



EMPLOYMENT TRIBUNALS

Claimant: Mr. D Tessaro

Respondent: JJ Comms (UK) Limited (In Creditors Voluntary Liquidation) – R1
The Secretary of State for Business, Energy & Industrial Strategy – R2

Heard at: Cardiff, by video

On: 27 April 2023

Before: Employment Judge G Cawthray

Representation

Claimant: In person – not legally qualified

First Respondent: Non-attending

Second Respondent: Mr. P Soni – Senior Employment Tribunal Representative - not legally qualified

RESERVED JUDGMENT

1. The Claimant is not an employee in accordance with section 230 of the Employment Rights Act 1996.

2. The Claimant is not entitled to a statutory redundancy payment and his claim is dismissed.

REASONS

Issues

1. Was the Claimant an employee of R1 within the meaning of section 230 of the Employment Rights Act 1996?
2. Was the Claimant entitled to a redundancy payments? If yes, how much?

Procedure

3. The Claimant represented himself at the hearing. The First Respondent, R1, had not submitted a response and there was no representative in attendance at the hearing. The Second Respondent, R2, was represented by Mr. Soni, Senior Employment Tribunal Representative for R2. Mr. Soni is not legally qualified.
4. R2 had produced a document Bundle amounting to 264 pages. R2 had also produced a case authority Bundle. The Claimant had received and reviewed both bundles and had them available to him throughout the hearing. I explained to the parties that I needed to be directed to any documents in the bundle that they wished me to consider.
5. At the start of the hearing the Claimant identified that he wished to rely on a number of pay slips, some of which had not been received by R2 and the Tribunal. The Claimant provided the pay slips by email at the start of the hearing and Mr. Soni was given time to review and confirmed that he was happy to continue.
6. The issues to be determined were discussed with the parties at the outset of the hearing. The parties confirmed they were aware of and ready to deal with the issues. The Claimant confirmed that he had read and understood R2's response to the claim. I reminded the parties about the issues to be determined at several times throughout the hearing.
7. The Claimant had not provided a written witness statement. The Claimant, after discussion regarding the issues, was given some time to consider what he wished to say. The Claimant affirmed and gave oral evidence. The Claimant was cross-examined by Mr. Soni and I asked a few questions.
8. Both parties made oral submissions. Mr. Soni relied on the Grounds of Resistance as the basis of R2's submissions and directed me to case law and legislative provisions.
9. No adjustments were required for the hearing. I explained to the parties that although regular breaks would be taken, a comfort break could be requested if required.

Facts

The background to R1

10. Prior to the incorporation of R1 the Claimant was a sole trader for approximately 12 months.

11. R1 was a business that installed and supplied telecoms equipment and data cables.
12. R1 was incorporated on 11 October 2020. At the date of incorporation the Claimant and a Mr. Paul Michael Rees were R1's officers. Mr. Rees resigned on 1 October 2012. Since that date, the Claimant has been the only director and registered officer. R1 has never had a board of directors.
13. Since incorporation the Claimant has been the only shareholder.
14. R1 has made payments to Mrs. Julie Tessaro, the Claimant's wife, and Ms. Lynda Rees, as evidenced by the pay slips provided by the Claimant. The Claimant's evidence is that Mrs. Tessaro had been employed by R1 to provide administrative support and Ms. Rees was a telecoms engineer. I make no findings of fact about the employment status of Mrs. Tessaro and Ms. Rees.
15. R1 went into Creditors Voluntary Liquidation on 17 June 2022.

The Claimant – his engagement with R1 and application for redundancy payment

16. The Claimant did not have a written contract of employment.
17. The Claimant engaged an account and external parties to provide payroll support.
18. The Claimant was, from 2012, the sole director and shareholder. He did not report to any person or board and was not managed or supervised in any way.
19. The Claimant's evidence on his working hours was not clear. He asserted that he agreed with R1 to work 48 hours per week but also stated that he worked in excess of 48 hours per week. The admission that the Claimant worked in excess of 48 hours per week is not consistent with the response that he gave to the directors questionnaire sent by the Redundancy Payments Service on 27 June 2022. In his response to that form the Claimant stated: "*I worked a fixed number of hours each week*". I find that the Claimant worked varying hours, and worked more than 48 hours per week when R1 was busy.
20. The evidence in relation to the Claimant's pay was not clear. He stated that he agreed with R1 that he would be paid the National Minimum Wage but later during evidence accepted that he had been paid less than the minimum wage.
21. The Claimant had been advised by his accountant to undertake an arrangement in which he was paid a low sum framed as wages was paid to him monthly together with a monthly dividend end payment. This was

done for tax efficiency purposes and the Claimant acted on the advice of the accountant.

