Case Number: 3300749/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss K Palmer	v	(1) The Secretary of State for Business, Energy & Industrial Strategy (2) GAP Presents Limited - In Liquidation

Heard at: Watford via CVP **On**: 16 November 2022

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant: In person
For the respondent: Mr P Soni, Representative

RESERVED JUDGMENT

The claimant was not an employee of the second respondent at any material time. The tribunal therefore has no jurisdiction to determine the claimant's claims. They are therefore dismissed.

REASONS

Introduction; the claims and the issue before me

1 In this case, the claimant claims a redundancy payment, arrears of pay, unpaid holiday pay and notice pay from the first respondent, under Part XII of the Employment Rights Act 1996 ("ERA 1996"). That Part confers on an employee a right to such payments in the event of the insolvency of the employee's employer.

2 It was not in dispute that the claimant was the sole shareholder and the sole director of the second respondent. It is the first respondent's case that the claimant was not an employee of the second respondent, and that accordingly the claim is outside the jurisdiction of the tribunal.

3 On 8 June 2022, Employment Judge Ord directed that there be a preliminary hearing on 16 November 2022 to determine whether or nor the claimant was an employee for the purposes of Part XII of the ERA 1996, which is determined by the application of the wording of section 230(1) and (2) of that Act and some extensive case law. I conducted that hearing.

The evidence before me

4 The claimant had made a witness statement in advance of the hearing of 16 November 2022, and she gave oral evidence at that hearing. I asked her a number of questions, and she was cross-examined at some length by Mr Soni. I found the claimant to be a patently honest witness, doing her best to tell me the truth.

5 There was a hearing bundle with 260 pages in it (including its index) before me. I read parts of it in advance of the hearing, I was referred to a number of its pages during the hearing, and after the hearing I reviewed its contents with care. Any reference below to a page is to a page of that bundle.

My findings of fact

6 The claimant ran a model agency, that is to say an agency which procured work for fashion industry models, earning fees for doing so. Before 2016, the claimant did that as a sole trader. Towards the end of 2015, the claimant's business's turnover started to exceed the level at which it became necessary to charge (and account to Her Majesty's Revenue and Customs, as it then was ("HMRC"), for) Value Added Tax ("VAT"). The claimant then sought advice from professional accountants, who advised her (she recalled) that because she was now liable to charge VAT and account to HMRC for it, she needed to establish a company to run her business. Such a company was incorporated on 10 December 2015 on behalf of the claimant by TRS Secretaries Limited. The company was the second respondent.

7 There was only one document in the bundle which (1) emanated from the accountants and (2) recorded the manner in which the claimant was advised by the accountants. That document was at page 88. It was in these terms.

> "Hi Kimberley
>
> Please find attached your payslip/s for January 2017.

To recap, we recommend the net pay for directors is £670 (£8,060 annual) and this has been calculated as part of a tax-efficient method to obtain remuneration during the current tax year 2016-17, as follows:

- The personal allowance for this year is £11,000, but once again national insurance kicks in above £8,060 which is both the primary threshold for employees and the secondary threshold for employers. Salary up to this level preserves your entitlement to state pension benefit but no NICs are paid.

- Please be sure to pay the exact amount slated on the payslip as this is what is reported to HMRC. If you have drawn too much it cannot be accounted for as salary when your company's accounts are prepared

- If you maintain an office at home we suggest that you should take a monthly salary of £670 (1/12th of £8,060) for the first eleven months of the current tax year (£690 in March 2017) plus a payment of rent, which you can draw either £735 quarterly or £245 monthly as you wish. This will bring your income up to the level of the £11,000 personal allowance without any NIC cost.

- Please be aware that if you have any other income from other sources this could take you over the £11,000 level and could result in additional personal tax liabilities. Please contact the office if you have any query relating to your personal tax situation.

- Additional income from your company may be taken as dividend, assuming that the company is generating sufficient profits.

- A company that generate[s] losses cannot pay dividends to shareholders.

