



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4102806/2023

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Held via Cloud Video Platform on 3 August 2023

Employment Judge M Sangster

10 Mrs C Blyth

Claimant  
In person

15 Recruitment Training (Edinburgh) Ltd  
(in Voluntary Liquidation)

First Respondent  
Not present/represented

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Secretary of State for Business & Trade  
Employment

Second Respondent  
Represented by  
Mr P Soni  
Lay Representative

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Employment Tribunal is that claimant's complaints do not  
succeed and are dismissed.

### REASONS

#### Introduction

35 1. The claimant presented a claim in which she sought a redundancy payment,  
and notice pay from the National Insurance Fund under sections 166 and/or  
182 of the Employment Rights Act 1996 (**ERA**). The Second Respondent  
denied that the claimant was entitled to any sums, on the basis that she was  
not an employee at the relevant times.

2. The claimant gave evidence on her own behalf. The respondents did not lead any evidence.
3. A joint set of productions was lodged, extending to 162 pages. The claimant also lodged a number of further documents.

5 **Issues to be Determined**

4. Was the claimant an employee at the relevant time?
5. If so, is she entitled to any sums under s166 or 182 ERA?
6. If so, what sums is she entitled to?

**Findings in Fact**

- 10 7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
8. Recruitment Training (Edinburgh) Limited (**RTL**) was incorporated in 1996. RTL was a training provider of Scottish Vocational Qualifications in Business & Administration, Management, Customer Service and Digital Marketing. RTL  
15 were contracted to deliver the Modern Apprenticeship Programme, which was funded by Skills Development Scotland.
9. The claimant commenced working with RTL, as Managing Director, on 30 June 2008. She was appointed as a statutory director at that time and held an  
20 80% shareholding from that point onwards. There were two other statutory directors of RTL, each of whom held a 10% shareholding. Neither was involved in the day to day running of RTL. Their involvement was limited to attending annual shareholder meetings.
10. The claimant did not enter into an express contract of employment, written or  
25 oral, with the respondent in June 2008, or at any stage thereafter.
11. The claimant took advice from an accountant in relation to how and what she should be paid. She was advised that she should pay herself a nominal monthly sum, through PAYE, under the tax and national insurance thresholds,

and to take payment beyond that as a dividend. She agreed to do so and the accountant dealt with all the arrangements to put that in place. In the tax years 2019/20, 2020/21 and 2021/22 the claimant was paid £8,628, £8,784 and £8,844 respectively by RTL through PAYE. She was receiving £748.48 per month, via PAYE, in the tax year 2022/23. In addition to sums paid via PAYE, the claimant received dividend payments from RTL of around £1,000 to £1,500 per month. The level of the dividend payment was set by the claimant, in consultation with her accountant, and was dependent on the financial performance of the company.

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- 10 12. The claimant determined her own hours of work. She initially worked on a full time basis, but reduced her hours to approximately 21 hours per week in around 2015. She would occasionally work overtime, for example if someone was on holiday. She did not receive, or expect, additional payment for doing so.
- 15 13. The claimant did not have a line manager or report to anyone. The claimant's duties were, to a significant extent, dictated by the requirements of the commercial contracts RTL entered into. She was otherwise free to determine how and when she wished to undertake the work she did. If she wished to take a holiday, she simply rearranged meetings and other work commitments to suit the time she wished to take away from the business.
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14. The claimant was aware of the national minimum wage. She was aware that, based on the hours she worked, the amount that she received via PAYE was less than the appropriate national minimum wage rate.
15. There were three other individuals who worked for RTL. They each had employment contracts and were paid fixed salaries, through PAYE, in excess of £20,000 each per annum. Each individual was line managed by the claimant.
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16. RTL ceased trading, and was placed into creditors voluntary liquidation, on 19 January 2023. The claimant applied to the Second Respondent for payment in lieu of notice and for a statutory redundancy payment. That application was rejected by the Second Respondent on 25 March 2023.
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17. The claimant engaged in early conciliation from 20-21 April 2023 and lodged her claim form with the Employment Tribunal on 26 April 2023.

### Submissions

- 5 18. The claimant, gave a brief submission, stating that there was sufficient evidence to show that she had an implied contract of employment with RTL. Her shareholding in RTL was irrelevant to the role she undertook.
- 10 19. Mr Soni, for the respondent, also gave a brief submission. He adopted the submissions set out in the Grounds of Resistance attached to the respondent's ET3 form. He referred the Tribunal to the multiple test set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 2QB 497 HC, as well as the case of ***Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another*** [2009] IRLR 475 and the case of ***Clark v Clark Construction Limited*** [2008] IRLR 364, referred to in ***Neufeld***. Particular reference was made to the cases of ***Rainford v Dorset Aquatics Limited*** UKEAT/1026/20 and ***Dugdale v DDE Law Limited*** UKEAT/0169/16, given the similarity in the factual circumstances in those cases to the factual circumstances of the claimant's position. He submitted that, in all the circumstances, the Tribunal should find that the claimant was not an employee of RTL and is therefore not entitled to the sums sought.
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### Relevant Law

20. Section 230(1) ERA defines 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*' Section 230(2) provides that a contract of employment means '*a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.*'
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- 30 21. The issue of the status of a person as employee, worker or neither of those terms has been the subject of much case law. The essential test for employment status was set out in ***Ready Mixed Concrete (South East) Ltd***

**v Minister of Pensions and National Insurance** [1968] All ER 433, which referred to the need for personal service, control and other factors consistent with a contract of service.

