EMPLOYMENT TRIBUNALS

Claimant: ALEC EVANS

Respondents: (1) BUSINESS FOCUS & DEVELOPMENT LIMITED (in liquidation)
(2) SECRETARY OF STATE FOR BUSINESS & INDUSTRY STRATEGY

Heard at: Exeter (by VHS) **On:** 5 May 2023

Before: Employment Judge Oldroyd (sitting alone)

Appearances

For the Claimant: Mr Jarvis (Counsel)

For the Second Respondent: Mr Soni

JUDGMENT

1. Upon payment to the Claimant by the Second Respondent of the sums set out in paragraph 2 below, the claim against the First Respondents is dismissed.

2. The Second Respondent shall pay to the Claimant the following sums pursuant to Section 182 Employment Rights Act 1996:

    a. Arrears of pay: £1,200
    b. Statutory redundancy: £7,892.22
    c. Statutory notice pay: £3,323.04
    d. Holiday pay £1,107

3. The Claimant's application for an order that the Second Respondent pay the Claimant's costs is dismissed.

WRITTEN REASONS

Brief introduction

1. For many years, the Claimant was the sole shareholder and a director of a limited company, the First Respondent.

2. The First Respondent is now in liquidation.

3. On the basis that the Claimant says that he was an employee of the First Respondent, he now seeks certain payments from the National Insurance Fund.

4. In its capacity as the guardian of the National Insurance Fund, the Secretary of State for Business, Industry and Strategy, the Second Respondent, has rejected the Claimant's claim to payments. The rejection is on the basis that the Claimant, contrary to his assertion, was not an employee of the First Defendant but simply its owner or director.

Evidence & Documents

5. The Claimant produced a short Witness Statement and gave oral evidence.

6. The parties also produced an agreed bundle which, during the course of the hearing, was supplemented by pay slips that were produced by the Claimant relating to, approximately, the 12 months preceding the liquidation of the First Respondent.

Fact findings

7. The First Respondent is Business Focus & Development Limited (**BFD**). BFD, now in voluntary liquidation, was incorporated on 23 August 2002.

8. BFD was essentially a small construction business, undertaking consultancy and building works. Its turnover never exceeded £250,000 and at any given time it employed no more than 3 individuals.

9. The Claimant was the sole and therefore controlling shareholder of BFD at all times. In his capacity as a shareholder, the Claimant was, on occasions, paid a dividend by BFD. However, the accounts of BFD and the Claimant's own evidence lead me to conclude that the dividends were modest in amount and also infrequent. The payment of a dividend was certainly not the norm.

10. The Claimant was also at all times a director of BFD, alongside Mrs Alison Evans. Mrs Evans (the Claimant's wife) also acted as company secretary.

11. The Claimant also says that he was an employee of BFD as from the incorporation of the company and until its insolvency (being a period of about 20 years).

12. The Claimant seeks to evidence his employment relationship with BFD by relying upon an unsigned written contract dated 30 August 2002. The unsigned document included provisions that are typically to be found to in a contract of employment. For example:

    a. The Claimant was obliged to work 40 hours each week.

    b. The Claimant was to be paid a salary of £12,000 per annum (a sum that the Second Respondent notes is lower than the National Minimum Wage).

    c. The Claimant was entitled to holidays of 22 days per year.

    d. The Claimant was entitled to two months' written notice.

    e. The Claimant was subject to disciplinary procedures and processes.

    f. The Claimant was entitled to enrol in the Company's pension scheme, administered by NEST.

13. In terms of the unsigned written contract , I am satisfied that, on the balance of probabilities, this document did not come into existence on 30 August 2002. It is clear that it came into existence at some point which is later in time and probably after 21 June 2016. I reach this view because:

    a. The Claimant accepted in his evidence that BFD did not operate a pension scheme in 2002 and yet the document refers to such a scheme.

    b. The NEST pension scheme to which the unsigned written contract refers did not come into being until 2008, some 6 years after the apparent date of the document.

    c. The Claimant was first enrolled into the NEST pension scheme shortly after 21 June 2016 as evidenced by a letter sent to the Claimant by Mrs Evans on that date.

