EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100848/2022

Held on 23 May 2022 by Cloud Based Video Platform

Employment Judge Neilson

Mr D Davidson	**Claimant** **Represented by:** **Mr Kenward – Counsel**
The Secretary of State for Business	**First Respondent** **Represented by:** **Mr Soni - Solicitor**
D2 Contracting Limited (In Liquidation)	**Second Respondent** **No appearance and No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the first respondent is ordered to pay to the claimant the following sums:

(a) the sum of £1,126.92 as a statutory redundancy payment; and

(b) the sums of £984.63 as the balance of notice pay and £37.56 as accrued leave (the latter two sums subject to deduction of any appropriate tax and National Insurance).

REASONS

1. This was a CVP hearing to determine whether the claimant was entitled to receive certain payments from the first respondent under the terms of sections 166 and 182 of the Employment Rights Act 1996 ("ERA").

2. The claimant was represented by Mr Kenward of Counsel. The first respondent was represented by Mr Soni, Solicitor. There was no appearance by or on behalf of the second respondent.

3. There was a written witness statement from the claimant. The first respondent confirmed that they were content for that to be treated as the claimant's evidence in chief. There was a bundle of documents and the claimant was taken to the relevant documents in the bundle and was cross examined by Mr Soni.

4. The claimant was seeking the following payments from the first respondent under sections 166 and 182 of the ERA:- Redundancy pay of £2,511.36; Holiday Pay of £1552.02; Arrears of pay of £3,348.48 and Notice Pay of £2,369.07.

5. The parties were agreed that the only two issues to be determined in the case were, firstly, whether the claimant had been an "employee" of the second respondent as defined under the ERA. It was agreed that he required to be an employee under the terms of the ERA to qualify for the payments referenced above. The second issue related to the correct calculation of the amounts being claimed by the claimant.

Findings in Fact

6. The second respondent was incorporated on 24 March 2015. The second respondent was set up by the claimant to provide quality assurance services to third party clients.

7. The claimant was appointed as a director of the second respondent on 24 March 2015. The claimant was the sole shareholder of the second respondent and owned 100% of the shares at all times.

8. The claimant remained a director of the second respondent throughout the period from incorporation to appointment of a liquidator.

9. Mr Andrew Davidson was also a director of the second respondent for a short period.

10. The claimant operated as a quality assurance consultant in providing services to clients of the second respondent. This involved providing services to financial institutions on behalf of the second respondent. The second respondent entered into contracts with clients for the provision of these services.

11. The intention of the claimant at the outset was to grow the business and employ a number of employees/contractors to provide the services.

12. The services provided by the second respondent to clients consisted of the assessment and management of PPI customer complaints. This involved root cause analysis, case assessment and providing training to the client's management and case handlers.

13. The actual provision of the services was carried out by the claimant throughout the period from 2015 to 2021.

14. The second respondent invoiced their clients based upon the time spent by the claimant working for these clients. The second respondent would provide a fixed number of days to its clients. The nature of the hours and days required varied depending upon the needs of the clients.

15. The claimant was aware of the requirement for employees to receive National Minimum Wage ("NMW") from 2015 onwards.

16. The claimant did not have any written terms and conditions of employment or written contract issued to him by the second respondent.

17. The claimant took holidays from time to time as agreed with the second respondent's clients.

18. The accountant acting on behalf of the second respondent provided advice to the second respondent regarding the salary and dividends that would be paid to the claimant. The claimant accepted that advice.

19. During the tax year ended 5 April 2018 the claimant received pay of £11,499 from the second respondent. He also received a dividend of £38,000.

20. During the tax year ended 5 April 2019 the claimant received pay of £11,850 from the second respondent. He also received a dividend of £48,000.

21. During the tax year ended 5 April 2020 the claimant received pay of £9,999 from the second respondent. He also received a dividend of £49,164.

22. During the tax year ended 5 April 2021 the claimant received pay of £9,767 from the second respondent. This equates to a weekly payment of £187.82.

23. As at 31 March 2021 the claimant was entitled to an annual salary of £9,767.

24. The claimant paid income tax and national insurance where appropriate to HMRC on the pay referenced in paragraphs 19 to 23 above.

