EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108546/2022

Held via Cloud Video Platform (CVP) in Glasgow on 5 June 2023

Employment Judge P O'Donnell

Mr Harinder Sahota	**Claimant** **In Person**
Secretary of State for Business, Energy & Industrial Strategy	**Respondent** **Represented by:** **Ms M Buckley - Representative**
Bizsolco Ltd t/a Negotium (In Liquidation)	**Respondent** **No appearance and No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was not an "employee" as defined in s230 of the Employment Rights Act 1996. He is not, therefore, entitled to payment of the sums sought from the First Respondent in terms of s182 of the 1996 Act and the claim is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought a claim against the First Respondent (R1) arising from their refusal to make payments to him from the National Insurance Fund in respect of sums he says are owed to him as a result of the Second Respondent (R2) ceasing to trade and being made insolvent.

2. The reason for R1's refusal to make a payment from the National Insurance Fund is that they consider that the Claimant is not an "employee" for the purposes of the Employment Rights Act 1996 because he was the sole director and shareholder of R2.

3. The sums claimed from R1 are as follows:-

    a. Statutory redundancy pay

    b. Pay in lieu of notice

    c. Pay in lieu of untaken wages

    d. Arrears of pay arising from the allegation that R2 did not pay the Claimant the national minimum wage

4. The sole issue for determination was whether the Claimant was an "employee". R1 accepts that if the Claimant is an "employee" then he is entitled to the sums claimed and that R2 was insolvent giving rise to an obligation to make a payment from the National Insurance Fund.

Evidence

5. The Tribunal heard evidence only from the Claimant.

6. There was a paginated bundle of documents prepared by R1 and a reference to page numbers below is a reference to that bundle. The Claimant also lodged documents which he sought to rely on but these were not in a paginated bundle and so where there is a reference to these then they will be described.

Findings in fact

7. The Tribunal made the following relevant findings in fact.

8. The Claimant set up R2 in July 2015. The company was involved in brokering and reselling telecoms and energy packages. Latterly it also carried out the same function with car payment solutions. The Claimant was the only person

involved in setting up R2 and he was the sole shareholder and director through the life of the company.

9. R2 predominantly engaged self-employed salespeople to carry out the work of the business. At the outset, there was only one such person but the numbers increased as the amount of work increased. At its heights, R2 had 8 self-employed salespeople actively working for it. There may have been more on their books but not all of them were active at any given time; there was no obligation on these salespeople to carry out any work for R2 and they had complete control over the amount of work they did for R2.

10. R2 did engage two salespeople on contracts of employment in 2021 although it continued to use the self-employed salespeople as well. For a short period in July to September 2018, R2 engaged an admin apprentice on a contract of employment.

11. The Claimant did not spend a lot of time working for R2 when the business first started. This was for two reasons; there was not a lot of work to be done when only one salesperson was active; the Claimant was focussed on the running of another business which he owned and operated.

12. In 2017, the Claimant started working full-time for R2 in 2017. This was due to a combination of the amount of work at R2 increasing and the closure of the other business which the Claimant owned.

13. The Claimant worked an average of 50-60 hours each week. The hours fluctuated according to the needs of the business. He carried out a range of duties such as the administration of the sales generated by the salespeople, dealing with suppliers and customers, networking, managing R2's social media accounts, payroll, marketing, dealing with complaints/feedback and managing staff.

14. The Claimant decided what tasks he would carry out each day based on the needs of the business and what needed to be done each day. No-one directed the Claimant's work or supervised this.

15. The Claimant was paid a varying amount over the period during which R2 traded for this work. At the very start, he was not paid anything at all because the company was not making enough money; the Claimant considered that he had to pay suppliers and staff before he could take any wage. He considered that if he had sought to be paid at the start of the business then R2 may not have survived.

16. It was the same position at the end of the business; the Claimant did not take a wage for several months before R2 ceased trading because there was insufficient money to pay him as well as other staff and suppliers.