14. It is curious that the unsigned written contract bears the date of 30 August 2002. The Tribunal was not referred to any metadata that might have cast light upon the date on which the document was created.

15. It was suggested by the Second Respondent, albeit somewhat tentatively, that the unsigned written contract may have been created for the purposes of these proceedings and so with the sole purpose of establishing the Claimant's status as an employee. The Claimant refuted any suggestion that the document was a retrospective creation of this type.

16. Finding the Claimant, as I did, to be a straightforward and candid witness, I have no reason to doubt the Claimant's evidence that the unsigned written contract was created, at some point prior to the insolvency of BFD and not in connection with these proceedings.

17. It would appear to me, instead, to be more probable that the unsigned written contract was produced by Mrs Evans (in her role as company secretary) sometime after 21 June 2016 with a view to documenting what she understood to be the contractual position between the Claimant and BFD at the time and indeed since the incorporation of the company.

18. I am further satisfied, having regard to the Claimant's evidence, that the unsigned written contract certainly reflected the the relationship between the Claimant and BFD as from the date of the incorporation. To this end:

    a. I accept that Claimant's evidence that he attended construction sites and personally worked on construction projects for about 40 hours each week. I noted the photographic evidence that the Claimant supplied and which demonstrated his "hands on" role.

    b. I accept that the Claimant was paid a salary initially of £12,400 per annum but rising to £14,400 by the time BFD was placed into liquidation. This was apparent form the payslips and P60s that the Claimant provided (and which the Second Respondent acknowledged were consistent with his bank statements). In respect of this salary, I note too, at this stage, that it was subject to PAYE (albeit the modest level of salary meant that very little tax ever became due). Although the Claimant's salary was ostensibly less than the National Minimum Wage, the Claimant explained that he was not aware of this. I again have no reason to doubt his evidence in this regard.

    c. The Claimant enjoyed certain corporate benefits, such as the fact that he was ultimately enrolled into a company pension scheme.

19. I do note that although the Claimant was entitled to holidays of 22 days per year, his evidence was that he did not not take any holiday, certainly in the period between the first national lockdown and the liquidation of the Company. To this extent, but to this limited extent only, the unsigned written contract is not consistent with the Claimant's actual role.

20. In terms of the day to day running of BFD, the Claimant accepted that he was not directly line managed but he did not accept that he was in sole control of BFD. The Claimant pointed to the fact that, whilst he was the sole shareholder and a director of BFD, his wife was also a director. Whilst the Claimant accepted that his wife only worked 5-10 hours each week, the Claimant explained that:

    a. Material business decisions were taken in consultation with Mrs Evans. The Claimant gave the decision to put BFD into liquidation as an example of this.

    b. Mrs Evans exercised a degree of control over what work the Claimant carried out. The Claimant described how, on one occasion, he had chosen to leave a site after a disagreement with a customer, but that he was "ordered" to return by Mrs Evans and he did so.

    Having regard to these cogent examples, I accept the Claimant's evidence that he was subject to a degree of control by BFD in the form of Mrs Evans. The Claimant was not simply free to do as he chose.

21. Following the onset of the pandemic, BFD suffered a downturn in its fortunes. For a period of time the Claimant received furlough payments. Ultimately and upon the redundancy of an employee in October 2021 and the termination of Mrs Evans' employment in December 2021, the Claimant became the sole survivor of the workforce of BFD.

22. In January 2022, the Claimant explained that he agreed to accept a temporary reduction to his salary of £600 pcm (which by this stage was £14,400 per annum) in order to assist BFD. The Claimant anticipated any reduction being "*made good*" once the fortunes of BFD had improved.

