# EMPLOYMENT TRIBUNALS

**Claimant:** Mr John Langdon

**Respondent:** (1) Secretary of State for Business and Trade
(2) John Dean Building Contractors (Creditors in Voluntary Liquidation)

**Heard at:** **Virtually (Bristol Tribunal)** **On:** **6 September 2023**

**Before:** **Employment Judge Bradford**

**Representation**
Claimant: Ms A Kendrick, Lay Representative, UKELC
Respondent: Mr P Soni, Lay Representative for the Secretary of State
No attendance by or representation for John Dean Building Contractors

# JUDGMENT

1. The Claimant was an employee of the Second Respondent, in accordance with s230 Employment Rights Act 1996 (ERA).

2. The First Respondent shall pay the Claimant the sum of £18,698.85 comprising:
   a. Redundancy pay of £12,825.00
   b. Holiday pay of £743.85
   c. Pay in lieu of notice of £5,130.00

3. The Claimant's claim against the Second respondent, following the filing of an amended claim form on 3 May 2023, is brought out of time and the Tribunal does not have jurisdiction to hear it.

# REASONS

1. This is a claim brought by Mr John Langdon, the Claimant, by way of ET1 filed on 17 March 2023. The Claimant owned the majority shareholding in, and worked for, the Second Respondent from 4 November 1991 until his he was made redundant on 17 June 2022. Thereafter the Second Respondent

went into Creditors' Voluntary Liquidation on 8 July 2023.

2. Mr Langdon appointed UKELC to submit a claim on his behalf for redundancy pay, holiday pay and pay in lieu of notice to the Redundancy Payment Service. The claim was submitted on 20 July 2022, and rejected on 20 December 2022. The Claimant's claim against the First Respondent was brought within three months of that rejection, and is brought in time in accordance with s188 ERA.

3. The Second Respondent has not filed any response the Claim, which was served on it on 22 May 2023. The ET1 was initially filed with the Tribunal on 17 March 2023, but was rejected due to a defect. That defect was rectified and thereafter, the ET1 was treated as received on 3 May 2023. This is significantly beyond the three month timescale within which the Claimant should have brought a claim against the Second Respondent. Such a claim should have been brought within three months of the redundancy, subject to the discretion in s111 ERA, that a claim may be brought "*within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*". Ms Kendrick, when invited, did not make submissions that the claim was in time. However, even on a finding (which I have not made) that it was not reasonably practicable for the claim against the Second Respondent to be brought within three months, the latest time such claim could reasonably have been brought was at the same time as the claim against the First Respondent. That is within three months of the rejection by the First Respondent of an application for a payment from the National Insurance Fund. The Claimant first contacted ACAS more than three months after that date, and the ET1 was filed on 3 May 2023. That is more than the three months permitted in s188 ERA. The claim against the Second Respondent has been brought out of time.

4. A Hearing of the claim against the First Respondent took place remotely via VHS on 6 September 2023. The parties had filed an agreed bundle of 167 pages, and Mr Soni provided the Tribunal with a list, and copies, of what he submitted was relevant caselaw. Ms Kendrick also assisted the Tribunal through reference to some recent first instance decisions, which she submitted had parallels with the Claimant's claim. Mr Langdon had provided a written statement dated 17 August 2023 setting out why he believes he was an employee of the Second Respondent. He gave oral evidence at the hearing. Ms Kendrick additionally briefly gave oral evidence on a discrete issue arising from the details she had supplied to the National Insurance Fund, which conflicted with the evidence given by Mr Langdon.

**Issues**

5. This is a claim brought Part XII ERA – Insolvency of Employers. The starting point is s182 which states:

   *182. Employee's rights on insolvency of employer.*

   *If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—*

*(a) the employee's employer has become insolvent,*

*(b) the employee's employment has been terminated, and*

*(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,*

*the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt*.

6. The debts referred to are set out in s184 and include arrears of pay; pay in lieu of notice in accordance with s86; holiday pay to which the employee became entitled during the 12 months ending with the appropriate date and any basic award of compensation for unfair dismissal. S186 sets out a limit of £643 in respect of a week's pay.