25. In the period from September 2021 through to 31 March 2021 the claimant was in receipt of a monthly salary of £885.

26. The second respondent did not make any pension contributions to or in respect of the claimant.

27. The claimant received £142.29 by way of job seekers allowance in the period between 1 May and 12 May 2021.

28. The second respondent's holiday year ran from 24 March.

29. The claimant did not take his full holiday entitlement in the year to 24 March 2021 as there was no reason for him to go anywhere or do anything because of lockdown.

30. The second respondent experienced a reduction in turnover through 2020/2021 due to the impact of the deadline imposed by the Government for PPI claims and the impact of the IR35 legislation.

31. The claimant ceased working on 31 March 2021 and approached the insolvency company, Findlay James (Insolvency Practitioners) Ltd in May 2021 for assistance regarding winding up the affairs of the second respondent.

32. The second respondent did not issue any notice of termination of employment to the claimant.

33. The claimant was 31 years of age as at 31 March 2021.

34. The second respondent was placed in liquidation on 18 August 2021. Alistair J Findlay of Findlay James Insolvency Practitioners was appointed as Liquidator.

35. The claimant appointed Redundancy Claims UK (RCUK) to act on his behalf in submitting a claim to the first respondent in terms of section 166 and 182 of the ERA.

36. By letter of 22 December 2021 the first respondent rejected the claim of the claimant on the grounds that they did not consider that he was an "employee" as defined under the ERA.

Submissions

37. Written submissions were lodged on behalf of the claimant. In addition Mr Kenward referred the Employment Tribunal to the document "Reply of Claimant To Notice Of Appearance of First Respondent". Mr Kenward also made oral submissions at the close of the evidence.

38. In essence the claimant's position in respect of the two disputed issues were as follows.

39. Firstly the claimant was employed by the second respondent under an implied contract of employment. Reference was made to the tests for employment status set out in the case of *Ready Mixed Concrete (South East) Ltd -v- Minister of Pensions* and *National Insurance 1968 1AER 433.* The evidence pointed to there being such an implied contract. The fact that the claimant was a sole shareholder and director did not exclude him from being an employee as defined under the ERA. Reference was made to a number of cases but in particular to both the Court of Appeal decision in *Secretary of State for Trade and Industry -v- Botterill 1999 IRLR 326* and the Court of Appeal decision in *Secretary of State for Business, Enterprise and Regulatory*

Reform -v- Neufeld 2009 IRLR 475. It is a question of fact, in each case, whether or not someone, who is a shareholder and director of a company, is also an employee of the company under a contract of employment.

40. Secondly with regard to the calculation of the sums the starting point is the calculation of a "weeks pay" under sections 210 to 219 of the ERA. This calculation must take account of the NMW. The entitlement to NMW becomes a contractual right (s*ee Paggetti-v- Cobb 2002 IRLR 861)*. Accordingly the calculations set out in the claimants Schedule of Loss are based upon a 48 hour week at NMW rates (the claimant having alleged that he worked an average of 48 hours a week).

41. With regard to the holiday pay it had not been reasonably practicable for the claimant to take holiday because of the effects of covid – and that that could apply to a wide range of reasons for not taking the leave. Mr Kenward also explained that he was putting forward a claim for 18.54 days (to cover both regulation 13 and 13A of the WTR) to be carried forward and not the 10.54 days referenced in the Schedule of Loss.

42. In relation to the arrears of pay the claimant was entitled to his best 8 weeks and entitled to treat payments made during that period as meeting a shortfall in an earlier period. On this basis the claim was for a full 8 weeks arrears of pay at NMW rates for an average of 48 hours.

43. Mr Soni on behalf of the first respondent referred to the arguments set out in the ET3. He accepted that the decision in *Neufeld* is the leading authority here on the interplay between shareholder/director/employee where the individual is the sole shareholder and director – however the facts were different in the current situation. Remuneration is an essential term of the employment. The claimant knew he was entitled to NMW at the outset. His "pay" does not therefore reflect a proper salary if he is claiming he worked 48 hours; the dividends were substantially larger than the pay; he was a 100% shareholder; there was no evidence of agreement on sick pay or holiday pay. It was important to look at all the facts. Mr Soni relied upon the case of

Dugdale -v- DDE Law Limited UKEAT/0169/16. The first respondent does not consider that there was an employment contract in place.