23. In the end, however, the Claimant's employment ended on 30 June 2022 and upon BFD's accountants explaining that BFD was unable to pay the Claimant's salary.

24. BFD was the subject of a voluntary liquidation on 26 July 2022.

25. As at the dated of the liquidation, it was noted that the P60 for the tax year 21/22 suggested that the Claimant was earning a salary of £12,344 and not £14,400 as he claimed. I am satisfied, though, that the Claimant was earning £14,400 as he claims. In this regard, I accept that the figure that appears on the P60 reflect the reduced wages that the Claimant agreed to be paid on a temporary as from January 2021 and also, potentially, some furlough payments.

The claim

26. Upon the liquidation of BFD, the Claimant submitted a claim to the insolvency service in respect of various payments that BFD had (owing to its insolvency) failed to pay to him upon the termination of his employment. The Claimant sought for the following payments to be made out of the National Insurance Fund:

    a. arrears of pay (during the period 1 January 2022 and 22 June 2022)
    b. statutory redundancy pay
    c. statutory notice pay
    d. holiday pay

27. The claim was rejected.

28. ET1 was presented on 4 October 2022.

29. ET1 identified BFD as the sole Respondent to the claim. However, by consent, the Secretary of State for Business & Industry Strategy (responsible for administering the National Insurance Fund) was added as a Second Respondent.

30. The First Respondent has played no part in these proceedings.

31. By way of ET3 dated 14 November 2022, the Second Respondent denied the claim on the basis that the Claimant was not an employee of BFD and so not eligible to any payments from the National Insurance Fund. The Second Respondent did not otherwise dispute the sums claimed by Claimant.

The law

32. Where an employer is an insolvent, Section 166 Employment Rights Act 1996 (**ERA**) provides that an employee may apply to the Secretary of State for payment of sums that would ordinarily be due to be paid (but which have not been paid) on the termination of employment. These sums include those now claimed by the Claimant, namely arrears of pay, statutory redundancy pay, statutory notice pay and holiday pay. In the case of arrears of pay Section 184 ERA 1996 limits the amount that can be claimed to 8 weeks of pay.

33. Section 182 ERA 1996 obliges the Secretary of State to make those payments from the National Insurance Fund provided that it is satisfied the employee's employer has become insolvent and the sums applied for are properly due.

34. It is an important feature of Sections 166 and 182 that payments ought only to be made to employees.

35. The definition of an employee is set out at Section 230 ERA 1996. It provides that an employee is an individual who entered into and worked under a contract of employment. A contract of employment is further defined as a contract of service.

36. Case law further elucidates the meaning of a contract of service.

37. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*, Mr Justice MacKenna formulated a multiple test, comprising three elements, for the purposes of establishing the existence of a contract of services:

'A contract of service exists if these three conditions are fulfilled. (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. In *Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA*, the Court of Appeal, whilst wholly endorsing the approach taken in *Ready Mixed Concrete*, described the need to demonstrate "*an irreducible minimum of obligation on each side*" of the employer- employee relationship to create a contract of services. This is sometimes referred to need to demonstrate mutuality of obligation.

39. A number of authorities have directly addressed the situation in which a controlling shareholder of a company is capable of being an employee.

40. In *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor 2009 ICR 1183, CA*. the Court of Appeal confirmed that that there was no objection in principle why a sole shareholder cannot be an employee:

"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."

41. The Court of Appeal went on to suggest a two stage approach to the determine the existence of an employer-employee relationship in this context:

"Whether or not such a shareholder/director is an employee of the company is a question of fact for the court or tribunal before which such issue arises. In any such case there may in theory be two such issues, although in practice the evidence relevant to their resolution will be likely to overlap. The first, and logically preliminary one, will be whether the putative contract is a genuine contract or a sham. The second will be whether, assuming it is a genuine contract, it amounts to a contract of employment (it might, for example, instead amount to a contract for services)"

42. In *Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635, EAT*, the EAT identified list of issues that a tribunal might consider in deciding whether a majority shareholder was an employee:

"*How should a Tribunal approach the task of determining whether the contract of employment should be given effect or not? We would suggest that a consideration of the following factors, whilst not exhaustive, may be of assistance:*

> *(1) 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.*
>
> *(2) 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.*
>
> *(3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes.*
>
> *(4) 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.*

(5) 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.

