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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101588/2023

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Hearing held in Glasgow by CVP on 24 July 2023

Employment Judge R Mackay

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Mrs C Roberts

**Claimant:
In Person**

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CatherineH1590 Ltd (In Insolvency)

**First Respondent:
No Appearance or
Representation**

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**Secretary of State for Business Energy &
Industrial Strategy
Insolvency Service**

**Second Respondent
Represented by:
Mr P Soni,
Lay Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant did not at the relevant time have the status of employee within the meaning of Section 230 of the Employment Rights Act 1996 (“**ERA**”). Her claims are, accordingly, dismissed.

REASONS

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Background

1. The claimant was engaged, she contends as an employee, by the first respondent.

2. She sought payment from the National Insurance Fund (“**the Fund**”) under Sections 166 and/or 182 of ERA. The second respondent, as statutory guarantor for payments made from the Fund, declined her claim.
3. The central question at this preliminary hearing was whether the claimant had the requisite status of employee in order to succeed in her claims.
4. The claimant, who was unrepresented, gave evidence on her own behalf. She and the second respondent co-operated in the preparation of a joint bundle of documents which was provided to the Tribunal.
5. The hearing had been listed for three hours although parties had been advised that it had been listed for two. In the event, the case concluded within the allotted time frame.

Findings in Fact

6. The first respondent became insolvent within the meanings of Sections 166 & 183 of ERA having gone into creditors’ voluntary liquidation on 13 January 2023.
7. Prior to becoming insolvent, the first respondent operated as an online retailer. It was established by the claimant and her husband.
8. The claimant and her husband were the sole shareholders of the first respondent at all times. At the time of the insolvency, the claimant held 90% of the shares with her husband holding the remaining 10%. She and her husband were the sole directors.
9. The first respondent operated for over a decade before its insolvency. During that time, the claimant’s husband worked full time shifts as a driver. Around June 2010, the claimant was made redundant (having previously also worked as a driver).

10. From that point onwards, the claimant assumed day-to-day responsibility for the running of the operations of the first respondent and the management of employees who were engaged from time to time.
- 5 11. On 20 June 2010, the claimant signed a document stated to be a contract of employment. Her husband had downloaded a template from the internet. She signed it on her own behalf. It was not signed on behalf of the first respondent. The reason for entering into that document was that the claimant and her husband felt that one of them required to “run” the business. It is clear, too, that the expectations of the claimant and her husband were not
10 that the claimant would operate as a conventional employee. The intention was simply that she would have day-to-day control over the running of the business.
12. The claimant typically worked in excess of normal full-time hours. She regularly worked at evenings and weekends. She rarely took, and was never
15 paid in lieu of, holidays and typically continued to manage the running of the business when she did so. The limited number of holidays taken by her were chosen by her. The claimant gave evidence that: “*We were never off work as it was our business*”.
13. The claimant managed her own time. No one gave her instructions as to
20 what to do, when to do it or where to do it. She made all day-to-day decisions affecting the operations of the first respondent. Larger decisions would be taken in consultation with her husband. Neither he nor anyone else effected any control over what she did. No-one was in a position to do so.
14. The sums earned by the claimant varied from time to time. She was paid
25 through payroll. Changes in her own remuneration were effected by her.
15. At the start of June 2019 there was a need to reduce costs in the first respondent. On the advice of an external accountant, the claimant reduced her own pay to £1,000 per month net. She enquired of her accountant about obligations to pay the national minimum wage. She was advised by him that

those provisions did not apply to her. On being asked in cross-examination whether other employees were paid national minimum wage, the claimant responded: "*Of course*".

5 16. At the time of the liquidation of the first respondent, the claimant was still on those reduced earnings.

17. The claimant and her husband invested funds into the first respondent by means of directors' loans. At the time of the insolvency, these amounted to almost £160,000. The claimant's share of that debt was 90%, given her 90% shareholding at the time of the insolvency.

10 18. Following the insolvency of the first respondent, the claimant submitted a claim to the Fund. She was asked to respond to a questionnaire. In this, she responded "No" to the question as to whether anyone supervised or guided her. She stated that she could be disciplined by or could raise grievances with her husband. The claimant accepted in cross-examination, however,
15 that there was in fact no one who would be in a position to perform those functions.

19. Her claim to the Fund was rejected, leading to the claim against the second respondent.

Relevant Law and Submissions

20 20. An employee is defined as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" (**section 230(1), ERA**).

21. A contract of employment means:

25 *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"* (**section 230(2), ERA**).

