



EMPLOYMENT TRIBUNALS

Claimant: Mr S Credie

Respondents: 1. Secretary of State for Business and Industry
2. CFH Solutions Limited (in Creditor's Voluntary Liquidation)

Heard at: Liverpool (by CVP)

On: 19 July 2023

Before: Employment Judge Benson

REPRESENTATION:

Claimant: In person

1st Respondent: Mr P Soni, Senior Employment Tribunal Representative

2nd Respondent: Not in attendance

JUDGMENT having been sent to the parties on 28 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim which has been brought by the claimant seeking a redundancy payment, arrears of pay, holiday pay and notice pay. The reason that the claimant has brought these claims to the Tribunal is that the first respondent is in creditors' voluntary liquidation, and he made a claim to the Secretary of State for payment but that was rejected. He therefore commenced these proceedings. Mr Soni is representing the Secretary of State, who has defended these claims on the grounds that the claimant was not an employee of the first respondent. A response was filed, and various authorities referred to.

The Issues

2. The issues which I have to decide are:

(1) Whether the claimant was an employee of the business;

(2) If so, what payments are due to the claimant?

Evidence and Submissions

3. I heard evidence from the claimant, Mr Lloyd, the finance director and Ms Credie. I was grateful for their evidence. All witnesses have been open and honest with their answers and that has informed my decision. I was provided with a bundle of 254 pages, and I heard submissions from Mr Soni on behalf of the Secretary of State and from the claimant.

The Facts

4. The claimant, together with three others who worked within the same industry, started a business CFH Solutions Limited in April 2011. At that time, he and his colleagues all took 25% shareholding in their new business. Each of the shareholders also worked within the business. Two of them, (Mr Wolstenholme and Michelle Giversleve) did not want to become directors as they had been involved in a previous company which had gone into administration, and they did not want to have the responsibilities attached to a directorship. For this reason, it was agreed that two of the shareholders, the claimant and his colleague Neil Priddey would take on the roles of statutory directors. I find that from 2011 all four shareholders were active individuals working in and managing the business on a full-time basis.

5. Mr Lloyd was Finance Director (not a statutory director) and also was actively involved in the business.

6. The business carried on quite satisfactorily until in 2016 when Mr Priddey left and at that time his shares were cancelled, so the claimant and the other shareholders all owned a third of the business. Each of the three remaining shareholders also continued to work full time in the business and were actively involved in its management. The claimant continued as the sole statutory director at Companies House.

7. In 2011 and again in 2018, formal contracts of employment were signed by all individuals, and I was provided with a copy of the contract of employment which was drawn up and issued to the claimant by the respondent's HR adviser in 2018. It is stated to be a contract of employment and it governed all of the terms and conditions of the claimant in respect of his relationship with the respondent.

8. The claimant regularly worked more than 50 hours a week. His contract confirms he was paid £42,000 per annum.

9. The three shareholders who remained after Mr Priddey left were paid based on a salary and remuneration arrangement totalling £42,000 per annum, and it was agreed that this would be paid by way of a mix of salary through the PAYE system and a monthly dividend. The three shareholders left it to their accountant to calculate how the payment would be split between salary and dividend, but they agreed it was to be paid in the most tax efficient. They each received a net payment into their bank each month and I accept that the claimant didn't pay much attention to his payslips which itemised the part being paid as PAYE. It was certainly intended that this sum would ensure the claimant and his colleagues were paid the National Minimum Wage but as time went on the figure was not amended to reflect annual

increases, and during the latter part of the claimant's time with the respondent it was not reflective of the statutory National Minimum Wage.

10. During the Covid pandemic, the respondent's business suffered and all of the shareholders (including the claimant) took pay cuts. At the beginning of 2022 it was clear that the business was struggling to survive. The shareholders considered proposals to keep the business running and suggestions were put forward by the claimant and others. I was referred to a memo from the claimant to his fellow shareholders with ideas and proposals as to how matters could be taken forward to rescue the business.

