EMPLOYMENT TRIBUNALS

Claimant: **Miss Lee-Ann Adendorff**

Respondents: **(1) Secretary of State for Business, Energy & Industrial Strategy**
(2) Design and Manage Limited (in liquidation)

Heard at: **East London Hearing Centre**

On: **27 January 2023**

Before: **Employment Judge Mack**

Representation

Claimant: In person
Respondent 1: Mr Soni (officer of the respondent)
Respondent 2: Did not appear and was not represented

JUDGMENT having been sent to the parties on 02 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. These are the Tribunal's reasons, given orally at the hearing on 27 January 2023. On 10 February 2023 the Secretary of State requested written reasons.

2. The claimant, Lee-Ann Adendorff, has brought a claim in which she seeks a redundancy payment, arrears of pay, notice pay and holiday pay from the National Insurance Fund. She brings this claim under sections 166 and sections 182 of the Employment Rights Act 1996 ("the 1996 Act").

3. The first respondent (referred to in this judgment as the respondent) denies that the claimant was entitled to any sums, on the basis that she was not an employee at the relevant time. The respondent also disputes the amounts claimed by the claimant. The second respondent, Design and Manage Limited ("D&M"), is in liquidation, did not appear in these proceedings and was not represented.

Issue

4. The issues to be determined by the Tribunal were agreed by the claimant and the respondent at the beginning of the hearing. They are:

   - Was the claimant an employee at the relevant time?
   - If so, is she entitled to any sums under section 166 or section 182 of the 1996 Act?
   - If so, what sums is she entitled to?

Procedure

5. The claimant represented herself and gave evidence on her own behalf. The claimant's evidence was by way of a written witness statement, which the Tribunal read in advance of the claimant giving oral evidence. The claimant was cross-examined by the respondent's representative, Mr Soni. The respondent did not give any evidence on its own behalf.

6. The Tribunal was referred to an agreed bundle of evidence, totalling 168 pages

Findings of fact

7. The claimant used to work for another firm. She had a period of illness in 2014 and 2015. She returned to work in 2015. After returning to work she decided to set up her own company. This company is the second respondent, D&M.

8. D&M was incorporated on 6 April 2016. The claimant was appointed as a director on the same day. She was the only director and the only shareholder of D&M. D&M went into Creditors' Voluntary Liquidation in August 2021. Therefore, at the time of the application to the National Insurance Fund it was insolvent.

9. The claimant worked as a design co-ordinator. She worked for large building contractors; for example, she would review technical drawings to ensure they were up to date and attend meetings between parties working on building projects.

10. During the period between 2016 and 2021 D&M also had the assistance of two overseas contractors. The claimant found these contractors. One was sourced via a virtual assistant website; the other was a family member. They were paid for their work by D&M.

11. The claimant did not enter into an express written or oral contract of employment with D&M in April 2016 or at any stage thereafter. D&M did not provide - and the claimant did not receive - any written terms of employment.

12. Per her evidence during these proceedings, the claimant decided how much to pay herself.

13. The claimant received money into her bank account from D&M. The Tribunal saw bank statements from 2019 to 2021 showing these payments. The statements were provided to the National Insurance Fund and had annotations (which the claimant had made) recording the reason for the payment. There were regular payments into the account. These were often - but not always - for £1,000. The payments were not made at regular intervals. The Tribunal was told in evidence that the last salary payment was made in September 2020; this was for £1,500. There was one furlough payment into the account in February 2021.

14. Other payments are recorded for travel allowances, expenses and bonuses. The claimant would receive a bonus on occasion. She might do this if a client paid a bonus to D&M. The claimant explained that the client would pay the bonus to D&M and the claimant would pay some of this to herself. There was no agreement between the claimant and D&M as to how the amount would be calculated; the claimant would decide the amount herself.

15. Various payslips were provided for the period between November 2020 and July 2021. These record a basic gross monthly payment of £791.67, with no tax or National Insurance deductions. However, no bank statement before the Tribunal records a payment of £791.67.

16. A monthly payment of £791.67 is equal to total annual payments of £9,500.04. The claimant's P60s for the years ending 2017, 2018, 2019 and 2020 show annual pay of £8,060, £8,164, £8,424 and £8,632 respectively.

17. The claimant had a pension fund with a company called Hargreaves Lansdown. This pension fund pre-dated the incorporation of D&M. The fund was in the claimant's name. The claimant would add to the pension fund periodically. She would do so using D&M's company credit card. The amounts to be added and the frequency with which they were added were not agreed with D&M; instead, they were decided by the claimant.