22. Where there is a dispute as to status, case law has developed a number of tests which may be applied. The leading authority in this context remains the case of ***Ready Mixed Concrete (South East) Ltd v The Minister of Pensions & National Insurance*** [1968] 2 QB 497. The core elements of a contract of employment include: (1) an agreement to provide the individual's own work or skill in the performance of service for the employer in return for a wage or remuneration; (2) in the performance of that service, the employer has a sufficient degree of control over the employee; and (3) the other provisions are consistent with a contract of employment.
23. Commonly referred to as “the irreducible minimum”, an employment contract must have personal service. There must be sufficient control and there must be mutuality of obligation. Other factors include the provision of equipment, the degree of financial risk adopted, the degree of integration into the business, whether a person is paid when absent due to sickness and whether the person is paid a fixed wage or salary.
24. Also relevant are the parties' intentions and how they describe themselves (unless this is not reflective of the reality of the situation) (***Young & Woods Ltd v West*** [1980] IRLR 201).
25. In ***Autoclenz Ltd v Belcher*** [2011] ICR 1157, the Supreme Court held:
- “Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other”.*
26. In looking at the position of a majority shareholder, in ***Fleming v Secretary of State for Trade & Industry*** [1997] IRLR 682, the Inner House held:

“Whether or not a person is an employee is a question of fact. The fact that the person is a majority shareholder is always a relevant factor and may be decisive. However, the significance of that factor will depend on the circumstances, and it would not be proper to lay down any rule of law to the effect that the fact that a person is a majority shareholder necessarily and, in all circumstances, implies that that person is not an employee”.

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27. In that case, the Inner House found that factors such as the claimant’s ability not to draw his salary and his personal guarantee of the company’s obligations pointed against employment status.

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28. Mr Soni agreed to make submissions first and referred to a number of the well known authorities.

29. He did not suggest that the written contract of employment put in place was a sham but rather that it did not reflect the reality of the relationship in practice.

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30. The claimant made a brief submission in response. She argued that the contract was genuine and that they were trying to keep the affairs of the first respondent right.

Decision

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31. Applying the test in **Ready Mixed Concrete**, the Tribunal first considered the question of control. The reality of the arrangement was that there was none. The claimant had complete freedom as to how she operated. She did not take instructions from anyone and was not answerable to anyone. Whilst she consulted with her husband (and fellow shareholder) on major decisions, there was no question that he in any way had control over her. On all day-to-day matters, the claimant had control not only of herself, but of the operations of the first respondent as an entity.

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32. Equally, considering mutuality of obligation, the arrangement is not a conventional employment one where the employer has an obligation to provide work and the individual has an obligation to perform it in return for

remuneration. The claimant had absolute autonomy over when she worked. Although in practice she rarely took time off, when she did, she had complete freedom to arrange that independently of anyone else.

5 33. In terms of remuneration, this fluctuated over time and was fixed by the claimant herself. In particular, at the time of the insolvency, the claimant had voluntarily reduced her remuneration to a level below the National Minimum Wage, itself an indicator that she did not have employee or even worker status.

10 34. In terms of personal service, whilst the claimant was clearly very personally involved in the first respondent and in the management of the company, the term “service” does not describe the function she performed. Her personal involvement was as the principal owner, director and manager of the company.

15 35. The absence of any one of these “irreducible minimum” factors would defeat the finding of employee status. The absence of all of them, make the decision of the Employment Tribunal a straightforward one.

20 36. The degree of financial risk adopted by the claimant is also heavily indicative of there being no employee relationship. At the time of the insolvency, she had loans to the company well in excess of £100,000. This demonstrates a degree of financial risk which would be expected of a shareholder but wholly anomalous for an employee in a company the size of the first respondent (if at all).

25 37. The Tribunal considered the terms of the contract of employment produced and while it was satisfied that it was not a sham in the sense that it was not entered into in bad faith or in order to mislead, it nonetheless did not reflect the reality of the situation. It was entered into by the claimant with a well meaning, albeit erroneous, belief that it was the best way to regularise the arrangement. In practice, however, none of the necessary components of employment status was present.

38. Instead, the claimant's position here is closer to that in *Fleming*. She was a majority shareholder and that factor, taken with all of the others, lead to the conclusion that she was not at the relevant time an employee.

5 39. As such, her claims against the second respondent cannot succeed. For what it may be worth, the claims cannot succeed against the first respondent either. They are, accordingly, dismissed.

10 **Employment Judge: R Mackay**
Date of Judgment: 07 September 2023
Entered in register: 12 September 2023
and copied to parties