11. At a meeting on 23 March 2022 the accountants advised that because the respondent was not making any profit, dividends could no longer be paid by the business and therefore remuneration to the three shareholders had to be paid solely by way of salary. That is recorded in a minute which was provided to me. From that date and for the following five months the three individuals had their payments by way of PAYE increased. A payment in August was not made. The claimant and his colleagues continued to work in and managed the business throughout this period.

The Law

12. The relevant definitions of an employee or worker are set out in section 230 of the Employment Rights Act 1996. This states:

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.
- (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

- (4).....
- (5).....

13. The courts and tribunals have developed a number of tests over the years aimed at helping them to identify a contract of service and to distinguish between employees and the self-employed.

14. The most common judicial starting point in the consideration of whether an individual is an employee is the judgment of Mr Justice MacKenna in Ready Mixed

Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. He stated:

15. '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.'

16. The continuing relevance of this passage was confirmed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, where Lord Clarke called it 'the classic description of a contract of employment'.

17. Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements: control, personal performance, and mutuality of obligation.

18. Where an individual is a director and/or shareholder of a company the Court of Appeal in Secretary of State v Neufeld and Howe [2009] EWCA Civ 280 has held that whether that individual is an employee is ultimately a question of fact.

19. The Court also took the view that exercising control of a company as a shareholder does not prevent the control test for an employment contract being met. The company, a separate legal entity, provides the necessary element of control.

20. In Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635, EAT, the EAT upheld a tribunal's finding that C, CCI Ltd's controlling shareholder, was not also an employee of CCI Ltd. C was receiving only a minimal salary and was instead relying on loans from the company to cover his living expenses. In the EAT's view, this, coupled with the fact that an employment contract was never drawn up, pointed strongly against an employment relationship.

21. The rules governing the calculation of a week's pay are set out in Chapter II of Part XIV of the Employment Rights Act 1996. Section 221 refers to the calculation of a weeks' pay when the employee has normal working hours. Section 221 states:

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

Conclusions

Was the claimant an employee of the respondent?

22. The first issue that I have to decide is whether the claimant was an employee. I am grateful to Mr Soni for his representations in the ET3, but also the summary of submissions that he has made and the authorities that he has referred the Tribunal to. I have reviewed the decision in Neufeld which provides the principle that exercising control of a company as a shareholder does not prevent the control test for an employment contract being met. It is therefore necessary to consider all of the facts.

23. On the facts of this case, which differs from Neufeld, there is no suggestion that the contract of employment which the claimant signed in June 2018 was any form of sham, and that has been accepted by Mr Soni. The claimant had an initial contract of employment in 2011, but a further written agreement was entered into in June 2018. With that in mind what must do is consider the well-established principles set out in Ready Mixed Concrete. Paraphrased, for an individual to be an employee, there must be mutuality of obligations, there has to be an element of control by the company over the employee and there has to be some form of personal performance. The fact that there was mutuality of obligation and personal performance is not something which Mr Soni disputes, and I agree that these are both present in this case.

24. In respect of control, which is the particular area that Mr Soni disputes, owing to a lack of information on the Companies House register, it was not apparent to him and the respondent prior to today that there were other shareholders who had shares in the company with the claimant. It has become clear today that there were two other shareholders who had equal shares in the business with the claimant as at the time of the insolvency, and they were actively involved in the management of this business alongside the claimant, even though it was only the claimant who was a statutory director. This is very different from the authorities to which I was referred as they focus upon shareholders who had controlling interests. The claimant did not.

25. Mr Soni suggests that because the claimant was also a landlord of the business that he essentially had ultimate control. I do not find that was necessarily the case. A business can locate itself wherever it wants, it just so happens that it was in the claimant's premises which he owned with another partner. The business was not tied to those premises.

26. It is clear to me from the minutes of meetings and evidence which I have heard that this was not a situation, which is common, where a director is the sole owner/sole director and has complete control of every part of the business. I find that the respondent exercised control over the claimant through the two other shareholders, who together had a majority shareholding.

27. The other issue which Mr Soni makes is that the claimant was remunerated by a mix of both of dividends and PAYE payments. He refers to the decision in **Clark**. In the facts of that case, it is again apparent that the claimant had a controlling shareholding in the business and how he was paid was just one of the factors to consider. The claimant has no controlling interest in this claim, and I do not

consider that the make-up of the claimant's remuneration assists the respondent in this case.

