

- (3) It is understood that the second respondent has conceded that the second claimant was an employee of the first claimant at the material time and therefore was entitled to receive a statutory redundancy payment and related payments under the Employment Rights Act 1996. Accordingly, the Tribunal is not required to make a decision regarding the second claimant's employment status at the preliminary hearing today.

REASONS

Introduction

1. These proceedings arose claim presented on 28 November 2022 (following a period of early conciliation) by the first claimant and her second claimant husband naming their former business as the (now first) respondent and relating to their alleged employment as directors from 17 December 2007 until 17 March 2022. The claimants' active role in the business ceased when the company entered liquidation. It was understood that this situation was primarily connected with the downturn in trade as a result of the Covid pandemic which was at its height during 2020 and 2021.
2. The claimants sought payments relating to redundancy, notice pay and other monies which they say were due to them as a result of being employees made redundant by the first respondent's insolvency. In the claim form, the first claimant sought £4928.86 and the second claimant sought £2548.25.
3. The Tribunal noted that the claim referred to a refusal by the Redundancy Payments Service to pay the sums claimed, (as the first respondent business in liquidation had insufficient assets to meet these liabilities). Accordingly, a Notice of Claim was sent adding the second respondent as the party responsible for the Redundancy Payments Service ('RPS'), on 16 June 2022.
4. The response was not returned by the liquidators for first respondent, and they have confirmed that they will not participate in the hearing today. The second respondent presented a response on 29 March 2023 and asserted that neither claimant could recover payments from the RPS as they could only be made to employees and neither claimant was employed by the first respondent. It was asserted that the claimants were both directors who did not fulfil the minimum requirements in their roles to be employees. The second respondent has more recently confirmed that the second claimant was an employee (not being a shareholder of the first respondent) and the RPS will not seek repayment of monies already paid to him. Although not present at the hearing today, the first claimant confirmed that her husband the second claimant would be withdrawing his claim in due course. No action was however, taken today as second claimant was not able to confirm his position to me personally and this matter will be reviewed by this Tribunal should nothing be heard from him within 28 days of today's hearing.

5. Judge Ross confirmed on 16 June 2023 that the case would be listed for a preliminary hearing ('PH') today to consider the question of whether the claimants were employees within the meaning of section 230 Employment Rights Act 1996 (ERA) and the determination of this issue would then decide whether or not the claims can proceed to deal with the substantive issue, namely whether they are entitled to statutory redundancy etc, payments.

Issues

6. Accordingly, the sole question before me today at this PH was whether the first claimant was an employee of the first respondent at the material time within the meaning of section 230 ERA 1996.

Evidence used

7. The claimant had not produced a witness statement, so instead, I took account of the amended claim form ET1 which provided additional information to section 8.2, and attention was given to a signed statement which the first claimant had provided to the RPS and signed on 15/11/22, (pp74-80 of the second respondent's bundle). She gave oral evidence under oath concerning her employment status as well, was subjected to cross examination and judicial examination and was given an opportunity to clarify any answers which she had given before being released from her oath/affirmation.
8. The second respondent bundle included their amended grounds of resistance, payslips, a contract of employment and other documents relating to the first claimant's application for a payment from the RPS.

Findings of fact

9. The first respondent (Charlie James) was incorporated as a limited company on 11 August 2017. Initially the first claimant (Mrs Andrew), was the sole director and was the shareholder with 100% of the shares. This position changed on 15 May 2019 when the second claimant (Mr Andrew) was appointed as a director, but despite an intention to do so, no change took place to the shareholding and Mrs Andrew remained the sole shareholder of Charlie James.
10. Mrs Andrew was a credible witness and gave honest answers to the questions asked during her evidence and she made concessions and reflected upon decisions made in the past. Her husband was unable to attend the hearing and none of the staff employed by Charlie James attended either.
11. I noted that Mrs Andrew placed a great deal of reliance upon her accountant as to Charlie James' business structure and how accounts should be formulated and she recognised that with hindsight both Mr Andrew and her should have exercised greater scrutiny of the advice which they had been given by their accountants even though understandably they focused upon the business.