- As you will be aware from our fact sheet, dividends of £5,001 and above will attract a tax charge of 7½%. As in previous years, dividends entering the higher rate tax bracket will continue to attract a 32½% tax charge.

- It is important to note that these figures apply only if there is no additional personal income other than salary and rent as above.

The RTI full payment submission has been filed today so that you can now draw your pay. Please make salary payment/s in the relevant month whenever possible; please let us know if there are exceptional circumstances so that we can keep your company's accounts correct and up to date.

> On a final note, if you have received a letter from the Pensions Regulator regarding auto enrolment please scan / send us a copy whether or not you think it will apply to your company. We are arranging with an associate to provide this service to those clients who need to auto enrol and details will be available shortly.
>
> As always, please do not hesitate to contact us if you have any query."

8 The claimant gave no thought to the manner in which her status (whether employed or self-employed) would change when she started to run her business through the second respondent. During the hearing before me she referred to the time when she "became a limited company". In deciding to establish the second respondent and run her business through it, she relied entirely on the professionalism of the accountants whom she engaged to advise her on income tax, corporation tax and VAT. No written contract of employment was created by anyone for the claimant at any time.

9 The claimant's witness statement contained this material passage.

> "To confirm, I Kimberley Sacha Palmer was the sole director and employee of Gap Presents Ltd 2016-July 2021.
>
> My day to day work was the running of the agency, liaising with clients, answering emails, suggesting and booking models, casting models, invoicing clients etc. Also the general marketing and promotion of the agency to new clients etc. The work was not just limited to 9-5 but often early mornings and late evenings too. I also worked whenever I went on holiday as nobody else ran the business but myself. If this work was not carried out the agency would not have existed.
>
> With regards to paying myself, please refer to the email correspondence from January 2016 which shows the information my accountants at the time Hammond Barr instructed me on how to set up my business and pay myself. All of this within government guidelines and acceptable to HMRC."

10 The claimant's business became insolvent after the Covid-19 lockdowns of 2020 and 2021 had caused the work available for models in the fashion industry to diminish dramatically. The claimant described the situation in this way in her witness statement:

> "No one could have foreseen covid and the huge impact it had on businesses like myself. The only help available was a loan which = debt. I therefore had no choice but to go insolvent. Again, professional advice was taken and along with this, information that a claim could be made for redundancy pay from government funds."

11 The claimant confirmed in oral evidence that she had no idea that she might be able to claim a redundancy payment until the company which trades in the name of Redundancy Claims UK ("RCUK") said to her that she was entitled to such a payment. RCUK drafted the claim form in this case. RCUK also completed on the claimant's behalf (but she signed to approve) the document at pages 62-68, which was a questionnaire administered by the first respondent to claimants for payments under Part XII of the ERA 1996 who were company directors. There was at pages 54-59 a document recording the claimant's claims under that Part as made directly to the first respondent. That document was also drafted on the claimant's behalf by RCUK. The document contained a claim for pay at the rate of the national minimum wage, i.e. £8.91 per hour. It also stated (as did the document at pages 62-68) that the claimant worked for "fixed hours with fixed pay", and that the hours per week were 40. It also claimed holiday pay on the basis that the claimant was entitled to 28 days of paid holiday per year.

12 The claimant did not think before taking advice from RCUK that she might be entitled to the national minimum wage. She also took only four weeks' holiday per year: a week at Easter, a week in the summer, and two weeks at Christmas. She took two weeks' holiday at Christmas because at that time the fashion industry shut down. During all of her holidays she was attentive to email and other correspondence, and responded in a timely way to any correspondence that she received. In practical terms, nothing changed in the way in which she worked after the second respondent came into existence. That is to say, the way in which the claimant worked after the second respondent came into existence was the same as it was before the second respondent came into existence.

13 The claimant was given by her accountants a P60 form every year. There were copies of such forms for the tax years 2018-19, 2019-20 and 2020-21 at pages 95-97. They showed that the claimant paid no national insurance contributions in the 2018-19 and 2019-20 tax years. She paid national insurance contributions in the 2020-21 tax year on declared annual income from employment of £12,021.