28. I find therefore taking all factors within Ready Mix Concrete into account, that the claimant has shown he was an employee of the respondent business as at the date of the liquidation.

What was the claimant's "weeks' pay" for the purposes of the redundancy payment?

29. A week's pay is governed by sections 221-224 of the Employment Rights Act 1996, and it is defined as "weekly pay" or "salary". In this case the claimant has normal hours of work and as such it is the amount that is payable to the employee under the contract.

30. The claimant however says that his weekly pay should be based upon his total remuneration of £42,000 (though his payslips show a slightly higher figure). The sum paid to the directors was by way of a mixture of dividends and PAYE and they left it to the company's accountants to pay them in the most tax efficient way. That is not unusual in owner-managed businesses. That was how they chose to be paid. I consider therefore that the amount which is paid by PAYE is their payment for the services they provide as employees. The dividend payments relate to their shareholding.

31. A week's pay for the purposes of the Employment Rights Act 1996 would therefore normally be calculated based on the claimant's salary, that is the PAYE figure. Mr Soni says the claimant's redundancy pay and other claims should be based upon the PAYE figure which he was paid for most of his employment and not his PAYE figure at the date of the company's liquidation.

32. The claimant and his two colleagues continued to be paid by a mix of PAYE and dividends until five months before the liquidation. At the meeting in March 2022 the shareholders accepted the accountant's advice that they could no longer receive dividends and there was insufficient profit, and they should be paid solely by way of salary through PAYE. I have been provided with payslips for those last five months which evidence this.

33. I do not find that there was any suggestion that this was done in some way to take advantage of or defraud the Secretary of State in respect of any forthcoming or possible liquidation. It is clear from the notes that I have seen around that time that the claimant (and other shareholders) was making all efforts to try and keep the business trading in different ways.

34. The accountants' advice was sound advice to ensure that the directors and the shareholders did not take dividends from a company that was not making any profit. As such, and although it may seem wrong that the claimant should benefit in this way, I find that the amount that the claimant was paid under his contract at the time his employment ended was £42,156 per annum based upon his salary paid in the previous five months.

35. I have used the payslips provided for my calculations (excluding July 2022) as they are very similar in amount whereas the July payslip has an increased amount of approximately £400, and I have had no explanation why that is the case.

36. I therefore find that the claimant's week's pay was £810.69.

Redundancy Payment

37. Applying the cap of £571, the claimant's statutory redundancy payment is £9,421.50. (16.5 weeks x £571). That claim is successful.

Unpaid Wages

38. I find that the claimant was not paid his salary for the period 1-18 August and based upon his annual gross salary, this amounts to a daily payment of £115.50 multiplied by 18 days totalling £2,078.92. The claimant's claim of an unlawful deduction from pay is successful.

Holiday Pay

39. Under the terms of the claimant's contract, he was entitled to 39 days' holiday for 2022 being 30 days' holiday and nine days Bank Holidays. His holiday year commenced on 1 January. I find that the claimant did not carry over any holidays as he gave evidence that he would forfeit any holidays that he had not taken in the holiday year. He generally did not take all holidays to which he was entitled and would not seek to carry them over. This was how he operated. He took his bank holidays as they fell.

40. The claimant's holiday entitlement for 2022 was 30 days. He was employed for 8½ months. His accrued entitlement is 21 days of which he had taken 14 days. His outstanding entitlement is therefore 7 days. At a daily rate of £115.50. This totals £808.50 gross. This claim is successful.

Notice Pay

41. The claimant has claimed his notice pay. The claimant claims three months' notice, though his contract states a longer period. He was dismissed and was entitled to notice. That was in breach of his contract. Based upon the period claimed at a net pay of £3,020 per month (calculated from the payslips) his damages total £9,060.00 net. I award that amount.

Employment Judge Benson

Date: 20 October 2023

REASONS SENT TO THE PARTIES ON
24 October 2023

FOR THE TRIBUNAL OFFICE

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