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

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

23. It is established law that a company may enter into a contract of employment with a person who is the principal shareholder and in sole control of the  
20 company (**Lee v Lee's Air Farming Limited** [1961] AC 12). In **Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & another** [2009] IRLR 475, Rimer LJ stated, at paragraph 80

25 *'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*  
30 *properly to be regarded as their 'owner' can also be an employee of the company. It will, in particular, be no answer to his claim to be such an employee to argue that: (i) the extent of his control of the company means that the control condition of a contract of employment cannot be satisfied; or*

(ii) that the practical control he has over his own destiny – including that he cannot be dismissed from his employment except with his consent – has the effect in law that he cannot be an employee at all. Point (i) is answered by Lee's case, which decided that the relevant control is in the company; point (ii) is answered by this court's rejection in [*Secretary of State for Trade & Industry v Bottrill* [[1999] IRLR 326] of the reasoning in *Buchan [v Secretary of State for Employment* [1997] IRLR 80].'

24. It does not, however, follow that such a contract necessarily existed. Whether there was a contract between a shareholder/director and the company, and if so whether it was a contract of employment, is to be decided by the application of ordinary principles. Thus, in **Neufeld**, Rimer LJ said at para 85:

*"In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In Lee's case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his*

*capacity as a director of the company; or whether he was acting as an employee.'*

25. At paragraph 89 of **Neufeld**, Rimer LJ considered cases where there was no written agreement. He stated '*This will obviously be an important consideration but if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim*'.

## 10 Discussion & Decision

26. Determination of a person's status is a question of fact for the Tribunal, to be ascertained by examining the particular circumstances of each case.

27. It was accepted that there was no express contract of employment between the parties, whether written or oral. Each of RTL's other employees were given written contracts of employment. No satisfactory explanation was provided as to why, given this, the claimant did not have a written contract of employment. The Tribunal deemed this to be an important consideration.

28. The claimant's position was that there was an implied contract of employment. No documentary evidence, such as in the form of minutes of RTL's board meetings addressing the claimant's status, whether as employee or otherwise, were produced. The Tribunal was mindful of the guidance given at paragraph 89 of **Neufeld**. It noted that the absence of an agreement was an important consideration and considered whether the parties conduct under the claimed contract pointed convincingly to the conclusion that there was a true contract of employment. The Tribunal concluded that evidence presented of the parties' conduct did not point convincingly to such a conclusion, for the following reasons:

- a. The evidence suggested that no control was exercised by RFL over what the claimant did, or how or when she did it. This was not consistent with an employment relationship.
- 5 b. The manner in which the claimant was remunerated pointed away from an employment relationship. While the claimant received regular payments via PAYE, this was a device to use up the claimant's personal allowances during each tax year. The sums paid via PAYE were not set by reference to the hours worked by the claimant or the national minimum wage, but by certain tax thresholds. The sums paid via PAYE were a small proportion of the claimant's income from RFL. The bulk of the claimant's income came from dividend payments made to the claimant throughout each financial year. The payment of the dividend to the claimant derived from her shareholding and was not dependent on the existence of a contract of employment. The amount of the dividend varied and was based on the financial performance of the company. This arrangement was not consistent with the claimant working under a contract of employment.
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- 20 c. The claimant was aware of the requirement to pay employees the national minimum wage. She was aware that she was not receiving this and took no action. Again, this was not consistent with the claimant working under a contract of employment.
- 25 29. Adopting the approach expressed by Mummery J in *Hall*, the Tribunal concluded, based on the evidence presented, that the reality of the relationship between the parties was that the claimant was not an employee of the respondent, as defined in section 230(1) ERA, as at 19 January 2023, when RFL went into creditors voluntary liquidation.
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30. Accordingly, the claimant had no entitlement to notice pay or a statutory redundancy payment, and the Tribunal does not have jurisdiction to consider



the claimant's complaints under section 166 and section 182 ERA. The claimant's complaints are accordingly dismissed.

**Employment Judge: EJ Sangster**  
**Date of Judgment: 03 August 2023**  
**Entered in register: 04 August 2023**  
**and copied to parties**

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