17. When the Claimant was paid a wage, the amounts fluctuated. The following pay slips were provided in the bundle:-

    a. 30 November 2016 – the Claimant was paid £800 gross

    b. 28 May 2021 – the Claimant was paid £900 gross

    c. 30 July 2021 – the Claimant was paid £1041.67 gross

    d. 27 August 2021 – the Claimant was paid £1041.67 gross

    e. 24 September 2021 – the Claimant was paid £250 gross

    f. 29 October 2021 – the Claimant was paid £1041.67 gross

    g. 26 November 2021 – the Claimant was paid £1041.67 gross (p130)

    h. 31 December 2021 – the Claimant was paid £1041.67 gross (p131)

    i. 28 January 2022 – the Claimant was paid £791.67 gross (p132)

    j. Payslips for February, March and April 2022 show that the Claimant received no pay at all in any of these months.

18. The amount which the Claimant was paid each month was determined by the Claimant. He considered his priority was to ensure that suppliers and staff would be paid first and then, if the cashflow situation allowed for it, he would take a wage. The amount would be based on what money was available. This decision was made on or shortly before the date each month when the

payroll had to be run. The Claimant had the intention that he would be paid £30000 a year gross but there was no month in which he took a wage that reflected this amount.

19. The payslips show that the tax and National Insurance was deducted from the Claimant's pay on most but not all the instances for which a payslip is available.

20. There was no occasion during the period R2 traded when the Claimant was sick and unfit for work. If such a situation arose then he considered that he would have simply worked through any illness as there was no-one else who would do the work. If he did not work then the various tasks would be left until he was fit to work again.

21. The Claimant did take holidays but could not recall how many each year. He believed that it was no more than 10 days a year. When he took holidays he would take his phone and laptop with him in order to carry out any necessary work. Holidays were recorded on an electronic system called "Bright HR" which was then used for payroll purposes.

22. There was no-one who could discipline the Claimant or terminate his position with R2. If any other member of staff (self-employed or employed) had a complaint related to their work then the only person to whom they could raise a grievance was the Claimant.

23. During the Covid pandemic, the Claimant placed himself on furlough after consulting with his accountant. He was on furlough from November 2020 to April 2021. He received furlough pay of £720 a month paid by the Government and R2 paid a top-up of £180 a month.

24. The Claimant had made director's loans to R2 and did take one repayment when the company was profitable. Whether a repayment was made and the amount of any such repayment was entirely in the control of the Claimant.

25. R2 ceased trading on 23 May 2022.

26. During discussions with his accountant when R2 was ceasing to trade, the Claimant was informed that a director such as himself could also be an employee and be entitled to a redundancy payment. The Claimant carried out further research on the internet and found a company, CFS Redundancy, who assisted people in making claims to the National Insurance Fund. The Claimant engaged this company and they made the application to R1 that is the subject of this claim.

27. The Claimant had no written contract with R2. At p126, there is a document prepared by CFS Redundancy as part of the Claimant's application to R1 that is described as "Summarised Terms of Employment". Although it is written in the present tense, the Claimant accepts that this was prepared after R2 ceased trading.

Respondent's submissions

28. Ms Buckley relied on what was set out in R1's ET3 and supplemented this orally.

29. The ET3 sets out the relevant statutory provisions and caselaw. For the sake of brevity, the Tribunal does not intend to repeat this as much of it is set out below.

30. R1 relies on discrepancies in the correspondence from CFS Redundancy regarding the claim to the National Insurance Fund in respect of the Claimant's hours and holiday entitlement.

31. It is submitted that the Claimant was the 100% shareholder and sole director with no evidence of anyone else being involved. The Claimant never received the full contractual salary to which he says he is entitled. The Claimant had ultimate control over what he did and what he was paid. In relation to what he was paid, this was not based on the work done or the hours worked but on the cashflow.

32. The various facts in this case demonstrate that, on the balance of probabilities, the Claimant was not an employee.

Claimant's submissions

33. In addition to the matters already addressed in evidence, the Claimant added the following points:-

    a. Although there was no written contract, the contract could be oral.

    b. He had joined the pension scheme.

    c. He had to work regularly.

    d. He was paid for the time he worked.

    e. He could not substitute someone else to do the work.