(6) 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). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.

(7) 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. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment(8) 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. That would be to apply the Buchan test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another."

34. *In Neufeld,* the Court of Appeal made slight modifications to the eight factors identified by the EAT in *Clark* but otherwise approved them . Principally (for our purposes) , the Court of Appeal suggested that the absence of a written contract was an important consideration but less powerful than had been suggested in *Clark*

Findings

43. For the purposes of determining whether the Claimant was an employee of BFD, it is appropriate to adopt the two stage approach taken in *Neufeld*, having regard to the *Clark* factors.

44. The starting point, therefore, is to consider whether the putative contractual arrangement between the Claimant and BFD was a sham. I find that it was not. This is consistent with my finding that the unsigned written document was not one which was produced solely for these proceedings. It instead reflected the essential features of the Claimant's relationship with BFD over a sustained 20 year period.

45. It is then necessary to consider whether the contractual relationship was a contract of service as provided for by *Ready Mix Concrete* and *Nethermere.* It is convenient to consider the four factors relevant to the existence of contract of service as set out in those cases.

Was there personal performance by the Claimant?

46. I have found that, as a matter of fact, there was an agreement between the Claimant and BFD. That agreement envisioned BFD providing work to the Claimant and the Claimant carrying out that work for remuneration. That is indeed what happened over an extended period of time. As I have set out, there is clear evidence that the Claimant was "hands on" in terms of the work that he carried out and that he was paid. Consequently, there is evidence of personal performance in keeping with the *Ready Made Concrete* test.

Mutuality of obligation

47. I must consider whether there was an obligation upon BFD to provide work and a salary to the Claimant and then whether there was an obligation on the employer to carry out that work.

48. I have found that the relationship between the parties was reflected by the unsigned written contract relied upon by the Claimant (but erroneously dated). That contract plainly placed obligations on BFD including an expectation that the Claimant would be provided with work as well as a salary and benefits. The Claimant was in return obliged to carry out that work. Again, this is actually what happened in practice. There is also clear evidence of the Claimant being paid a salary over a period of time (which salary was subject to tax), These factors lead me to conclude that there was mutuality of obligation.

Control

49. In circumstances where the Claimant is the sole shareholder of BFD and also a director, there is at least cause to doubt whether BFG had any practical control over the Claimant. However, as the authorities establish, a controlling shareholder and a director is quite capable of being an employee.

50. In this instance, I am satisfied that the BFD did exert sufficient control over the Claimant. To this end, I am satisfied with the Claimant's evidence that Mrs Evans , in her capacity as director exerted that control. This was apparent form the two examples that the Claimant gave, namely:

    a. Mrs Evans involvement in the decision to place BFD in liquidation; and

    b. Mrs Evans directing the Claimant to reattend a site that he had left and the Claimant's compliance with that direction.

51. Even though the Claimant had no line manager, this was not case where the Claimant was free to do as he pleased; he was answerable to the company and Mrs Evans was there to hold him to account.

