



EMPLOYMENT TRIBUNALS

Claimant: Mr J Rostance

Respondents: (1) The Secretary of State for Business, Energy and Industrial Strategy
(2) Wow Video Production Ltd (in liquidation)

Heard at: Bristol (via vhs) On: 16.02.2023

Before: Employment Judge David Hughes

Representation

Claimant: In person

Respondents: (1) Mr Soni, lay representative
(2) No appearance and not represented

JUDGMENT having been sent to the parties on 02.03.2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case, the Claimant claimed against the Secretary of State in respect of what he says is money owed to him by the 2nd Respondent.
2. The 2nd Respondent was a company incorporated by the Claimant in 2010. Its business was the creation of videos, including marketing videos. The Claimant's brother was a director for a brief time – a matter of weeks – thereafter the Claimant was the sole officer of the company and, so he says, its sole employee.
3. At the outset of the hearing, I canvassed with the parties the issues I would have to decide. They agreed that the first issue for me to decide was, whether the Claimant was an employee of the 2nd Respondent. If he was, I would have to decide what his wages were.

What happened

4. I have already dealt with the incorporation of the 2nd Respondent.
5. The Claimant's case is that he was employed by the 2nd Respondent from the time it was incorporated to the time it was wound up. Save possibly for a 2 month period in which a business development person worked for it (whether as an employee or not was not clear), he says that he was the sole employee.
6. It was not disputed that the Claimant did a considerable amount of work for the 2nd Respondent. In his statement, he identified 6 core roles:
 - a) Business development;
 - b) Marketing;
 - c) Social media;
 - d) Video director;
 - e) Video editor;
 - f) Human resources manager
7. The Claimant said that, save for the 2 month period referred to above when another person was hired, he personally undertook all of the roles he identified. In support of his contention that he was an employee, he referred to the fact that, in his HR manager capacity, he sourced staff needed, such as camera operators, and paid them when they invoiced the 2nd Respondent after particular jobs were completed.
8. The Claimant told me, and it was not seriously challenged, that he worked 6 days a week, often 7 days a week. Moreover, he worked long days, of 10 or more hours. He did not take holidays, and usually if not invariably worked on Bank Holidays. At different points in the documentation before me, his working hours have been described as 50 hours per week or 48 hours per week. I find that no thought was given by the Claimant, whether as a director of the 2nd Respondent or in any other capacity, to what his working hours were to be, and no agreement as to this between the Claimant and the 2nd Respondent.
9. Asked about his entitlement to take holidays, he said that his holiday entitlement was whatever the statutory minimum was. I do not accept that that answer

reflected an agreement reached, even tacitly, between the Claimant and the 2nd Respondent. It appeared to me to be an answer given on the spur of the moment, simply because the question had been asked.

10. The Claimant included in the bundle payslips, which indicated that he received a monthly salary of £737.00 at the end of each month. At the hearing, he said that his contract of employment provided that he should receive an annual salary. He produced tax returns, showing his taxable income for PAYE purposes to be £8,784.00 for the year ending 05.04.2021, £8,594.00 for that ending 05.04.2020, £8,424.00 for the year ending 05.04.2019, a total of £9,523.96 (split between two payroll numbers) for the year ending 05.04.2018 and £8,052 for the year ending 05.04.2017.
11. The Claimant told me that these amounts were set according to the level of income he could receive without becoming liable for tax. For example, asked about a payslip for the month of August 2021, the Claimant said that the sum on the payslip - £737.00 – was arrived at by dividing his annual tax-free allowance by 12. Questioned about whether – given the hours he said he worked – this would have been below the National Minimum Wage, the Claimant said that he had not been aware that it may have been below that level, although he had heard of the National Minimum Wage. He also told me that there was no agreement as to any overtime payments.
12. The Claimant accepted that he did not receive any so-called salary from the 2nd Respondent until January 2013. Thereafter, right through until the company was dissolved, at no point did he receive regular monthly payments of salary.
13. The Claimant said that there were times when the 2nd Respondent did not have money to pay him. He said that he could not run the 2nd Respondent's bank balance down to zero, because it needed to be able to pay its suppliers. But he recognised that it was not always the case that the 2nd Respondent was short of money. His evidence was that he had loaned significant amounts of money to the 2nd Respondent, and had taken remuneration in the form of repayment

of money loaned. Even when the 2nd Respondent had money to pay a regular monthly salary, it did not always do so.