7. The Claimant's claim was rejected by the First Respondent on the basis that he was not an employee. The issue for the Tribunal to determine therefore is whether, in addition to being a director (and from 2014 the sole director) and majority shareholder, the Claimant was also an employee. It was accepted by the First Respondent that if the Claimant were an employee, then no issue was taken with the claims sought to be paid from the National Insurance Fund.

**Submissions**

8. On behalf of the Claimant, it was submitted that he was an employee as he worked alongside other employees in the company. He was required to be there every day, his work involved a combination of administrative duties and working on site. It was submitted that the fact he was also a shareholder and director did not mean he could not be an employee. Nor was the fact that he was an entrepreneur and able to profit from the work put in mean that he was not an employee. When he set up the company, he was advised to take a small salary and leave profits in the business to grow it. That arrangement never got reviewed. It was submitted that there could not logically be a finding that the Claimant was self-employed as it was the company that was VAT registered. Money went into the company account and shareholders were paid once costs had been covered. The Claimant's salary was paid via PAYE.

9. On behalf of the First Respondent, it was submitted that the Claimant was not an employee, as he did not have a contract of employment, either express or implied. It was accepted that there is no reason in principle why a director and shareholder cannot also be an employee. It was submitted that whether such a person is an employee is ultimately a question of fact. The facts of the present case pointed away from a finding that the Claimant was an employee as in his online claim for payment from the Redundancy Payment Service, he said he worked a 14 hour week for £136. In relation to these proceedings he said he worked 45 hours/week. The fact he earned under the national minimum wage pointed to him being an office holder, as they are not entitled to receive the minimum wage, whereas employees are.

**10.** The First Respondent contended that the three minimum requirements of a

contract of employment set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All E.R. 433 were not satisfied. It was submitted that the cases of *Rainford v Dorset Aquatics Ltd* [2021] 12 WLUK 203, *Dugdale v DDE Law Ltd* UKEAT/0169/106 and *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] EWCA Civ 280 pointed to a person not being an employee where they received a small remuneration and a large dividend payment. Indeed, remuneration below the national minimum wage pointed against a contract of employment. In relation to control, it was submitted that the Claimant was not subordinate to anyone else and he had significant control over the company with his 45% shareholding and his status as a director.

**Findings of fact**

11. It was not disputed that the Second Respondent, John Dean Building Contractors was set up by the Claimant and others in 1991, and that he had been a director, and held 45% of the shares, until the company went into liquidation in July 2022. In his statement, the Claimant set out the criteria, which he believed made him an employee as follows:

    - *I was required to work regularly, with a set number of hours and I expected to be paid for hours worked. I was provided with payslips and my pay recorded weekly with HMRC.*

    • *I was obliged to carry out my duties, finding new projects, quoting new contracts etc. and in return I expected the company to pay me.*

    • *I agreed that I would be subject to supervision by Contract Administrators on site and architects on behalf of clients involved in the projects. I was also supervised and guided by the company accountants on financial matters.*

    • *I opted out of the company auto-enrolment pension scheme*

    • *I was entitled to and took annual holidays for which I was paid.*

    • *The company operated disciplinary and grievance procedures in line with HR guidance from the Federation of Master Builders and this applied to all employees.*

    • *I was not working or employed elsewhere.*

12. The Claimant had provided an 'employment schedule' which he had requested from HMRC, evidencing his PAYE earnings from tax years 1999/00 through to 2021/22. His gross earnings did not change during that period, and were £7,020 per year. Until 2010/11 tax and national insurance had been paid on them, and indeed tax paid until 2017/18. Thereafter his earnings were below the thresholds for such payments to be deducted at source. In addition, the Claimant had provided payslips, which evidenced that he earned £136/week. He had provided the company accounts for the years ending December 2020 and December 2021.

13. Under cross examination, the Claimant said that he had no written contract of employment, although other employees had such contracts. He worked at least 45 hours/week. He had provided a summary of his daily routine within

the bundle which involved starting work at 7am and finishing at 5pm each day except Fridays, when he finished at 3.30pm. Other employees typically worked 8am to 4.30pm. He accepted that his salary was far below the minimum wage. He explained that it had been the figure advised by his accountant and reflected the minimum wage when the company was set up in 1991, but it had never been reviewed. His income was a combination of his salary, and the dividends he earned. In his position as director, he had a role in managing the company's money. His renumeration fluctuated as he did not take money out of the business when that was not affordable to the company.