22. The Bundle contained bank statements for R1 between March 2020 and June 2023.
23. The Claimant was directed to page 262 in the Bundle, and was asked questions on the basis that the bank statement at this page was from June 2022. This is what it is labelled on the Bundle Index. However, the top of page states that the statement was issued on 10 June 2020.
24. I have therefore carefully reviewed other bank statements in the Bundle, and note the key information about payments made to the Claimant below as finding of facts.

28 April 2020 – standing order to Dino Tessaro – ref Dividends Mar 20 - £500

28 April 2020 – standing order to Dino Tessaro – ref Wages Mar 20 - £720

28 May 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

28 May 2020 - standing order to Dino Tessaro – ref Wages Mar 20 - £791.66

29 June 2020 – standing order to Dino Tessaro – ref Dividends Mar 20 - £500

29 June 2020 - standing order to Dino Tessaro – ref Wages Jun 20 - £633.33

28 July 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

28 July 2020 - standing order to Dino Tessaro – ref Wages Jun 20 - £633.33

28 August 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

28 August 2020 - standing order to Dino Tessaro – ref Wages Jun 20 - £633.33

28 September 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

28 September 2020 - standing order to Dino Tessaro – ref Wages Jun 20 - £633.33

28 October 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

28 October 2020 - standing order to Dino Tessaro – ref Wages Jun 20 - £633.33

30 November 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

30 November 2020 – standing order to Dino Tessaro – ref Wages Nov 20 £791.66

14 December 2020 – online banking bill payment to Dino Tessaro – re Dividends Mar 20 - £250

29 December 2020 - standing order to Dino Tessaro – ref Dividends Mar 20 - £500

29 December 2020 – standing order to Dino Tessaro – ref Wages Nov 20
£791.66

28 January 2021 - standing order to Dino Tessaro – ref Dividends Mar 20 -
£500

28 January 2021 - standing order to Dino Tessaro – ref Wages Nov 20
£791.66

1 March 2021 - standing order to Dino Tessaro – ref Dividends Mar 20 -
£500

1 March 2021 - standing order to Dino Tessaro – ref Wages Nov 20
£791.66

29 March 2021 - standing order to Dino Tessaro – ref Dividends Mar 20 -
£500

29 March 2021 - standing order to Dino Tessaro – ref Wages Nov 20
£791.66

28 April 2021 – standing order to Dino Tessaro – ref Dividends Mar 20 -
£500

28 April 2021 - standing order to Dino Tessaro – ref Wages Nov 20
£791.66

28 May 2021 - standing order to Dino Tessaro – ref Dividends May 21 -
£500

28 May 2021 - standing order to Dino Tessaro – ref Wages May 21 -
£791.66

28 June 2021 - standing order to Dino Tessaro – ref Dividends May 21 -
£500

28 June 2021 - standing order to Dino Tessaro – ref Wages May 21 -
£791.66

28 July 2021 - standing order to Dino Tessaro – ref Dividends May 21 -
£500

28 July 2021 - standing order to Dino Tessaro – ref Wages May 21 -
£791.66

31 August 2021 - standing order to Dino Tessaro – ref Dividends May 21 -
£500

31 August 2021 - standing order to Dino Tessaro – ref Wages May 21 -
£791.66

28 September 2021 - standing order to Dino Tessaro – ref Dividends May
21 - £500

28 September 2021 - standing order to Dino Tessaro – ref Wages May 21
- £791.66

28 October 2021 - standing order to Dino Tessaro – ref Dividends May 21
- £500

28 October 2021 - standing order to Dino Tessaro – ref Wages May 21 -
£791.66

29 November 2021 – standing order to Dino Tessaro – ref Dividends May
21 - £500

29 November 2021 - standing order to Dino Tessaro – ref Wages May 21 -
£791.66

18 January 2021 – on-line banking bill payment to Dino Tessaro £1,500.00
– ref: loan repayment

28 February 2022 - on-line banking bill payment to Dino Tessaro– ref:
Wages Feb 22 - £791.66

4 April 2022 - on-line banking bill payment to Dino Tessaro £1,500.00 – ref: director loan - £1,500.00.

25. The pay slip dated 31 March 2022 states the Claimant was paid £791.66 on 31 March 2022. There was no corresponding payment in R1's bank statement for that date.
26. Pay slip dated 30 April 2022 states the Claimant was paid £791.66 on 30 April 2022. There was no corresponding payment in R1's bank statement for that date.
