way of dividends. The claimant was acting on the advice of his accountants and maximising a device by which he gained various tax advantages by suppressing his salary to below the national minimum wage to bring him under the threshold for paying tax and National Insurance, but at the same time benefiting from substantial dividends as a shareholder.
23. During the annual leave year from 29 April 2020 to 28 April 2021, he says he took 9 days' leave from his statutory entitlement of 28 days.
He states that the effect of the pandemic was that he was unable to take his full entitlement and is entitled to carry it forward and claim from the Fund. a payment for holiday accrued but not taken. He was entirely in control of the Company and could take holiday as and when he chose. He said his wife who worked in the NHS was not available to holiday with him as she worked through Covid. He said he had an underlying health condition which made him risk adverse. It was clearly possible for the claimant to take holiday in the year to April 2021, he could have stayed at home or if he wanted a holiday away from home it was possible to make safe arrangements in the periods in between lock down and I find it

reasonable for him to have done so. He was entirely in control of when he took holiday and there were no operational reasons which rendered it impracticable. Likewise, I find it would have been reasonable for him to have taken holiday in the period from April 2021 until the end of October 2021 in respect of which he says that he is entitled to be paid for 11 days holiday accrued but not taken. The company did not keep any records at all relating to holiday taken. Given the claimant's unreliability relating to the very key matter of pay I am not inclined to believe him in respect of the days he took as holiday in the absence of proper records which the regulations require be kept.

24. On the advice of the Company's accountant, the Claimant says he was furloughed in from March 2021 to September 2021. When the furlough payments ceased it became clear that the business was in some difficulty and, following advice from an insolvency practitioner, the Claimant made the decision, as director and shareholder, to liquidate R2.
25. He initially took advice in August 2021, but waited until the beginning of November to instruct the insolvency expert to take the necessary steps. The claimant decided to stop working for the company on 31 October 2021. He was not dismissed by the liquidator. The claimant confirmed that it was his decision alone to bring the business to a close, and that he knew exactly what would happen and when and in effect he had notice of precisely what was happening when.
26. The claimant claims, among other things, for arrears of pay. His calculation for arrears of pay goes back to 6 April 2020. From 6 April 2020 to 5 April 2021 the claimant was continuing to receive from the business a nominal payment. Those acting for him (and the figures have not been disputed) calculate that, in that period under the national minimum wage the claimant should have received a total of £21,765.12. Because of the arrangements his accountants implemented to ensure his wages were below the tax and National Insurance threshold there is a shortfall of £12,265.12 between that which he actually received £9500 and the national minimum wage, that he should have received. Those advising the claimant in the claim have rolled back any payments he did receive by way of wages in the period 6 April 2020 to 31 October 2021 to cover the earlier period of shortfall in the NMW payments thus leaving more than 8 weeks arrears of wages which at the latest rate of NMW equate to £3421.44. 8 weeks is the maximum that may be recovered from the Fund. By so doing, the claimant seeks to benefit from the company's wrongdoing in failing to pay the NMW (which, if there was a contract of employment would have been unlawful), which was a matter entirely within the claimant's control and notwithstanding the separation of legal personality as between the claimant and the company this is tantamount to benefiting from his own wrongdoing.
27. The claimant produced a written statement of evidence which was adopted as his evidence in chief. In the course of cross examination, he was unable to explain passages in that statement relating to his claim for arrears of wages. He could not explain what the words in his own statement meant.

He also accepted that paragraph 23 of his statement had been drafted by his advisers and were not his own words, and that he had never read the Working Time regulations 2020, but had been informed of it when his statement was drafted.

These responses were such that it strengthened my view that the claimant was not a reliable witness.

28. The claimant made a claim for redundancy and insolvency payments on 14 December 2021.
29. He made a claim for a redundancy payment of £3207.60 calculated as
5years sevice x age factor 1.5 x £427.66 - £320 716.
30. He made a claim for holiday pay - 30 days - £2566.08.
31. He made a claim for notice pay - five weeks £2138.40
32. he made a claim for arrears of pay - £2566.08

Conclusions

Employment Status

33. In order to succeed in a claim against the Secretary of State in insolvency the claimant must establish that he is an employee within the meaning of section 230 ERA 1996. In that context it means '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*'. In this case there is no written or verbal contract and the claimant relies on implied contractual terms. Neither is there a board minute or memorandum setting out the claimant's duties and arrangements. The burden of proof is on the claimant to demonstrate what those contractual terms are and whether they amount to a contract of employment.
34. The only evidence the tribunal has as to the existence of a contract and its terms is the evidence of the claimant himself and to the HMRC documents, payslips and company accounts to which he was referred. I did not find the claimant to be a reliable witness.
35. The mere fact that the individual is a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that, in practice, he or she is able to exercise real or sole control over what the company does. (Neufeld).
36. The Secretary of State has referred to the case of Eton in which it is said that a director of a company is normally the holder of an office, not an employee. Of course, the directorship itself is an office, but while it may be true that in some contexts, some directors are only officeholders and take no active part in the business of the company in this case the output of the company is the output of the claimant himself, it is a one-man band.