12. Charlie James was established as a restaurant takeaway in the Fylde Peninsula and both claimants had left professional careers and made many sacrifices to establish the business. They used their own resources and moved into Mrs Andrew's parents' home to assist with the costs of establishing it.
13. I understood that Charlie James specialised in selling pie and mash with Mr Andrew effectively operating as the chef and Mrs Andrew operating in what could be described as a front of house role. This suited their respective skills and personalities, but they also needed a number of part time staff in roles relating to the washing of pots, assisting with food preparation, serving food and a manager as also appointed. They were all issued with contracts of employment..
14. The accountant also advised Mr and Mrs Andrew that as directors, they should be formally offered employment in writing by Charlie James and be given contracts of employment. The precise reason for this advice was not clear, but Mrs Andrew obtained standard form contracts of employment from the internet and her version which she had signed, was available in the bundle, (p87-89 of the bundle).
15. Mrs Andrew's job title was given in the contract as director, with employment commencing on 16 December 2017. Mrs Andrew agreed under clause 4 of the contract that she was employed and subject to supervision by her employer. Clause 5 provided that Mrs Andrew would perform duties as required by her employer customarily performed by a person holding a similar position in industry. It did not specify a precise and detailed job description other than to say that she was a director, running the business and managing staff. Mrs Andrew said in evidence that 90% of her work was attending to the business and carrying out duties, greeting customers, managing staff and related activities.
16. Her employer was named in the contract as being Charlie James but no reference was made to a person, management system or board of directors who might supervise her and the contract was very much a standard form document which had not been tailored in any detail concerning the precise circumstances of Charlie James' business and Mrs Andrew's role.
17. The contract described Mrs Andrew as being permanent, full time and with hours of work being 5pm to 10pm. I understood from Mrs Andrew's evidence that the hours when the business opened varied due to trialling times so they could ascertain when the times were busiest and later on in reaction to Covid. Ultimately, Mrs Andrew said that the teatime period (understood to be later afternoon/early evening) being the busiest time in terms of custom.
18. Although reference was made to holiday pay in the contract, Mrs Andrew accepted that none was paid to her either separately or as part of her payslips, although she took limited holiday. Both Mr and Mrs Andrew received regular pay but it was for a fixed sum of £737 per month (compared with staff paid on a weekly basis) and not measured against hours worked or

in accordance with the requirements of National Minimum Wage legislation. There were some payslips disclosed for Mrs Andrew, but they were paid at a level which did not attract income tax or national insurance payments (pp84-5). While there may have been sound business reasons for the payment level when Charlie James began, the pay did not seem to accord with any performance by the claimants as employees of the respondents.

19. Reference was made within the contract of employment to notice periods, grievance and disciplinary procedures, but I did not hear convincing evidence of how this would be resolved should an issue arise in relation Mrs Andrew as director and owner of the business.
20. I accepted that her staff were properly employed and she was very clear of this situation in her evidence, but this is not relevant to the issue before me today.
21. Unfortunately, due to Covid, Charlie James (which was initially making good progress developing a customer base and identifying the best hours to be opened), fell like many other service sector enterprises to the harsh environment existing during the pandemic. Mrs Andrew said that both Mr Andrew and her received payments while on furlough (when the business could not open during lockdown), from government's Coronavirus Job Retention Scheme, where they would receive 80% of their salary. However, no documentation was provided concerning this process during the hearing.
22. However, despite their best efforts, Mr and Mrs Andrew were unable to keep the business running as the country emerged from the pandemic and in March 2022, had to place the company into liquidation on 20 April 22. No letter or form of notice of termination of employment was available to me which showed that Charlie James as an employer had dismissed either director. The premises have since been surrendered and are now operated by another unrelated business.
23. The insolvency of Charlie James was understood to have been a lengthy and complicated process and both Mr and Mrs Andrew remain registered as directors with Companies House, albeit with management being carried out by the liquidators. It is understood that Charlie James will have no assets to pay redundancy to Mr and Mrs Andrew or any other contractual and statutory payments that might arise. It is anticipated that Charlie James will be wound up in due course.
24. I did take account to the evidence concerning the possible director loan identified in the Statement of Affairs as at 8 April 2022 (p57), but accept on balance (and for the purposes of this preliminary hearing only), Mrs Andrew's evidence that she had not entered into a directors loan and this was not a liability to Charlie James. I noted that the second respondent in submissions did not seek to allege this was something I should consider in my deliberations.