27. In his response to the directors questionnaire sent by the Redundancy Payments Service on 27 June 2022 regarding payment of dividends, the Claimant, when answering when dividends were last paid to him stated: "*The last dividends that were taken were for the year ending March 2019 in the sum of £5,414.*" Given the bank statements as detailed above, I do not find this to be correct. The last recorded payment of a dividend to the Claimant based on the bank statements in the Bundle was 29 November 2021.
28. The company bank statements show payments to Ms. Rees labelled as salary. The payment amounts to Ms. Rees varied.
29. The Claimant provided various pay slips from September 2017. Not all were accessible. Some of the pay slips for the Claimant show that the R1 did not deduct any tax, did not make National Insurance deductions and did not make any pension contributions.
30. Some of the pay slips for Mrs. Tessaro show that National Insurance deductions were made and in relation to Ms. Rees show that tax, National Insurance contributions and pension contributions were all deducted.
31. The Claimant was actually paid less than National Minimum Wage. The Claimant never raised any concerns about the level of salary paid to him and did not seek to recover any sums either during the solvent period of operation of R1 or in this employment tribunal claim.
32. There was no written agreement in respect of holiday. In response to questioning the Claimant stated that he did not take regular holidays.
33. The Claimant accepted that he was responsible for all payments from R1.
34. On 7 June 2022 the Claimant instructed Redundancy Claims UK to seek the recovery of sums on his behalf.
35. On 17 August 2022 the Redundancy Payments Service rejected the Claimant's application.

Law

Employment status

36. Section 230 of the ERA provides the definition of employee, employment and worker as follows:

“(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...”

37. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, McKenna J set out the conditions required for a contract of service, namely that:“(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.”

38. The importance of the test set out in *Ready Mixed Concrete* was affirmed by the Supreme Court in *Autoclenz Ltd v Belcher and others* [2011] ICR 1157. The ‘irreducible minimum’ for a contract of employment comprises:

a. Control;

- b. Personal performance; and
- c. Mutuality of obligation.

39. The key factors to be taken into account in determining whether an individual is an employee are:-

-The degree of control that the employer has over the way in which the work is performed;

-Whether there is mutuality of obligation between the parties – i.e. was the employer obliged to provide work and was the individual required to work if required;

-Whether the employee has to do the work personally.

However, even if the irreducible minimum is met, that is not definitive. It is necessary to then look at all the other relevant circumstances which must be consistent with there being an employment relationship. Those relevant circumstances, factors, will vary from case to case but can include:

- The intention of the parties;
- Custom and practice in the industry;
- The degree to which the individual is integrated into the employer's business;
- The arrangements for tax and national insurance;
- Whether benefits are provided; and
- The degree of financial risk taken by the individual.

40. A check list approach should not be adopted in relation to other factors and the tribunal must stand back from the accumulated detail and consider the overall picture.

41. When deciding questions of employment status, a Tribunal can look beyond what is written in the contract between the parties and consider how the relationship worked in practice (*Autoclenz*).

42. In addition, I also considered the principles of the case law referenced by the Respondent in submissions, namely:

Secretary of State v Neufeld and Howe [2009] EWCA Civ 280

State v Knight [2013] UKEAT/0073/13/RN

Nethermere (St Neots) Ltd v Gardiner [1984] I.C.R 612

Eaton v Robert Eaton Ltd & SOS – IRLR 83 [1988]

Fleming v SOS [1997] IRLR 682

Rainford v Dorset Aquatics Ltd EA-2020-000123-BA, UKEAT/0126/20/BA

Dugdale v DDE Law Limited – UKEAT/0169/16/LA

Clark v Clark Construction Limited [2008] IRLR 364

Redundancy payments

43. The Employment Rights Act 1996 states:

135 The right.

- (1) *An employer shall pay a redundancy payment to any employee of his if the employee—*
- (a) *is dismissed by the employer by reason of redundancy,*
 - or*
 - (b) *is eligible for a redundancy payment by reason of being laid off or kept on short-time.*
- (2) *Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).*