18. The claimant had a number of periods of sick leave between 2016 and 2021. The claimant continued to be paid by D&M during these periods.

19. The claimant did not work a set number of days or hours each week. She would usually work between three to four days per week.

20. The claimant took periods of time away from working. For example, if a building site on which she was working took holidays during August, then she would take an extra week away from working herself. She would also take time off between projects, particularly if she had been feeling stressed.

Submissions

21. For the respondent, Mr Soni adopted the Grounds of Resistance attached to the ET3. He submitted that there was no implied contract of employment between the claimant and D&M and, therefore, the claimant was not an employee of D&M. In particular, he drew the Tribunal's attention to the discrepancies in payments recorded in the claimant's bank accounts, payslips and P60s. He submitted that the claimant was an office holder and

the limited company - D&M - was set up to take advantage of optimum director salary. He submitted that the evidence was consistent with the claimant having received advice from an accountant as to this amount, which led to her drawing £1,000 per month.

22. The claimant adopted the arguments in her witness statement. She told the Tribunal that her motivation for setting up the company was because of poor experiences in previous employment. She stated that she had an employment contract with D&M and was paid £1,000 monthly. She accepted that there had been discrepancies between the paperwork before the Tribunal. However, she said that this was due to errors in documents prepared by a claims management company (which the claimant had previously engaged) and advice received from the accountant engaged by the D&M. She noted that the differences in amounts recorded in the various documents were not significant.

Relevant Law

23. Section 170(1) of the 1996 Act provides:

Where on an application made to the Secretary of State for a payment under section 166 it is claimed that an employer is liable to pay an employer's payment, there shall be referred to an [employment tribunal] -

(a) any question as to the liability of the employer to pay the employer's payment, and

(b) any question as to the amount of the sum payable in accordance with section 168.

24. Section 188(1) of the 1996 Act states:

A person who has applied for a payment under section 182 may present a complaint to an [employment tribunal] -

(a) that the Secretary of State has failed to make any such payment, or

(b) that any such payment made by him is less than the amount which should have been paid.

25. Section 188(3) of the 1996 Act is:

Where an [employment tribunal] finds that the Secretary of State ought to make a payment under section 182, the tribunal shall-

(a) make a declaration to that effect, and

(b) declare the amount of any such payment which it finds the Secretary of State ought to make.

26. Section 230(1) of the 1996 Act defines an "employee" as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."* Section 230(2) of the same Act defines a contract of employment as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

27. The essential test for employment status was set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. This decision held that a contract of service will exist where an employee agrees to provide personal service to an employer; the employee agrees to be subject to the control (to a sufficient degree) of the employer; and the other provisions of the contract are consistent with it being a contract of service. This was affirmed in the Supreme Court in the case *Autoclenz Ltd v Belcher and ors* [2011] ICR 1157. This requires the Tribunal to answer three questions:

    a. Did the worker agree to provide his or her own work and skill in return for remuneration?

    b. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

    c. Were the other provisions of the contract consistent with it being a contract of service?

28. Guidance on determining whether an individual has employee status was provided in *Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218, where the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at [1992] ICR 739), who had said:

> *"[T]his is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation."*

29. There is a series of cases, starting with *Nethermere (St Neots) Ltd v Gardiner and Anor* [1984] ICR 612 and ending with *Carmichael and Anor v National Power plc* [1999] ICR 1226 (HL) to the effect that there cannot be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service. Therefore, in examining whether there is a contract of employment, the Tribunal is required to consider personal performance, control and mutuality of obligation.

30. It is established law that a company may enter into a contract of employment with a person who is the principal shareholder and in sole control of the company (see *Lee v Lee's Air Farming Limited* [1961] AC 12 (PC). In *Secretary of State for Trade and Industry v Bottrill* [1999] IRLR 326 the Court of Appeal held that a majority shareholding was a factor - but not necessarily a deciding factor - in determining whether a director shareholder was an employee. At paragraph 23 Lord Woolf MR said this:

> *"We do not find any justification for departing from the well-established position in the law of employment generally. That is whether or not an employer or employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling*

> *shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly is not to be taken as determinative without considering all the relevant circumstances."*

31. In this judgment Lord Woolf also set out some of the other factors which a tribunal might consider important in deciding whether there is an employment relationship. At paragraphs 28 and 29 he said:

> *"The first question which the tribunal is likely to wish to consider is whether there is or has been a genuine contract between the company and the shareholder. In this context, how and for what reasons the contract came into existence (for example, whether the contract was made at a time when insolvency loomed) and what each party actually did pursuant to the contract are likely to be relevant considerations.*
>
> *If the tribunal concludes that the contract is not a sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, actually gave rise to an employer/employee relationship."*

32. In *Clark v Clark Construction Initiatives Ltd* [2008] ICR 718 (EAT), Elias P (from paragraph 92) dealt with the circumstances in which a tribunal could disregard the apparent terms of a contract of employment:

> "*We would suggest that there may be three sets of circumstances where it may be legitimate not to give effect to what is alleged to be a binding contract of employment. The first is in the circumstances envisaged by Underhill J, namely where the company itself is a sham.*
>
> *The second is where the contract is entered into for some ulterior purpose, such as to secure some statutory payment from the Secretary of State. Hence the reason why in both* Fleming *and* Bottrill *the courts recognised that one potentially relevant factor would be the circumstances in which the contract was created.*
>
> *The third is where the parties do not in fact conduct their relationship in accordance with the contract. This may be either because they never really intended that it should be so conducted, or because the relationship has ceased to reflect the contractual terms."*

33. Elias P gave general guidance as to the factors that may be taken into account at paragraph 98.

34. In *Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another* [2009] ICR 1183 (CA), Rimer LJ stated, at paragraph 80:

> "*There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. There is also no reason in principle why someone whose shareholding in the company gives him control of it – even total control (as in Lee's case) – cannot be an employee. In short, a person whose economic interest in a company and its business means that he is in practice properly to be regarded as their 'owner' can also be an employee of the company. It will, in particular, be no answer to his claim to be such an employee to argue that: (i) the extent of his control of the company*

> *means that the control condition of a contract of employment cannot be satisfied; or (ii) that the practical control he has over his own destiny – including that he cannot be dismissed from his employment except with his consent – has the effect in law that he cannot be an employee at all. Point (i) is answered by Lee's case, which decided that the relevant control is in the company; point (ii) is answered by this court's rejection in Bottrill of the reasoning in Buchan."*

35. However, this does not necessarily mean that a contract exists. The tribunal must decide, on the application of ordinary principles, whether there was such a contract and, if so, if it is a contract of employment. In *Neufeld*, Rimer LJ said at paragraph 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."*

36. At paragraph 89 of *Neufeld*, Rimer LJ considered cases where there was no written agreement. He stated:

> "*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."*

Decision

37. It is accepted that there was no written contract of employment or written terms of employment between the claimant and D&M. However, this is not determinative of the claimant's status. The claimant states that there was an implied contract between the claimant and D&M. The Tribunal has considered the parties' conduct and whether this was consistent with there being a contact of employment between the claimant and D&M.

38. The Tribunal has decided that there was not such an implied contract between the claimant and D&M. This is for the following reasons:

a. There was no requirement for the claimant to perform certain services for D&M. The Tribunal has reached this conclusion based on:

    a. The claimant's evidence that she decided the work that she would undertake by identifying on her own behalf, from a project's job specification and deliverables, the work that she thought she could complete;

    b. The absence of an obligation on the claimant as to days and hours to be worked each week;

    c. The ability for the claimant to take unpaid leave whenever she desired: in effect, she was the master of her own working arrangements;

b. There was no requirement for D&M to pay the claimant a certain amount of remuneration for the services provided. The Tribunal has reached this conclusion based on the varying amounts paid to the claimant by D&M over the relevant period and the discrepancies between the payslips, bank statements and P60s as to the amounts paid to the claimant;

c. The ability of the claimant to determine the amount of bonus to pay herself;

d. On the information disclosed by all the documents, the failure by D&M to pay the claimant the National Minimum Wage; and

e. The absence of other benefits consistent with being an employee - namely annual leave, sick pay arrangements or pension contributions - being provided to the claimant by D&M. In addition, the amount of pension contribution was decided by the claimant and not D&M.

39. The Tribunal has concluded that this is inconsistent with the arrangement between the claimant and D&M having the necessary elements of control and mutuality of obligation. The Tribunal has therefore decided, based on the evidence presented, that the reality of the relationship between the parties was that the claimant was not an employee of D&M, as defined in section 230(1) of the 1996 Act, from 6 April 2016 onwards.

Employment Judge Mack
Date: 13 March 2023