Relevant Law

34. There are a number of payments to which an employee is potentially entitled on the termination of their employment:

    a. Section 135 of the Employment Rights Act 1996 (ERA) provides that an employee is entitled to redundancy payment where they are dismissed in circumstances where they are redundant. The definition of redundancy can be found in section 139 ERA and includes the situation where the employer ceases to carry on the business in which the employee is employed.

    b. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 ERA which is based on length of service. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.

    c. Section 13 ERA provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

d. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of any untaken holidays.

35. Where the employer is insolvent then an employee can seek payment of any of these sums from the Secretary of State in terms of s182 ERA. The Secretary of State will make payment from the National Insurance Fund if certain criteria are met. If the Secretary of State refuses to make a payment from the Fund then the employee can bring a claim to the Employment Tribunal in terms of s188 ERA.

36. The term "employee" is defined in s230 ERA:

(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.

37. The definition of what amounts to a contract of service has been subject to different tests over the years. For example, the earliest test was focussed solely on control as the determining factor. Later cases introduced the "integration or organisational" test (*Stevenson Jordan and Harrison Ltd v Macdonald and Evans* 1952 1 TLR 101, CA) or the "economic reality" test (*Market Investigations Ltd v Minister of Social Security* 1969 2 QB 173, QBD)

38. It is now settled that what should be applied by the Tribunal is the "multiple test" which takes looks at all of these factors as a whole. The test is set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 All ER 433, QBD:-

'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.'

39. Subsequent decisions have set out what is considered to be the irreducible minimum required for there to be a contract of service; control, personal performance and mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner and anor* 1984 ICR 612, CA, *Carmichael and anor v National Power plc* 1999 ICR 1226, HL). However, the existence of the irreducible minimum is not the end of the matter and does not create a presumption that a contract of service exists; all the relevant factors must be examined (*Revenue and Customs Commissioners v Atholl House Productions Ltd* 2022 EWCA Civ 501, CA*, Kickabout Productions Ltd v Revenue and Customs Commissioners* 2022 EWCA Civ 502, CA).

40. In recent cases, the higher courts have made it clear that the Tribunal can look behind the contract to assess the true nature of the relationship between a claimant and respondent with the terms of any contract, whilst being relevant evidence, not being the beginning and end of the Tribunal's assessment (*Autoclenz Ltd v Belcher and ors* 2011 ICR 1157, *Uber BV and ors v Aslam and ors* 2021 ICR 657 and *Ter-berg v Simply Smile Manor House Ltd and ors* 2023 EAT 2).

41. The question of whether a controlling shareholder and director can be an "employee" in terms of s230 ERA has been the subject of a number of cases over the years that has seen the law on this point develop.

42. The early view was that a controlling shareholder and director could not be an employee because they were not under the control of the company (*Buchan v Secretary of State for Employment*; *Ivey v Secretary of State for Employment* 1997 IRLR 80, EAT). A similar view was taken by the Inner House of the Court of session in *Fleming v Secretary of State for Trade and Industry* 1997 IRLR 682, although the Court was unwilling to introduce a rule

that such individuals could never be employees and that this was a matter for the Employment Tribunal to assess based on the facts of each case.

43. In *Secretary of State for Trade and Industry v Bottrill* 1999 ICR 592, the Court of Appeal (in upholding a decision that a controlling shareholder and director was an employee in that case) set out questions which a Tribunal may wish to ask in such cases:

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. In this context, of the various factors usually regarded as relevant (see, for example, Chitty on Contracts (27th edn, 1994, Sweet & Maxwell), para. 37–008), the degree of control exercised by the company over the shareholder employee is always important. This is not the same question as that relating to whether there is a controlling shareholding. The tribunal may think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the articles of association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant. It is for the tribunal as an industrial jury to take all relevant factors into account in reaching its conclusion, giving such weight to them as it considers appropriate.