14 The claimant received payments from the second respondent by way of dividends, as envisaged by the email at page 88 the text of which I have set out in full in paragraph 7 above. There were in the bundle copies of the claimant's income tax returns for the three tax years to which I refer in the preceding paragraph above. They were accompanied by the tax calculations for those years. The claimant's income in those years, i.e. declared income, after expenses (including, presumably, a sum stated to be rent for the use of her home and stated to have been paid to the claimant by the second respondent, as envisaged by the third bullet point in the email at page 88 set out in paragraph 7 above: there was no document in the bundle recording the expenses which were offset by the second respondent against turnover) was shown on pages 113, 128, and 143. The first of those showed that in the tax year 2018-19 the claimant was paid £8,424 as income from "all employments", and £26,271 by way of "Dividends from UK companies". The second showed that the claimant

was in the tax year 2019-20 paid £8,628 as income from employments and £12,130 by way of dividends. In the final year, 2020-21, the only income was from employment (that is to say, no dividend was paid to the claimant), and the income for the year was (as stated at the end of the preceding paragraph above) £12,021.

The relevant case law

15 As I said to the parties on 16 November 2022, the applicable principles were stated most clearly in the judgment of the Court of Appeal in *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] EWCA Civ 280, [2009] ICR 1183 and the judgment of the Employment Appeal Tribunal ("the EAT") (Elias P presiding) in *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635. I sent copies of both those reports to both parties by email during the hearing. The key passage in *Neufeld* was paragraphs 79-90. I found paragraphs 85, 88 and 89 to be of particular importance. I bore it in mind that in the latter paragraph, the Court of Appeal made it clear that the statement in paragraph 98 of the judgment of the EAT in *Clark* that "the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced to writing" and that the absence of such written terms "will be powerful evidence that the contract was not really intended to regulate the relationship in any way", had to be approached with caution. In paragraph 89 of its judgment in *Neufeld*, the Court said this:

> "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."

16 Thus, it would be wrong to say (as did Elias P in paragraph 101 of the judgment in *Clark*) that the absence of a written contract of employment "is an extremely powerful factor pointing against the contract regulating the relationship". However, no doubt was cast by the Court of Appeal in *Neufeld* on the proposition stated at the end of paragraph 103 of the judgment in *Clark* that if the idea that a person who is the sole shareholder in and the sole director of a company was to be employed by that company came from an accountant who advised on the establishment of that company for tax purposes (and while those are not the precise words used in that paragraph to describe the proposition, they are an accurate reflection of the situation considered in that paragraph) then that "may lend support to the conclusion that from the claimant's point of view it was a

contract in form but not substance". The whole of that paragraph bears repeating here. It has to be read with the paragraph which precedes it. Those two paragraphs are as follows.

> "102. Mr Laddie [counsel for the claimant, whom the employment tribunal had found was not an employee] submits that the tribunal failed to have regard to certain matters which might have had an effect on their [i.e. the tribunal's] characterisation of the relationship. In particular, he submits that they ought to have recorded the fact that the proposal for the arrangements came from the accountants.
>
> 103. We know not whether that is so or not, since we have no evidence about the matter, but we reject the notion that the tribunal erred in law in not identifying each and every feature which may have some bearing, however small, upon the balanced decision which the tribunal had to make. The tribunal did refer in terms to the fact that the arrangement was made with the involvement of the accountants. In truth, it makes little difference whether the accountant was the originator of the arrangement or was implementing a proposal that came from the claimant himself. Indeed, if anything the fact that it was the accountant's idea may lend support to the conclusion that from the claimant's point of view it was a contract in form but not substance."

17 I regarded the following statement at the end of paragraph 96 of the judgment in *Clark* as being of some assistance and as having been endorsed by the Court of Appeal in *Neufeld*:

> "However, if the controlling shareholder acts in a manner which suggests that the contract is being set at nought, or is treated as no more than an irrelevant piece of paper, then the tribunal will be entitled to refuse to give effect to it."