37. The issue of employment status will not be determined by a single factor. Ready Mixed Concrete sets out three matters for consideration (1) whether the individual agreed to provide his or her own work and skill in return for remuneration (mutuality of obligation);
(2) whether the individual agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant; and
(3) whether the other provisions of the contract were consistent with its being a contract of service.

In the Nethermere case Stephenson LJ relied upon the above factors but highlighted mutuality of obligation as the '*irreducible minimum of obligation*'.

38. In the Neufeld case, the Court of Appeal counsels the tribunal to first consider whether the contract relied on by the claimant is a sham, in that respect the court assumed that some kind of written document would be produced. In this case there is no document of any kind, expressly evidencing the contract of employment the claimant needs to show.
39. In the Neufeld case, the Court of Appeal reviewed the case of Clark in which Elias J sets out eight points of guidance to tribunals for the purposes of determining employment status. At point 6 he says '*the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced to writing*'. In Neufeld that the Court of Appeal directs the Tribunal to apply a degree of caution in weighing up the absence of a written document, but confirms the absence of a written terms '*will be an important consideration*'. It is a factor I have weighed in the balance.
40. The claimant said he was unaware that he required a contract of employment and I infer from his testimony that he did not put his mind to the contract terms at all. In his testimony, the claimant was vague and unconvincing as to the terms on which he was allegedly employed. The key terms under section 1 ERA 1996 are normal working hours, holiday arrangements and pay, incapacity and sick leave, pension arrangement notice, discipline and grievance matters, pay and the intervals at which remuneration is to be paid. The claimant led no evidence about many of those matters, and of those subjects that were covered his evidence was vague and lacked detail. These key features appear not to be governed by a contract at all and I have weighed this in the balance against the claimant's assertion that he was employed under a contract of employment. At point 5 of the judgement of Elias J which was approved by the Court of Appeal in Neufeld it says' if.... *In certain key areas where one might expect it (the conduct of the parties) to be governed by the contract, it is in fact not so governed, that will be a factor, and potentially a very employment important one militating against a finding that the controlling shareholder is in reality an employee*'.

41. Because the claimant was the sole director and shareholder he was in a position to control how much money he took and how he took money out of the company, his options included dividends and directors fees and loans as well as salary. In the years to 2019, when according to his HMRC records his salary was well under £10,000.00, the company accounts reveal that he drew £34,500.00, £59,000.00 and £59,000.00 by way of dividends in the years to 2019. The claimant was acting on the advice of his accountants and maximising a device by which he gained various tax advantages by suppressing his purported salary to bring him under the threshold for paying tax and National Insurance which was in turn at a level below the National Minimum Wage (NMW), but at the same time benefiting from substantial dividends as a shareholder. Such a device is legitimate (save for the failure to pay national minimum wage) and commonplace amongst one-man band companies. The claimant indicated that he had left these matters to his accountants and did not concern himself with the detail, including the terms of his remuneration.
42. Pay is probably the most critical term in an employment contract and forms an essential part of the irreducible minimum. It is incredible that the claimant did not know his arrangements as to remuneration. He incorrectly asserted that he was in receipt of the national minimum wage as regular monthly pay which from the bank statements was clearly untrue and the claimant accepted he was mistaken and explained that he had left these matters to his accountants. He was unable to put a figure on what he did receive as a wage (although he was referred to payslips purporting to disclose same by Counsel), the payment into his bank account for wages was not regular and anything he did purport to receive by way of wages was not designated as such on the bank statements. In so far as the bank statement entries did purport to relate to wages they were mixed up with other payments such as expenses and repayment of loans to him without distinction. Given that remuneration is at the heart of the irreducible minimum necessary to establish a contract of employment the fact that the claimant was inaccurate and uncertain about those terms, leads me to conclude that there was no clear contractual term relating to pay and I weigh that in the balance against him.
43. I have given the Tax documents some weight as to the intentions of the company and the claimant but it is generally accepted that such documents are not conclusive.
44. In all the circumstances I conclude that the claimant has failed to show on the balance of probability that he was employed under a contract of employment and his claims fail.

Calculations and Entitlement to the payments

45. Having found that the claimant has failed to show that he was employed under a contract of employment I am not required to deal with the calculations of the payments which would have been due had the Claimant established employment status.

5 April 2022

Employment Judge O'Neill

Appendix 1

Regeling v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1999] ICR 605

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD

Nethermere (St. Neots) Ltd. v Gardiner [1984] IRLR, 240, CA

Autoclenz Ltd v Belcher [2011] ICR 1157,

Fleming v Secretary of State for Trade and Industry [1997] IRLR 682, CS

Nesbitt v Secretary of State for Trade and Industry [2007] IRLR 847, EAT, Secretary of State for Trade and Industry v Bottrill [1999] ICR 592,

Clark v Clark Construction Initiatives Ltd [2008] ICR 635, EAT

Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld [2009] ICR 1183, CA

Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605, EAT,

Rainford v Dorset Aquatics UKEATPA/0126/20/BA

Dugdale v DDE Law UKEAT/ 0169/16/LA

Rajah v SOS EAT/125/95

Eaton v SOS etc 1988 IRLR 83

Paggetti v Cobb [2002] IRLR 861, EAT

Clark v Clark Construction Initiatives Ltd (2008) IRLR 364 EAT