14. In relation to his work for the company, the Claimant stated that as an office holder he oversaw the financial side of the business (which was carried out by the accountants) and he signed off the annual accounts. He was accountable to the other shareholders, his wife and sons, who were also employees. At times he was office based, at times he did manual work on site as part of a team of workers. He went out and got work. He quoted for jobs. He was guided in financial management by the accountants and was answerable to the other shareholders. When he worked on site he would be supervised by tradesmen. His wife had as much say in the direction of the company as he did. She had different duties, such as oversight of disciplinary procedures. When asked whether anyone else could have carried out his work, the Claimant said that cover was provided by different people when he was on holiday. Certain things, like quotes for big jobs would await his return.

15. I found the Claimant to be an honest, genuine witness. His oral evidence was consistent with his written statement and provided helpful additional information. I accepted the Claimant's evidence as to his working routine and how the company was managed.

**Law**

16. S230 ERA defines an employee as:

    *230.— Employees, workers etc.*

    *(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.*

17. Whether a person falls within this definition depends not on the terms of any written contract, but on the de facto working relationship. It has been said to be a matter of statutory, not contractual, interpretation - *Uber BV v Aslam* [2021] UKSC 5.

18. In order for a person to be an employee, there must be a contract, and there are three essential elements which are required in order to establish a contract of employment:

    a) An obligation to provide work personally;

b) Mutuality of obligation (meaning that the employer must provide work and the employee must do it);

c) The worker must agree to be subject to the control of the employer to a sufficient degree.

19. Taking these in turn, the obligation to carry out work personally does not cease to exist where there is power to send a substitute where the worker is unable to do the work – *James v Redcats (Brands) Ltd* [2007] IRLR 296. In *Staffordshire Sentinel Newspapers Ltd v Potter* [2004]IRLR 752, the EAT stated that where there is no express term relating to an obligation to do the work personally or the circumstances in which a substitute may be provided, the Tribunal must look at what happened in practice in order to determine the true agreement between the parties. This was confirmed in *Autoclenz Ltd v Belcher* [2011] UKSC 41. The court will look at the reality of the arrangements between the parties.

20. Moving to mutuality of obligation, namely that both the employer and employee are under a legal obligation to each other, it follows that without this, there cannot be a contract at all. Most cases deal with whether an employer had to offer work, and whether workers had to accept it if offered. That is not particularly helpful in the circumstances of this case. It was said in *Varnish v British Cycling Federation* (UKEAT/0022/20/L) that where there was no dispute that there was a contract, and no intermittency in the relationship, it may not always be helpful to use the term 'mutuality of obligation'. The better approach, it was suggested, was to determine whether the obligations under the contract are of the type that give rise to a contract of employment.

21. In terms of a sufficient degree if control, this will vary. What is required, according to the Court of Appeal in *Troutbeck SA v White* [2013]EWCA Civ 1171, is the 'ultimate' ability of the employer to control the manner in which work is carried out.

22. There are a variety of factors which feed into the determination of these issues, such as how a person is treated for tax purposes. A full-time working director of a family firm who drew fees rather than being paid a salary was held to be self-employed in *Parsons v Albert J Parsons & Sons Ltd* [1979] IRLR 117. Old authority, in relation to whether a person was in partnership or employed, suggests that where a person receives a salary as well as a share of profits, there was strong evidence he was an employee and not a partner - *Ross v Parkyns* (1875) LR 20 Eq 331.

23. Company directors can be both employees and office holders - C*lark v Clark Construction Initiatives Ltd* [2008] ICR 635. It was said that circumstances in which there may not be a binding contract of employment were: firstly, where the company itself was a sham; secondly, where the contract was entered into for an ulterior purpose; and thirdly, where the parties did not conduct their relationship in accordance with the contract. The onus was on the party seeking to deny the effect of a contract to satisfy the court that it was not what it appeared to be. Secondly, the mere fact that an individual had a controlling shareholding did not of itself prevent a contract of employment arising. Third, the fact that the individual had built the company up or would

profit from its success would not militate against a finding that there was a contract in place. If the parties' conduct was in accordance with the contract, that would be a strong pointer towards the contract being valid and binding.