18 Nevertheless, the passage in the two judgments which I applied which was of most importance was paragraph 85 of *Neufeld*, which was this:

> "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 [i.e. *Lee v Lee's Air Farming Ltd* [1961] AC 12] 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." (Original emphasis.)

A discussion

19 Some employees work as and when required and work well above their contracted hours because they are dedicated to their jobs. However, there is usually scope for disengagement from the job. Thus, there is in practice a discernible difference between the position of a self-employed person (or one who provides services only, and is not employed under a contract of service, i.e. employment) and that of an employee.

20 A self-employed person providing services via a company limited by shares, all of which shares are owned by that person, will in practice be answerable only to himself or herself, and will be in a position to benefit financially from doing work which would not have been offered to the company by a client or customer if the self-employed person had not been responsive to queries, for example by keeping an eye on emails for much of the waking day, every day of the year. However, an employee who is paid only commission over and above the national minimum wage will be able to benefit financially from doing work which would not have been given to the employer to be done by that employee if the employee had not been responsive in the same way. Nevertheless, in those two situations the relationships between the (natural) person providing services or work to the company and that company are different, despite the fact that the company in both cases contracts with third parties for the provision of the services which the person in question provides.

21 If someone (i.e. a natural person) is providing services to clients of a company on behalf of the company and is being paid to do so by the company, then the relationship between the person and the company could be one either of self-employment, or of employment. There is no necessity for the relationship to be of either sort. The relationship of self-employment might be that of a worker who is not an employee and is not in business on his or her own account. The mere designation, by a person acting on behalf of a company on the advice of accountants given for tax purposes, of a person who provides services on behalf of the company as an employee of that company, cannot make that person an employee within the meaning of section 230(1) and (2) of the ERA 1996. However, there would not be a need for a conscious decision that a person who

provides services on behalf of a company is to be an employee of the company for that person to become an employee within the meaning of section 230(1) and (2): the person who is providing the services in question might in practice work in such a way that the relationship is properly classifiable as one of employment. However, without such a conscious decision, the proposition that the person was an employee will require particular scrutiny.

My conclusion on the question of the claimant's status

22 In all of the above circumstances, I came to the conclusion that the claimant was never an employee of the second respondent within the meaning of section 230(1) and (2) of the ERA 1996. I did so for the following reasons.

22.1 The claimant herself gave no thought to her employment status after the incorporation of the second respondent.

22.2 Even though (as was recognised in paragraph 85 of the judgment in *Neufeld*, which I have set out in paragraph 18 above) "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", that passage envisaged there being at least some "handling" of the matter, i.e. some consideration being given to the question of the claimed employee's employment status.

22.3 The best that could be said by the claimant here in this regard was that she had had a discussion with her accountants, who had told her that she would be an employee of the second respondent as well as the second respondent's only director and only shareholder.

22.4 However, that thing was said as part of what I concluded was precisely the sort of "arrangement ... made with the involvement of the accountants" to which the EAT referred in paragraph 103 of its judgment in *Clark* (which I have set out in paragraph 16 above).

22.5 There was not on the claimant's own evidence any reference made by the accountants to a contract of employment for the claimant. Nor was there any discussion between the claimant and the accountants about the possible terms of a contract of employment.

22.6 The claimant's own evidence (some of which is set out in paragraph 9 above; her oral evidence was to the same effect) showed that there had been no change whatsoever in the way in which she worked after the incorporation of the second respondent as compared with the situation

before that incorporation, including in regard to holidays and working hours. She was self-employed before that incorporation.

22.7 The work which the claimant did for the second respondent was precisely that which could reasonably be expected to be done by a director who was not an employee. It was done in the manner of a self-employed person.

The outcome

23 In those circumstances, I concluded that (1) the claimant never did become an employee of the second respondent, and (2) her claims were therefore outside the jurisdiction of the tribunal. They were therefore all dismissed.

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Employment Judge Hyams

Date: 22 November 2022

SENT TO THE PARTIES ON

7 December 2022

FOR THE TRIBUNAL OFFICE