EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
TINA GUPPY
AND

Respondents
THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY (1)
M T & ASSOCIATES LIMITED (IN LIQUIDATION) (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD at Southampton by VHS **ON** 6 July 2023

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person
For the Respondent: Mr P Soni

JUDGMENT

The judgment of the tribunal is that the Claimant's claims are all dismissed

REASONS PURSUANT TO A REQUEST FROM THE CLAIMANT

1. In this case the claimant Ms Guppy has brought claims for statutory redundancy pay, arrears of pay (on the ground that she was paid below the National Minimum Wage), unpaid notice pay and for accrued but unpaid holiday pay. The claims are all denied by the respondent. This claimant's entitlement to these amounts turn on the claimant's employment status.
2. I have heard from the claimant, and I have heard from Mr Soni on behalf of the first respondent. The second respondent is in liquidation and did not attend.

3. There was a degree of conflict on the evidence. I have heard the claimant give her evidence and have observed her demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

4. The claimant and her late fiancée (Martin Ingram) set up a business together in 2006, operating in partnership. They did not employ any people, instead using subcontractors. They clearly worked hard to establish and run the business.
5. In February 2011 they incorporated the business as a limited company, in the name of MT & Associates Limited, on the advice of their accountants.
6. They also entered into director service agreements with the company at that time, in forms which would have been capable of being a contract of employment. The claimant acknowledged that she did not consider the terms of this and simply signed as advised.
7. The working methods do not change following the incorporation, a fact which the claimant also acknowledged. The tribunal finds that the business was still run as a partnership, evidenced by the long hours worked by them both, the continuation of the same methods of making decisions, the facts that holidays were taken together at times when the business was quiet and the fact that the entire holiday entitlement was not taken. In addition, there is the reliance on low levels of pay with an expectation (sadly not fulfilled) that they would receive dividend payments as the business grew.
8. In addition, the tribunal finds that the terms of the employment contracts were not adhered to, especially in relation to pay. There was a requirement to pay the National Minimum Wage but this was ignored. Instead, they paid themselves a monthly non-specific amount with adjustments made by the accountant at times. The adjusted rates were set by the accountant to minimise tax and national insurance and without reference to the National Minimum Wage. The claimant acknowledged that if the National Minimum Wage had been paid, the business would have failed much earlier.
9. There continued to be no other employees of the business.
10. In 2020 Mr Ingram sadly died and the claimant became the sole shareholder and director of the business.
11. In June 2022, the claimant liquidated the business and then brought this case against it.

Law

12. Having established the above facts, I now apply the law.
13. Employees are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works

under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

14. The claimant's claim for accrued but unpaid holiday pay is brought under regulation 14 of the Working Time Regulations 1998 ("the Regulations").
15. This tribunal has jurisdiction to hear breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). This jurisdiction is subject to certain preconditions, including that in paragraph 3 (c) of the Order, namely that the claim arises or is outstanding on the termination of the employee's employment. Accordingly the right to bring a breach of contract claim before this tribunal is limited to employees.
16. The National Minimum Wage Regulations 2015 ("NMW Regs") came into effect on 6 April 2015 and govern the appropriate rates and pay reference periods for the national minimum wage ("NMW"). The Regulations were introduced pursuant to the National Minimum Wage Act 1998 ("NMWA"). Section 1 of the NMWA provides that all 'workers' are entitled to be paid the NMW, provided they have ceased to be of compulsory school age and work, or ordinarily work, in the UK. The definition of 'worker' in section 54(3) of the NMWA includes someone who is working under a contract of employment.
17. Sections 166 to 168 of the Act entitle an employee to apply to the Secretary of State for payment of various sums due to them including when the employer is insolvent and has not paid the relevant sums. This extends to the various sums claimed by the claimant in this case.
18. I have considered the following cases to which I have been referred: Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA and [2011] UKSC 41; Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Express and Echo Publications Ltd v Tanton [1999] IRLR 367; Consistent Group Ltd v Kalwak [2008] IRLR 505 CA; Firthglow Ltd (t/a Protectacoat) v Szilagyi [2009] ICR 835 CA; Snook v London and West Riding Investments Ltd [1967] 2 QB 786]; Clark v Clark Construction Initiatives Ltd and anor [2008] ICR 635 EAT; Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor [2009] ICR 1183, CA.
19. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz in the Supreme Court: "18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "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 … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". 19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must … be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."