14. The Claimant pointed out to me that the 2nd Respondent was a small company, without the HR or payroll department of a large enterprise. That is true. But setting up a direct debit to pay him a monthly salary would not have been a difficult task, and it is one that, I find, the 2nd Respondent could have easily done.

15. The Claimant contended that the agreement he had with the 2nd Respondent was for the payment of an annual salary, not a monthly one. He says that, over each financial year, he was paid the sum to which he was entitled. He contends that there is no requirement that an employee be paid at monthly intervals. That may be true, but I do not accept the Claimant's evidence there was an agreement that he would be paid an annual amount. If that were so, why would payslips that would have the reader believe that he was being paid monthly be created?

16. I am not satisfied that there was any genuine agreement that the Claimant would be paid a fixed salary, to which he was entitled at fixed intervals. The Claimant took remuneration — in the form of re-payments of money loaned to the 2nd Respondent (the exact quantities of which were not explored before me), and in share dividends. He did not cause the 2nd Respondent to take even the simple step of setting up a direct debit, to pay him the money he says he was due in salary, at any interval, whether monthly or annually. I find that the presenting of the Claimant's remuneration as being, in part, salary, was an attempt to present his income in a way that minimised his tax liability, rather than a reflection of an agreement reached that he was entitled to a salary from the 2nd Respondent.

17. I am not satisfied that there was any agreement between the Claimant and the 2nd Respondent as to what exactly the Claimant's duties were. That they were broad is not surprising, given that he was the sole shareholder and director of the company that, he says, also employed him. I also find that, although the Claimant did personally undertake a wide range of duties for the 2nd

Respondent, he was not personally required to do so. I have already referred to the time when another person was hired – on what exact basis was, I repeat, not clarified – to undertake duties for the 2nd Respondent. I think it probable that, had he chosen to do so, the Claimant could have chosen to have other people undertake any of the duties that, through either choice or necessity, he himself undertook.

Law

Employment Rights Act 1996 (“ERA”)

18. S1 of the ERA provides as follows:

1.— Statement of initial employment particulars.

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) Subject to sections 2(2) to (4)—

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker,

(b) the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work including any terms and conditions relating to—

- (i) normal working hours,
- (ii) the days of the week the worker is required to work, and
- (iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,
- (d) any terms and conditions relating to any of the following—
 - (i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
 - (ii) incapacity for work due to sickness or injury, including any provision for sick pay,
 - (iia) any other paid leave, and
 - (iii) pensions and pension schemes,
 - (da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,
- (e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,
- (f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,
- (g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,
- (ga) any probationary period, including any conditions and its duration,
- (h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,
- (j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,
- (k) where the worker is required to work outside the United Kingdom for a period of more than one month—
 - (i) the period for which he is to work outside the United Kingdom,
 - (ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv) any terms and conditions relating to his return to the United Kingdom,

(l) any training entitlement provided by the employer,

(m) any part of that training entitlement which the employer requires the worker to complete, and

(n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.

(5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—

(a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.

(6) In this section "*probationary period*" means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—

(a) commences at the beginning of the employment, and

(b) is intended to enable the employer to assess the worker's suitability for the employment.

19. S166 of the ERA provides as follows:

166.— Applications for payments.

(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.

(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,

(aa) a payment which his employer is liable to make to him under an agreement to refrain from instituting or continuing proceedings for a contravention or alleged contravention of section 135 which has effect by virtue of section 203(2)(e) or (f), or

(b) a payment which his employer is, under an agreement in respect of which an order is in force under section 157, liable to make to him on the termination of his contract of employment.

(3) In relation to any case where (in accordance with any provision of this Part) an employment tribunal determines that an employer is liable to pay part (but not the whole) of a redundancy payment the reference in subsection (2)(a) to a redundancy payment is to the part of the redundancy payment.

(4) In subsection (1)(a) “*legal proceedings*” —

(a) does not include any proceedings before an [employment tribunal]³, but

(b) includes any proceedings to enforce a decision or award of an employment tribunal.

(5) An employer is insolvent for the purposes of subsection (1)(b)—

(a) where the employer is an individual, if (but only if) subsection (6), (8ZA) or (8A) is satisfied,

(b) where the employer is a company, if (but only if) subsection (7), (8ZA) or (8A) is satisfied,

(c) where the employer is a limited liability partnership, if (but only if) subsection (8), (8ZA) or (8A) is satisfied; and

(d) where the employer is not any of the above, if (but only if) subsection (8ZA) or (8A) is satisfied.