44. If employment is established then in relation to the calculation of any sums due Mr Soni pointed to the fact there was no evidence as to the hours worked and the claimants "salary" should be taken to be based upon the figures disclosed to HMRC – an annual salary of £9,767 which he calculated to be a weekly pay of £182.31. There was accordingly no arrears and all other payments would fall to be calculated on the basis of this weekly amount.

The Law

45. Section 166 of the Employment Rights Act 1996 ("ERA") provides that "(1) Where an employee claims that his employer is liable to pay him an employers payment and either…(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. (2) In this Part "employer's payment" in relation to an employee, means- (a) a redundancy payment which his employer is liable to pay to him under this Part,".

46. Section 182 of the ERA provides that "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."

47. Section 184 of the ERA applies section 182 to arrears of pay; accrued holiday pay and statutory notice pay (but subject to maximum amounts).

48. Section 230 of the ERA provides "(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…"

49. Sections 170 and 188 of the ERA give the Employment Tribunal the right to determine any question of liability regarding the payments.

50. The Working Time Regulations 1998 ("WTR") provides for the entitlement to annual leave in regulations 13 and 13A and for payment for any untaken but accrued annual leave on termination of employment under regulation 14.

51. Regulation 13(10) of the WTR provides "Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society) the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11)."

Discussion & Decision

52. There were only two issues to be determined in this case. Was the claimant an "employee" as defined in the ERA and secondly, if he was, what was the amount of the payment he was entitled to.

Employment Issue

53. To be entitled to claim under sections 166 and 182 of the ERA it must be established that the claimant was an "employee" as defined under the ERA. This means that there must be a contract of employment in place. The parties were agreed that this was the key issue.

54. The test for whether or not there is a contract of employment in place is that set out in the decision in *Ready Mixed Concrete*. This is a threefold test. Firstly there must be mutuality of obligation whereby an individual agrees to

provide their own work and skill in exchange for remuneration. Secondly that the individual must have agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant. Thirdly that the other terms of the contract are consistent with it being a contract of employment.

55. The issue of control is more problematic in circumstances where the employer is a limited company subject to the control of the "employee" as a shareholder and director – as applies in this case.

56. That issue was addressed in *Neufeld* where two separate cases concerning directors of companies who also held a controlling shareholding were considered by the Court of Appeal. In both cases the directors were seeking payments from the Secretary of State under the ERA when their businesses went into liquidation. The Court of Appeal held that there was no reason in principle why someone whose shareholding in the company gives him control, even total control, cannot be an employee. In arriving at its decision the Court of Appeal reviewed a number of earlier authorities on the question of whether or not a controlling shareholder and director (or indeed a sole shareholder and director) in a company could also be an employee. The Court of Appeal reviewed the guidance provided by Elias J in *Clark -v- Clark Construction Initiatives Ltd 2008 IRLR 364* and added some observations of their own (see paragraphs 78 through to 90 of the *Neufeld* decision).

57. At paragraphs 85 and 86 of the *Neufeld* decision the Court of Appeal further addressed the issue of identifying whether or not a contract of employment was in place as follows:-

"*85. In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In Lee's case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that,*

there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee."

"[86] We have referred in the previous paragraph to matters which will typically be directly relevant to the inquiry whether or not (there being no question of a sham) the claimed contract amounts to a contract of employment. What we have not included as a relevant consideration for the purposes of that inquiry is the fact that the putative employee's shareholding in the company gave him control of the company, even total control. The fact of his control will obviously form a part of the backdrop against which the assessment will be made of what has been done under the putative written or oral employment contract that is being asserted. But it will not ordinarily be of any special relevance in deciding whether or not he has a valid such contract. Nor will the fact that he will have share capital invested in the company; or that he may have made loans to it; or that he has personally guaranteed its obligations; or that his personal investment in the company will stand to prosper in line with the company's prosperity; or that he has done any of the other things that the 'owner' of a business will commonly do on its behalf. These considerations are usual features of the sort of

companies giving rise to the type of issue with which these appeals are concerned but they will ordinarily be irrelevant to whether or not a valid contract of employment has been created and so they can and should be ignored. They show an 'owner' acting qua 'owner', which is inevitable in such a company. However, they do not show that the 'owner' cannot also be an employee."

58. The Employment Tribunal would add that it did not consider that the first respondent was contending that there was any issue of a sham contract in this case. That was not put to the claimant in giving evidence. The key issue here is whether the claimed contract amounts to a true contract of employment.