24. It was again stated in *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] EWCS Civ 280 that there is no reason in principle why a controlling shareholder should not be an employee. The mere fact that a person profits from the success of a business does not mean he cannot be an employee. Further, this case made clear that arguments about the extent of an individual's control of a business did not mean that the control condition of a contract of employment could not be satisfied. The court gave guidance to assist in deciding whether a shareholder and director was also an employee. Guidance relevant to the matters in the present case included:

    - it was a question of fact requiring consideration of whether the putative contract of employment was a genuine or sham contract and whether, assuming it was a genuine contract, it amounted to a true contract of employment;

    - in cases that raised no allegation of sham, it would or might be necessary to inquire into what had been done under the claimed contract. It might well be insufficient merely to place reliance on a written contract made years earlier;

    - in a case in which the alleged contract was not in writing, or was only in brief form, it would usually be necessary to inquire into how the parties had conducted themselves under it;

    - the following features would not ordinarily be of any special relevance and should be ignored in deciding whether the putative employee had a valid contract of employment: his controlling shareholding in the company, share capital invested by him in the company, loans made by him to the company, his personal investment in the company and his other actions that an owner of business would commonly do on its behalf;

25. The Court considered that if the parties' conduct under the claimed contract pointed convincingly to the conclusion that there was a true contract of employment, the court would not wish employment tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim.

26. A final matter of law for me to set out is that which relates to the national minimum wage. S1 of the National Minimum Wage Act 1998 sets out the entitlement of an employee to be paid the national minimum wage. S17 sets out that the employee is entitled to additional remuneration in the event that they qualify for the national minimum wage and are not paid it.

27. In the case of Paggetti v Cobb [2002] IRLR 861 EAT, the Appeal Tribunal held that a week's pay must be calculated at the national minimum wage where that was not the actual pay received, when calculating remedy in accordance with claims brought under the ERA.

## Findings

28. My starting point, consistent with the guidance given in *Neufeld*, is that it is for the Claimant to satisfy me that he had a contract of employment. He says that there was an implied contract. The First Respondent points out that the fact other employees had written contracts goes against the Claimant's assertion. Had a written contract been produced in relatively recent times, I would be extremely skeptical of its veracity, and indeed, would need to consider very carefully, in light of the caselaw, whether it was a sham. The fact that the Claimant worked consistently (given the evidence of consistent pay) for the Second Respondent, and has given credible evidence as to the duties and tasks he carried out, persuades me that there was an agreement, albeit implied, that he would work, in the manner outlined, for the Second Respondent. The Claimant's position as a founding director and majority shareholder of the company set him apart from other employees. In small businesses, that are set up with limited, if any, professional advice, a written contract for the Claimant may well have been overlooked, and I do not see this distinction as in any way determinative. I find that there was an implied contract between the Claimant and the Second Respondent.

29. I have been referred to the three criteria for a contract of service in *Ready Mixed Concrete*; (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; and (iii) the other provisions of the contract are consistent with its being a contract of service. The first two of these align with the 'irreducible' elements of a contract of employment which I come to below. I will however deal with the third of these criteria here, as that is broad, and certain matters have been raised to suggest that there were various things that were not consistent with any contract the Claimant may have had, being a contract of service (or employment).

30. I have ben referred to the case of *Dugdale v DDE Law Ltd* (UKEAT/0169/16/LA) as authority for the proposition that a salary below the minimum wage, or a small salary accompanied by a large dividend, point away from a contract of employment. In *Dugdale*, where a director was held not to be an employee, it was said that the point about salary being below the minimum wage was of no real significance. In that case, there were far greater differences between the purported employee's salary and his dividend, for example in one year a salary of £9,500 and a dividend of £86,666.

31. So, I move to consider whether the three essential elements of a contract of employment have been made out.

32. Obligation to provide work personally. The Claimant's evidence, which I accept, it that he did not work anywhere other than with the Second Respondent since setting up the business. It follows that, save for holidays and anything which prevented him from attending work as normal, he carried out his role personally and at no time arranged for anyone to substitute for him. There has been no evidence that the Claimant delegated his responsibilities to others. Rather, the evidence has been that within the small

team, each person had their role. In addition, when asked about whether others could carry out his role, the Claimant answered that staff covered as far as possible during for example, holidays, but certain things, such as quoting for bigger jobs, would await his return.