Other factors

52. I must also have regard to whether other factors are inconsistent with a contract for services including factors expressly raised by Second Respondent:

    a. The Second Respondent points to the absence of a signed written contract as being inconsistent with a contract for services. I do not regard this to be significant for three reasons. First, *Neufeld* (paragraph 89) confirms that the existence of a written contract is important but not decisive. Second, I have found that the unsigned written contract relied upon by the Claimant did exist after 21 June 2016, even if only in an unsigned form. Third, I have found that the actual conduct of the Claimant and BFD over a sustained period was to a very great extent in keeping with the terms of the unsigned written agreement.

    b. The Second Respondent points to the fact that the Claimant's salary was less than the National Minimum Wage. This, the Second Respondent says, suggests that the Claimant was being paid solely as a director (as to be paid this sum as an employee would be unlawful). In respect of this point, I was satisfied that the Claimant (and BFD) did not appreciate that the Claimant was being paid less than the National Minimum Wage and, this being so, I do not accept that it is right to suggest that the Claimant regarded himself as not being an employee for this reason. Simply put, the Claimant did not consciously choose to be paid less than the National Minimum Wage.

    c. The Third Respondent points to the fact that the Claimant received dividends. I do not find this to be a significant contra indicator of employment given the infrequency with which dividends were paid. Certainly, salary was the principal method of payment by BFD to the Claimant. Further, it is not disputed that the Claimant was a shareholder and the fact that he might, as an owner, benefit financially from the BFD's performance is to be expected but that does not mean he cannot be an employee.

    d. Although not expressly relied upon by the Third Respondent, I have considered the fact that the Claimant voluntarily reduced his salary for a period of time and also did not take holiday to which he was contractually entitled. These factors are, on the face of things, more in keeping with a "self-employed" mentality. However, they are not sufficient, in my view, sufficient for me to conclude that the Claimant was not an employee for two reasons.

        - First, the evidence suggests that the Claimant only took a reduced salary and holiday for a limited period of time when BFD was struggling financially. It is not necessarily unusual for employees to act in the way that the Claimant did in these circumstances.

        - Second, the fact that the Claimant took a reduced salary and holiday for a limited period of time is outweighed by the the other

factors which are suggestive of a contract of service and which have been identified above.

53. Having concluded that the putative contract was not a sham and that the essential ingredients of a contract of service were present, I find that the Claimant was an employee throughout the period in contention.

54. Consequently, the Claimant's claim for payments from the National Insurance Fund must succeed.

55. For the sake of good order, I also dismiss the claim against the First Respondent, it being in liquidation and having taken no part in these proceedings.

Remedy

56. On the basis that the Claimant has succeeded in his claim, he is entitled to arrears of pay, statutory redundancy, notice pay and holiday pay.

57. The Third Respondent did not dispute these entitlements (other than on the basis that the Claimant was not an employee) and it agreed the sums claimed by the Claimant subject to the Tribunal accepting that the Claimant's salary was £14,400 (which it has).

58. There is, though, one adjustment that I must make to the sums claimed. The Claimant is seeking arrears of pay that extend to 6 months. Section 184(1) ERA limits any claim for arrears of pay to a period 8 weeks, however. On this basis, the sum payable in respect of arrears of pay is therefore £1,200 and not £3,600 as claimed.

59. The Claimant therefore recovers:

    a. Arrears of pay: £1,200
    b. Statutory redundancy: £7,892.22
    c. Notice pay: £3,323.04
    d. Holiday pay £1,107

Costs

60. At the conclusion of the hearing, the Claimant applied for his costs to be paid by the Second Respondent. The Claimant asserted that the Second Respondent had behaved unreasonably by defending this claim on a false premise. To this end, the Claimant pointed to the fact that in its ET3, the Second Respondent inflated the Claimant's salary by a factor of 10.

61. Rule 76a Employment Tribunal Rules of Procedure gives the Tribunal a wide discretion to make a costs order against a party who behaves unreasonably. I declined to exercise my discretion in favour of the Claimant in this instance. I was satisfied that the misstating of the Claimant's salary was plainly a typographical error and it did not influence the Second Respondent's conduct of

the proceedings. Moreover, I was satisfied that the Second Respondent could not be criticised for defending this claim in circumstances where there was some doubt over the origins of the unsigned written contract.

Employment Judge Oldroyd
Date: 22 May 2023

Sent to the parties on
7th June 2023 by Miss J Hopes

For the Tribunal Office