59. In applying the tests set out in *Ready Mixed Concrete* and having regard to the guidance in *Neufeld* the decision of the Employment Tribunal is as follows.

60. Firstly having regard to the issue of mutuality of obligation. The Employment Tribunal was satisfied that as a matter of fact the claimant carried out the work personally – as it was his own work that was provided to the clients. In doing that work he was not acting as a director or shareholder. Doing that work was consistent with him being an employee of the second respondent. The second respondent invoiced for the time that the claimant spent working. There were no other employees to deliver the services. In the view of the Employment Tribunal in carrying out that work the claimant was acting as an employee. That work was carried on from 2015 through to 2021 – a period of six years. The claimant was paid a salary throughout that period. He also received a dividend – but having regard to the guidance in *Neufeld* the Employment Tribunal was satisfied that it was permissible for the claimant to structure his affairs in such a way as to be remunerated both as an employee and as a shareholder. Accordingly the Employment Tribunal was satisfied that there was mutuality of obligation as between the claimant and the second respondent.

61. In relation to the issue of control the Employment Tribunal has had regard to the guidance in *Neufeld*. It is clear that the claimant took a deliberate decision to set up a company, the second respondent, to be a vehicle through which he could deliver services to third party clients. He was the sole shareholder and a director from 2015 to 2021. In setting up the company the claimant has, with the support of his accountant, structured his remuneration in a way that is most convenient to him. That involved the payment of both salary and dividends. The law allows the claimant to structure his business affairs in that way and to take the advantages that limited liability companies provide. It is important to distinguish between the claimant acting as a "owner" and potentially as an "employee" as highlighted in *Neufeld*. Following *Neufeld* the Employment Tribunal does not consider that the claimants ownership of the shares and his position of director means that the element of control is missing. The Employment Tribunal accepts that the intention at the outset was to grow the business and engage/employ others. We accept that "control" can be more theoretical than real and that in circumstances where there is a limited liability company as a separate person then it does in theory have the right of control in respect of the claimant in his position as employee rather than in his position as owner or director.

62. Mr Soni referred to the case of *Dugdale.* We did consider that decision but were satisfied that a key distinction in that case was that the claimant there was operating as a partner in the law firm. What she actually did was consistent with being a partner rather than an employee. That is quite different from the position here where the claimant was operating as an employee.

63. Finally we have considered whether there are other factors pointing towards or away from employment. There was no written contract – but following *Neufeld* we consider that that is of limited significance. He took holidays as agreed with clients. He was paid a salary. He paid National Insurance and the accounts of the second respondent were prepared on the basis that he was paid a salary each year. The salary level was discussed with the accountant and agreed on the basis that was what was implemented. There

was limited evidence but what there was consistent with there being a contract of employment.

64. The conclusion of the Employment Tribunal was that there was a contract of employment in place between the claimant and the second respondent. That is consistent with the evidence and the guidance, following *Neufeld*, to ignore the fact of ownership in arriving at a decision on this point.

Amount of Payments

65. The claimant alleges that his various claims should be calculated taking into account NMW. He alleges that he worked on average 48 hours per week. This did strike the Employment Tribunal as a rather convenient figure for the claimant to put forward. No time sheets or records were produced to substantiate the hours that he worked. There was no written evidence of the hours of work. As these records would have been provided to the clients it is surprising they were not available. There were other areas where the claimant's recollection of events was inconsistent. The claimant admitted under cross examination that he was aware of the NMW – although he claimed in his statement that he was unaware that as an employee of the business the second respondent was required to pay him at the NMW. The claimant also admitted under cross examination that he could not remember whether or not he had been placed on furlough during the period from March 2020 onwards. The Employment Tribunal found it surprising that he was not able to remember whether he was on furlough. In his statement the claimant stated he was the sole director. In fact Mr Andrew Davidson had also been appointed as a director for a period. Taking all these points into consideration the Employment Tribunal did not consider that there was reliable evidence that the claimant worked on average 48 hours per week.