33. The Respondent relies, for example, on *Rainford v Dorset Aquatics Ltd* [2021] 12 WLUK 203 as being a case where a director of a company was found not to be an employee. The director in question however was free to do other work outside the company, indeed he did so, and the evidence was that there would have been no difficulty in finding a substitute to carry out that director's role as site manager. There are therefore a number of important distinctions on the facts between that case and the present one. I find that there was an obligation on the Claimant to provide work personally in accordance with the unwritten agreement in place. Certainly, the evidence is that he did so.

34. Mutuality of obligation. The evidence was that the company provided the Claimant with sufficient work to keep him busy at least 45 hours/week, and that he undertook that work. There was no evidence that he picked and chose which jobs or types of work he did, or that he only worked when he wanted to. Indeed, this finding is consistent with there being no delegation, as referred to above. I also bear in mind the analysis of this requirement given in *Varnish*, whether the obligations under the contract are of a type that give rise to a contract of employment. I am satisfied that they are. The Claimant carried out a range of duties, that included working on site alongside other employees. With his employee hat on, he carried out every day work; with his director hat on he carried out different duties such as signing off accounts.

35. Sufficient degree of control. The case of *Ready Mixed Concrete* is often referred to as the basis for this requirement. Once mutuality of obligation has been established, a sufficient degree of control is required in order to establish a contract of employment. It should be noted that this reference was to the right to control, rather than actual control. This is perhaps the most difficult requirement for someone who is a director and majority shareholder to satisfy. However caselaw, *Neufeld*, makes clear that the fact a person is a controlling shareholder and director does not mean that the control condition of a contract of employment cannot be satisfied. The Claimant has given an example in his written evidence of being subject to the control of others such as architects when on-site. He was guided by the accountant in financial decisions. As set out above, what is required is the 'ultimate' ability of the company to have control over the employee. Whilst he held more shares than any other shareholder, they amounted to less than 50% of the total shares, and hence he could be overruled. He explained that he was accountable to the other shareholders, and as such, I am satisfied that he did not make all the decisions and the company, through those it appointed in other roles, had a degree of control over the Claimant.

36. I am satisfied that these essential elements of a contract of employment are made out. I find that the parties' conduct accorded with a contract being in place, and take heed of the comment in *Neufeld* that where conduct pointed convincingly to a contract being in place, then the court would not wish employment tribunals to seize too readily on the absence of a written

agreement.

37. In reaching this finding, I have taken into consideration the point made on behalf of the First Respondent about the low wage paid, and the inconsistency in what was reported to the RPS in terms of hours worked and what has been said to the Tribunal. I am satisfied that a logical explanation has been given for that inconsistency, which was due to Ms Kendrick seeking to act in the interests of her client, in anticipation that his claim to the scheme would be rejected if it was said that he was earning less than the national minimum wage. This was not an inconsistency of the Claimant's making and does not in any way undermine his evidence. Overall, I find the fact that the Claimant received payment through the PAYE scheme and had tax and national insurance deducted when his salary was above the thresholds. I am satisfied that his low salary, which had at the inception of the company reflected the minimum wage, was maintained due to oversight in not reviewing it annually. I do not find that this in itself, points away from him being an employee.

**Sums to be paid**

38. A claim for redundancy pay, at national minimum wage, as it was at the date of his dismissal, June 2022 has been made as follows:

    Date of redundancy 17.06.2022

    Date of birth 15.10.1960 Aged 61

    Start date 04.11.1991

    Years of service = 31

    Weekly wage £427.50 at national minimum wage

    30 weeks @ £427.50 p/w = £12,825.00

39. I am satisfied that this calculation is correct, in light of the law set out above, even though the Claimant was not paid the minimum wage. 30 weeks is the maximum that can be claimed.

40. A claim for holiday accrued but not taken has been made as follows:

    Holiday year start 01.01.2022

    8.7 days @ £427.50 p/w = £743.85

41. A claim for pay in lieu of notice has also been made. Only 9 weeks has been claimed. In accordance with s86 ERA, the Claimant is entitled to 12 weeks. S184 ERA states that notice pay on insolvency is to be in accordance with s86.

    12 weeks x £427.5 = £5,130.00

**Case No: 1401204/2023**

Employment Judge S Bradford
Date 8 September 2023

Judgment & reasons sent to the Parties on 28 September 2023

For the Tribunal Office