20. Clarke LJ in Autoclenz in the Supreme Court has discussed the cases where the written documentation may not reflect the true reality of the relationship. These include Kalwak and Szilagyi, and the Court of Appeal decision in Autoclenz. In paragraph 29 Clarke LJ preferred the approach of Elias J (as he then was) in Kalwak, and the Court of Appeal in Szilagyi, to that of the Court of Appeal in Kalwak. The question to be asked is what was the true agreement between the parties? It is important to look at the reality of the obligations and the reality of the situation. He referred in paragraph 30 to the judgment of Smith LJ in paragraph 50 of Szilagyi: "The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by". In paragraph 35 he concluded "so the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description".
21. The Supreme Court has upheld the Court of Appeal in the Autoclenz decision, and the approach to be adopted where there is a dispute (as in this case) as to an individual's status. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?
22. The specific issue of whether a majority shareholder of a company can also be an employee has been considered in various cases. The Court of Appeal

in Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor [2009] ICR 1183, CA ('Neufeld') affirmed that a majority shareholder could also be an employee. Where an individual's employment status is in dispute, the court or tribunal must be satisfied that any relevant document is a true reflection of the claimed employment relationship, and for this purpose it will be relevant to know what the parties have done under it. Where that party acted in accordance with their contract, this was a strong indicator that the contract was valid and binding. An irregular salary can point against a valid contract of employment.

23. The claimant also referred to an example of a case from the Employment Tribunal where an owner of a small business was found to be an employee. These cases do not bind the tribunal and tend to be very fact specific.

Applying the law

24. I begin by adopting and applying the four part Autoclenz test in that order. First, the contractual terms or factors which point to employment status are as follows:
    a. there was a contract of employment
    b. she was paid a wage
    c. she was registered for PAYE
    d. she did pay a small amount of National Insurance
25. The contractual terms or factors oppose this are these:
    a. she was unaware of the terms of the contract, simply signing this as part of the incorporation of the business
    b. she and Mr Ingram continued to operate the business in the same way, as a partnership. There was no adherence or acknowledgement of contracted hours and the holiday entitlement appeared irrelevant.
    c. they drew random amounts as monthly payments without reference to the National Minimum Wage, reflecting the behaviour of a partnership
    d. the monthly payments were adjusted by their accountant to minimise tax and again without reference to the National Minimum Wage
26. As to the second limb of the Autoclenz test, I find that there was no control or management of what the claimant or Mr Ingram did. They acted as business partners whilst Mr Ingram was alive and she ran the business on her own after he died. They could appoint others to do their jobs and did so through their use of agents. On balance I find that there was no "irreducible minimum": there was no mutuality of obligation; no requirement for personal service; no direct control.
27. As to the third and fourth limbs of the Autoclenz test, I find that the claimant did not carry out services personally for the second respondent in the capacity of client or customer.
28. Based on the Autoclenz test, the balance is against the claimant being an employee. Essentially, there was no mutuality of obligation in this case, with

the claimant sitting on both sides of the equation but simply acting as an officeholder without regard to the employment aspect. There was no control of her as employee, she simply decided everything. In reality, there was a continuation of the partnership arrangement after the incorporation, there was no real change at that point. The only change came with Mr Ingram's death, where she became a sole trader.

29. I then turn to Neufeld. The claimant did not act in accordance with the employment of contract, indeed she did not even know its terms. The irregular amounts paid to her with no reference to the National Minimum Wage all indicate that this was not a valid contract of employment. The fact that the accountant set the levels and made adjustments emphasises that she was not acting as an employee but as an office holder.
30. She argues that she paid tax and National Insurance and so should be entitled to rely on its benefits but the amounts paid were substantially below what she should have paid had she taken her full salary as an employee. The arrangement was set up and operated by their accountant to minimise the amounts paid by way of tax and National Insurance and allowed the business to continue.
31. I find therefore that, if there had ever been a contract of employment, it had been discharged by the actions of the claimant and Mr Ingram and had ceased to exist before the company's dissolution.
32. The relevant time to test whether the claimant was an employee was when the insolvency occurred. As I have concluded that any contract which may have existed would have been discharged by then, I find that the claimant was not an employee at the relevant time. All her claims are dependent on her being an employee. As a result, all her claims are dismissed.

33. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 11; a concise identification of the relevant law is at paragraphs 12 to 23; how that law has been applied to those findings in order to decide the issues is at paragraphs 24 to 32; and no compensation was awarded

_____
Employment Judge H Lumby
Dated 2 September 2023

Judgment sent to Parties on 20 September 2023

For the Tribunal Office