44. In *Clark v Clark Construction Initiatives Ltd and anor* 2008 ICR 635 the EAT set out a number of factors which it considered a Tribunal may find of assistance in dealing with cases of controlling shareholders and directors:

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 and thus, on the face of it, has earned the right to take advantage of the benefits that employees may derive from such payments.

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, in practice, he or she is able to exercise real or sole control over what the company does.

c. The fact that the individual 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

d. 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

e. Conversely, if the conduct of the parties is either inconsistent with the contract, or in certain key areas is in fact not governed by the contract as one would expect, that would be a potentially very important factor militating against a finding that the controlling shareholder is an employee

f. If contractual terms have not been identified or reduced into writing, that will be powerful evidence that the contract was not really intended to regulate the relationship in any way

g. 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, such practices may well be necessary.

h. Although the courts have stated that the existence of a controlling shareholding is always relevant and may be decisive, that does not mean that this alone will ever justify a tribunal in finding that there was no contract in place.

45. In *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor* 2009 ICR 1183 the Court of Appeal made the following modifications to the eight factors identified by the EAT in *Clark*:

> *88. We respectfully agree with the essence of the factors referred to by Elias J. in [98] of his judgment although we add a comment on four of them. Mr Tolley criticised his first factor as amounting to a suggestion that the mere production of a written contract purporting to be a contract of employment will shift to the opposing party the burden of proving that it was not a genuine such contract. 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. If the putative employee's assertion is challenged the court or tribunal will need to be satisfied that the document is a true reflection of the claimed employment relationship, for which purpose it will be relevant to know what the parties have done under it. The putative employee may, therefore, have to do rather more than simply produce the contract itself, or else a board minute or memorandum purporting to record his employment.*

*89. 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 *715 agreement, but the employment judges appear to have had no doubt that the parties' conduct proved a genuine employment relationship.*

90. As for Elias J.'s seventh and eighth factors, we say no more than that we regard them as saying essentially what we have said above in our "never say never" paragraph.

Decision

46. As noted above, the sole issue for determination in this case is whether the Claimant is an "employee" as defined in s230 ERA which requires there to be a contract of employment between the Claimant and R2.

47. It was not in dispute that there was no written contract in this case. The Claimant did not seek to argue that the document at p126 was a written contract and, if he had, the Tribunal would not have been prepared to find that this was a written contract given that it was created after the end of any potential employment relationship.

48. The Claimant is correct that there can be an oral contract but there requires to be evidence that a contract has been created. The Tribunal recognises that there is a degree of artificiality in looking for an agreement between the Claimant and R2 when the only person who could bind R2 is the Claimant himself.

49. With that being said, there still needs to be some evidence from which the Tribunal can find that there has been a contract. The traditional method of creating a contract is by way of offer and acceptance between the parties to

the contract. In the case of a contract of employment, the offer (in whatever form it takes) will set out the terms and conditions on which the employee will provide their labour to the employer. This will include the duties to be carried out, what the employee will be paid for doing the work, the hours to be worked, where the work is to be done and other matters including entitlement to holidays and sick pay. The contract is created when the employee accepts any such offer.

50. There is nothing even remotely resembling this in the present case. The closest which the facts of this case come to having an offer and acceptance is the Claimant's intention to take a salary of £30000 a year when the business was profitable enough to make this feasible. There was nothing about what work the Claimant was to do, the hours he was to work, entitlement to holidays or any other matters which would, in the Tribunal's industrial experience, normally feature in a contract of employment (whether written or oral).

51. Looking at the facts of this case, the Tribunal considers that the relationship between the Claimant and R2 is more akin to the owner of a business seeking to grow that business rather than an employee/employer relationship. Indeed, had the Claimant not incorporated the business as a limited company then there would be no question that he was not an employee but, rather, someone in business on their own account. It is only the existence as R2 as a legal person separate from the Claimant that allows for the possibility of an employment relationship.