(6) This subsection is satisfied in the case of an employer who is an individual—

(a) in England and Wales if—

(i) he has been made bankrupt or has made a composition or arrangement with his creditors, or

(ii) he has died and his estate falls to be administered in accordance with an order under section 421 of the Insolvency Act 1986, and

(b) in Scotland if—

(i) sequestration of his estate has been awarded or he has executed a trust deed for his creditors or has entered into a composition contract, or

(ii) he has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section to divide his insolvent estate among his creditors.

(7) This subsection is satisfied in the case of an employer which is a company—

(a) if a winding up order has been made, or a resolution for voluntary winding up has been passed, with respect to the company,

(aa) if the company is in administration for the purposes of the Insolvency Act 1986,

(b) if a receiver or (in England and Wales only) a manager of the company's undertaking has been duly appointed, or (in England and Wales only) possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge, or

(c) if a voluntary arrangement proposed in the case of the company for the purposes of Part 1 of the Insolvency Act 1986 has been approved under that Part of that Act.

(8) This subsection is satisfied in the case of an employer which is a limited liability partnership—

(a) if a winding-up order, an administration order or a determination for a voluntary winding-up has been made with respect to the limited liability partnership,

(b) if a receiver or (in England and Wales only) a manager of the undertaking of the limited liability partnership has been duly appointed, or (in England and Wales only) possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the limited liability partnership comprised in or subject to the charge, or

(c) if a voluntary arrangement proposed in the case of the limited liability partnership for the purpose of Part I of the Insolvency Act 1986 has been approved under that Part of that Act.

(8ZA) This subsection is satisfied in the case of an employer if—

- (a) the employer is a legal person,
- (b) a request has been made for the first opening of collective proceedings—
 - (i) based on the insolvency of the employer, as provided for under the law of any part of the United Kingdom, and
 - (ii) involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and
- (c) any of the following has decided to open the proceedings—
 - (i) a court,
 - (ii) a meeting of creditors, or
 - (iii) the creditors by a decision procedure.

(8A) This subsection is satisfied in the case of an employer if—

- (a) a request has been made for the first opening of collective proceedings—
 - (i) based on the insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a member State, and
 - (ii) involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and
- (b) the competent authority has—
 - (i) decided to open the proceedings, or
 - (ii) established that the employer's undertaking or business has been definitively closed down and the available assets of the employer are insufficient to warrant the opening of the proceedings.

(8B) For the purposes of this section —

- (a) "*liquidator or person performing a similar task*" includes the official receiver or an administrator, trustee in bankruptcy, judicial factor, supervisor of a voluntary arrangement, or person performing a similar task,
- (b) "*competent authority*" includes—
 - (i) a court,
 - (ii) a meeting of creditors,
 - (iii) a creditors' committee,
 - (iv) the creditors by a decision procedure, and

(v) an authority of a member State empowered to open insolvency proceedings, to confirm the opening of such proceedings or to take decisions in the course of such proceedings.

(8C) An employee may apply under this section only if he or she worked or habitually worked in Great Britain in that employment to which the application relates.

(9) In this section—

(a) references to a company are to be read as including references to a charitable incorporated organisation, and

(b) any reference to the Insolvency Act 1986 in relation to a company is to be read as including a reference to that Act as it applies to charitable incorporated organisations.

20. S182 of the ERA provides:

182. Employee's rights on insolvency of employer.

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.

21. S230 of the ERA provides as follows:

230.— Employees, workers etc.

(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.

(3) In this Act “*worker*” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(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, and

(b) in relation to a worker, means employment under his contract;

and “*employed*” shall be construed accordingly.

(6) This section has effect subject to [sections 43K, 47B(3) and 49B(10)]²; and for the purposes of Part XIII so far as relating to Part IVA or section 47B, “*worker*”, “*worker's contract*” and, in relation to a worker, “*employer*”, “*employment*” and “*employed*” have the extended meaning given by section 43K.

(7) This section has effect subject to section 75K(3) and (5).

22. There is no dispute that a director of a company can also be an employee. Whether or not that is so is a question of fact.

23. Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld & Howe [2009] EWCA Civ 280 [2009] ICR 1183 was cited to me. The following can be drawn from that case:

- a) The fact that an individual is the sole shareholder and director of a company is no obstacle to them also being an employee of the company¹;
- b) The fact of the individual's control is part of the backdrop against which the assessment will be made, but is not ordinarily of any special relevance in deciding whether or not they have a valid contract of employment²;
- c) The fact that they will have share capital in the company, or may have made loans to it, or may have personally guaranteed its obligations, or that they stand to prosper in line with the company's prosperity, or done any of the things an owner of a business will commonly do on its behalf, will equally not ordinarily be of any special relevance³;
- d) The Court of Appeal agreed with the essence of the factors set out by Elias J in Clark v Clark Construction Initiatives Ltd [2008] ICR 635, but put a gloss on some of them⁴.

24. The factors referred to in Clarke were as follows⁵:

- a) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments. The Court of Appeal in Neufeld said "*We doubt if Elias J was intending to refer to a legal burden. In cases where the putative employee is asserting the existence of an employment contract, it will be for him to prove it; and, as we have indicated, the mere production of what purports to be a written service agreement may by itself be insufficient to prove the case sought to be made.*";

¹ @ para 80

² @ para 86

³ Ibid

⁴ @ paras 88-90

⁵ @ para 98

- b) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does;
- c) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays;
- d) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para 96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee;
- e) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing: *Fleming v Secretary of State for Trade and Industry [1997] IRLR 682* . This will be powerful evidence that the contract was not really intended to regulate the relationship in any way. The Court of Appeal in Neufeld thought that *“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”*;
- f) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight;
- g) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean

that the fact alone will ever justify a tribunal in finding that there was no contract in place.

25. As for the last two, the Court of Appeal in Neufeld considered that they amounted to never saying never.

26. I was also referred to Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] 2 Q.B. 497, in which a 3-stage test was set out for determining whether there was a contract of employment.

Analysis

27. In this case, I am satisfied that the Claimant worked long hours in the attempt to make a success of the 2nd Respondent. That is not the question before me. The question is, whether he did so as an employee of the 2nd Respondent, or in some other capacity.

28. I find that the Claimant was not an employee of the 2nd Respondent, for the following reasons:

- a) His duties were not defined, not even orally or in the broadest possible terms;
- b) He was not required to carry out personally the functions he performed for the 2nd Respondent. He did carry them out personally, save for a brief period when another person was hired, but the 2nd Respondent would have had no cause for complaint had he chosen to hire someone else to perform any of the functions that he performed for the 2nd Respondent;
- c) The attitude of the parties towards payment of the so-called salary was inconsistent with a relationship of employment. Although there may be no legal impediment to an agreement to pay a yearly salary in irregular amounts, the documentation prepared in the form of payslips was positively and deliberately misleading. It leads one to believe that the Claimant was paid a regular monthly sum. That is simply not so. Although it is conceivable that a genuine employee might be blasé about when they receive their

salary, this approach is, I think, inconsistent with a genuine relationship of employment;

- d) There is the attitude towards the National Minimum Wage. Even in a small business such as the 2nd Respondent, the attitude towards it – which can only be described as cavalier – is inconsistent with either the 2nd Respondent or the Claimant taking a supposed employer-employee relationship seriously;
- e) That there was no attempt to comply with the provisions of S1ERA to provide written particulars may not be of great assistance, but is another factor pointing to there being no contract of employment;
- f) No thought at all was given to holiday entitlement. It matters not that the Claimant would likely have chosen to work anyway. His answer when asked about this – that his holiday entitlement was whatever the statutory minimum was – did not appear to me to be a reflection of a position that had been agreed upon in the past. No agreement between the Claimant and the 2nd Respondent as to holiday entitled was reached, I find, even in the most nebulous of terms, between the Claimant and the 2nd Respondent;

29. I note that the Claimant refers to his P60 forms. But these are forms that have been prepared either by him or on his behalf. It is not surprising that they reflect the position that he now contends to be the case. It seems to me that the most likely explanation for the presentation of part of his remuneration from the 2nd Respondent as salary is to present a sum that would allow him to receive that amount without having to pay tax. He told me clearly that the sum he received was fixed by reference to tax allowances, and that he received other remuneration in the form of repayment of loaned money, on which he would, so he told me, not be required to pay tax.

30. I am mindful that the Claimant did not invoice the 2nd Respondent. Given the above, I find that unsurprising, and of little assistance.

Employment Judge Hughes

Date 19 April 2023

Judgment sent to the parties on 20 April 2023

For the Tribunal Office