Conclusions

44. The burden of proving employment status is upon the Claimant.
45. The Claimant's position is that he had pay slips showing that he was being paid by R1 and that as he wasn't getting paid for working elsewhere this evidences that he was as an employee of R1. The Claimant did not address any of the issues regarding the substantive working relationship, despite having seen R2's response and me explaining to him the issues for determination, as were also set out in the Notice of Hearing dated 12 February 2023.
46. The Respondent's position, as emphasised during closing submissions, was as set out in the Grounds of Resistance.
47. The starting point, as established in *Neufeld* is that a person can be an employee and a director and shareholder. Whether someone is an employee and a director/shareholder is a matter of fact.
48. In determining whether or not the Claimant was an employee or not I must consider the position as at the date of R1 becoming insolvent, which in this case was 17 June 2022.

49. Control

50. When looking at the control exercised by R1 it is necessary to look at whether the ultimate authority over the Claimant rested with R1.

51. Based on the evidence presented and the findings of fact above, I do not consider R1 to have control over the Claimant in the performance of his work. The Claimant gave no evidence of how he was directed to undertake tasks, but in view of the fact that he had no supervision and reported to no one it is reasonable to conclude that he determined what work he would do and when.

52. He also determined when and how to take holidays, if he so wished.

53. Personal service

54. In considering personal service, an employee must be obliged to perform the work personally, subject to a limited power of delegation.

55. There was no evidence put forward to support a requirement of personal service. R1 appears to have had other staff working for it undertaking administrative and engineering roles, and as director the Claimant would have responsibility for the overall running and operation of the company.

56. There was no evidence that R1 could oblige the Claimant to undertake any work personally.

57. Mutuality of obligation

58. When assessing the mutuality of obligation between the parties I must consider if there was an obligation on the employer to provide work and on the employee to accept and perform the work offered. Little evidence was put forward in this respect by the Claimant. It is reasonable to conclude that the Claimant chose when and how to work. I accept that at times the Claimant worked above 48 hours per week, but consider that this was a matter his choice, and as a director and shareholder he naturally would have had an interest in the success of R1.

59. The fact the Claimant did not work at any other organisation does not provide evidence that he is employee of R1. Indeed an employee can be employed by more than one company at the same time.

60. When looking at consideration, I am mindful that being paid by a purported employer is not conclusive. It is necessary to consider the nature of payments. In this case, I have considered the nature of the sums that were paid – namely in a tax efficient mix of purported wages and dividends as recommended by an accountant, the fact the payments have no correlation to the hours allegedly worked, that the amounts paid did not meet the National Minimum Wage requirements and that in some months when purportedly employed towards the end of 2021 onwards the

Claimant was not paid any wages at all in some months and yet no concerns were raised and no steps taken to recover such sums during the purported employment and concluded that R1 did not feel obligated to pay the Claimant any wages. It is notable that directors do not require to be paid the National Minimum Wage.

61. It is also notable that the tax, national insurance and pension treatment between the Claimant and Mrs. Tessaro and Ms. Rees differs, and that there is inconsistency between R1s bank statements and the pay slips in the Bundle.
62. It is accepted that there is no written contract of employment. However, a contract of employment can be oral and/or implied. It is necessary to look at the reality of the relationship between the Claimant and R1.
63. On the evidence before me I do not consider there to be any oral contract. Further, there is nothing to be able to enable me to conclude that there was an implied contract of employment.
64. In conclusion, on balance, I am not satisfied that there was a contract of employment between the Claimant and R1 and conclude that the Claimant was not an employee of R1 within the meaning of section 230 Employment Rights Act 1996. I do not consider the irreducible minimum has been met. I consider the Claimant chose how and when he undertook activity for R1 in the capacity as a director, and there was no employment relationship between the parties.
65. Accordingly, the Claimant is not entitled to a statutory redundancy payment.

Employment Judge G Cawthray

Date: 30 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 2 May 2023
FOR EMPLOYMENT TRIBUNALS Mr N Roche