66. The second respondent, acting through the claimant, engaged accountants to advise him regarding the salary, dividends and tax structure that the second respondent should adopt. We do have evidence of the actual salary paid to the claimant throughout various periods of his employment. Three payslips were made available and these related to the months of January,

February and March 2020. These disclosed a monthly gross salary of £833.33. The HMRC evidence disclosed that the claimant received pay of £11,499 in the year to 5 April 2018; pay of £11,850 in the year to 5 April 2019; pay of £9,999 in the year to 5 April 2020 and pay of £9,767 in the year to 5 April 2021. These sums are very consistent and in all the circumstances the Employment Tribunal accepts that these sums represent the actual salary paid. The claimant in his statement stated that he discussed with his accountant the amount of salary that could be paid to him. Other than the word of the claimant there was no evidence to establish that NMW had not been paid and there was evidence of salary being paid on a regular monthly basis up to March 2021 – a salary figure that the claimant and his accountant had discussed. The Employment Tribunal considered that the more likely position was that the accountant calculated the salary correctly having regard to NMW. Accordingly whilst the Employment Tribunal accepts that there was an employment relationship between the claimant and the second respondent the Employment Tribunal finds that the evidence points to there being an agreement for the payment of an annual salary and that at the 31 March 2021 the most reliable figure there is for that annual salary is the figure of £9,767. Under sections 221 of the ERA the weeks pay is the amount payable under the contract of employment and that sum on a weekly basis was £187.82. That is the correct figure for calculation of any payments due to the claimant and is the figure used by the claimant on page 48 of the bundle in the document that was prepared by RCUK.

67. It follows from the above that the claimants claim for arrears of pay cannot succeed. His claim for arrears of pay was based upon the difference between what he was paid and NMW based upon a 48 hour week. He was paid up to and including March 2021. There were no arrears of pay.

68. The statutory redundancy payment based upon a weekly wage of £187.82 (6 years' service and 31 years of age) is £1,126.92.

69. In relation to notice pay the claimant was entitled to six weeks' notice. The claimant's representative accepts that the sum of £142.29 should be deducted from this. The total due is £984.63.

70. In relation to Holiday pay it is not disputed that the holiday year runs from 24 March in the year. As at 31 March 2021 he had a pro rata entitlement to 0.54 days of holiday under Regulation 14 of the WTR. There is no general entitlement to carry forward unused holiday from one leave year to the next (regulation 13(9) of the WTR). In his Schedule of Loss the claimant maintained that under regulation 13(10) of the WTR he was entitled to carry forward 10 days of unused leave. Mr Kenward in his submissions stated that in fact the entitlement was to carry over 18 days (to take account of both regulation 13 and 13A). The claimant under cross examination admitted that there was no reason for him to take holidays during lockdown as there was no reason to go anywhere or do anything because of lockdown. There was no evidence that it was not reasonably practicable for the claimant to take some or all of the leave in the period prior to 24 March 2021 as a result of the effects of coronavirus. He did not take the leave because of a conscious decision that he could not go somewhere or do some particular thing. This differs from the evidence the claimant gave in his statement. In paragraph 21 he said that he was unable to take his holidays due to volume of work. The Employment Tribunal preferred the claimants answer under cross as disclosing the true reason but in any event the claimant does not link the volume of work in any way to Covid. To qualify as holiday it is not necessary that a person has to go somewhere or do something. It would still have been possible for him to take time off work and stay at home. That would still constitute a holiday and a rest from work. Accordingly the Employment Tribunal could see no basis upon which the provision in regulation 13(10) was invoked. In relation to any holiday rights under Regulation 13A of the WTR the provisions of regulation 13(10) do not apply. No evidence was led to substantiate any other basis for a carry forward of the regulation 13A leave (for example evidence of a relevant agreement under regulation 13A(7)) and in the absence of any such evidence the Employment Tribunal can see no basis for such a carry forward – the standard position being that the leave should be taken in the leave year to which it applies. Accordingly, there being no right to carry over, the entitlement to accrued leave was to 0.54 days in accordance with regulation 14 of the WTR. That amounts to £37.56.

71. The Employment Tribunal finds that the claimant is entitled to payment of £1,126.92 as statutory redundancy pay under section 162 of the ERA and a total of £1022.19 (Notice of £984.63 and holiday pay of £37.56) under section 182 of the ERA.

72. The latter payments are subject to the deduction of any appropriate tax and national insurance.

Employment Judge: **Stuart Neilson**

Date of Judgement: **13 July 2022**

Entered in register: **14 July 2022**

and copied to parties