52. In this context, the Tribunal notes that the issue of the Claimant being an employee did not arise until the business was insolvent and he was advised by his accountant that a director could also be an employee and claim a redundancy payment. This issue was raised by the accountant and not the Claimant which the Tribunal considers demonstrates that the Claimant had not considered that he was an employee prior to that. In such circumstances, it cannot be said that he had any intention to enter into a contract of employment with R2 when carrying out any work for the business.

53. Assuming that there was some form of contract between the Claimant and R2, the question then becomes whether that contract was a contract of employment.

54. Looking at the issues which make up the "irreducible minimum", the Tribunal bears in mind that when it is looking at matters such as the mutual obligations it is looking at legal obligations and not practical or economic obligations.

55. This is important because there was no evidence that there were any legal obligations between the Claimant and R2. For example, there was no legal obligation on the Claimant to do any work for R2 at all and it was his evidence that he did very little work at the outset with his main focus being his other business. As R2's business grew, the Claimant did increase the amount of work he was doing but this was not because he had a legal obligation to do so, rather, it was because there was a need for this work to be done and an economic imperative to ensure that this work was done for the business to make money and grow.

56. Similarly, there was no legal obligation on R2 to pay the Claimant at all, let alone to pay him any specific amount; he received no pay at the outset of the business; the same happened at the end of the business; between those periods the amount being paid fluctuated.

57. The Tribunal does recognise that there can be situations where an employer does not pay an employee (or pays them less than they are due) and this does not mean that there is not a contract of employment. This is not, however, what happened in this case; as will be addressed further below, in this case, the Claimant was determining month-by-month how much he could afford to pay himself.

58. The lack of legal obligation also applies to the issue of personal service. There was no evidence that the Claimant was legally obliged to personally carry out the work which he did for R2. He could have decided to employ a manager or other employee to do this work and the reason he did not do so was an economic one (that is, the business could not afford to employ such a person) rather than the Claimant being legally obliged to do the work himself.

59. Turning to the issue of control, it is quite clear that the reality of the relationship between the Claimant and R2 was that the Claimant had complete control over R2 rather than the other way round. The Claimant was the sole shareholder and director; there was no-one who could remove him from any role he had with the company nor was there anyone who could override any decision he made about how the business operated.

60. The Claimant had complete control over what work he did on a day-to-day basis and the hours which he worked. If he wanted to take time off for any reason then he did not have to ask permission from anyone else and this was wholly in his control. He was the one who decided that he would be placed on furlough during the pandemic.

61. It was when it comes to the issue of pay that the degree of control which the Claimant had comes into sharp focus. The amount which he was paid each month was a matter for the Claimant and the Claimant alone. He could decide that he would not take any pay in a particular month or if he was taking a payment then he could decide how much. The only consideration was how much the business could afford depending on its cashflow.

62. Whilst the Tribunal has, in its industrial experience, seen a range of different methods of remuneration (such as fixed salary, hourly rates of pay, piece work and commission) it has never come across a situation where an employee had complete control over how much they were paid each month and determined that by how much the business could afford.

63. Looking at the other matters about which evidence was led, there is very little that significantly weighs in favour of the relationship between the Claimant and R2 being an employment relationship. The Claimant was a member of the pension scheme operated by R2 but this does not weigh heavily in favour of an employment relationship. The evidence about holidays and sick leave was, at best, neutral given that the Claimant's evidence was that he would work during any such periods of leave.

64. In these circumstances, even if there was a contract between the Claimant and R2, the Tribunal does not consider that this was a contract of employment.

65. The Tribunal finds that the Claimant was not an employee of R2 as defined in s230 ERA because, for the reasons set out above, there was no evidence from which the Tribunal could find that there was a contract between them and if there was a contract then it was not a contract of employment.

66. The Claimant is not, therefore, entitled to a payment from the National Insurance Fund by R1 in terms of s182 ERA and his claim is not well founded. The claim under is hereby dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **09 June 2023**
Entered in register: **12 June 2023**
and copied to parties