Meaning of employee and worker (inc employee under the EA 2010)

The legislation

25. Section 230(1) of the Employment Rights Act 1996 defines “employee” as an individual who entered into or works under a contract of employment. Sub-section (2) defines “Contract of Employment” as a contract of service or apprenticeship, whether expressed or implied, and whether oral or in writing.

Case law

Employee

26. There is extensive case law on the question of who is an employee. In Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 it was said that a contract of employment exists if these three conditions are fulfilled:
- a. 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 of his master.
 - b. 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.
 - c. The other provisions of the contract are consistent with it being a contract of service.
27. The Tribunal is not bound by the label the parties attach to their relationship (although it carries some weight). See for example: Autoclenz v Belcher [2011] UKSC 41, a case which considered the significance of the terms of a written agreement;

The irreducible minimum

28. In Carmichael v National Power plc 2000 IRLR 43 the House of Lords confirmed that there is an “irreducible minimum” of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.
29. In Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471, the Employment Appeal Tribunal stated that the significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of employment rather than some other kind of

contract.

30. If the “irreducible minimum” is established, the other considerations include the degree of control which the employer exercises over the individual, how the parties have labelled or characterised their relationship, the treatment of tax and national insurance, and any other matters that form part of the working relationship; all of which are relevant but not, in themselves, conclusive. In this regard, the second respondent referred to Nethermere (St Neots) Limited v Gardiner [1984] ICR 612.

Discussion

31. Ms Ware relied in her submissions upon the detailed argument contained in her amended grounds of resistance presented on behalf of the second respondent and argued that Mrs Andrew was not as an employee of Charlie James. She added that she was a director, sole shareholder, with no supervision, no board of directors and with no control being exercised separately by the company over her, there being no *master and servant* relationship. Ms Ware also submitted that the salary while paid was simply the optimum director’s salary and did not reflect payment for services rendered by employee.
32. Mrs Andrew in her submissions asserted she was an employee, and she was an owner of Charlie James along with husband. She said that she did not have complete autonomy and that the two directors were reliant on each other. She concluded by saying that she “...was *the face of the business rather than the business*”, (my emphasis), and that she was more of a manager to her staff than an owner.
33. I would observe first of all that there is no dispute that in principle a director can be an employee of the company they are appointed to. However, they like other employees, they must be subject to the requirements of section 230 ERA, related legislation and case law, with particular reference to the question of whether the irreducible minimum requirements of mutuality of obligation, control and personal service are satisfied.
34. I would also note that the second respondent is no longer seeking to resist the claim of Mr Andrew regarding his entitlement to payments from RPS. The arrangements for his employment are not directly a matter for consideration for me today. However, I note that the distinction between Mr Andrew and Mrs Andrew insofar as the second respondent are concerned is the fact that she was a 100% shareholder of Charlie James whereas Mr Andrew held no shares. While this had not been the long term intention of the claimants, it was a clear difference in involvement between each claimant by the business.
35. It is the case that Mrs Andrew placed a great deal of reliance on their accountants and advice was given which was often taken as being correct. It appears that the structure of the business, the need for a shareholder and a director were treated as matters to resolve urgently to get the business started. It is understandable that the business was established as a limited

company as this provides some distance in terms of liability for the owner (or owners), restricting it to the value of their shares and any other loans or guarantees that they might give.

36. It is often the case however, that small limited companies of this nature can create businesses were behind the 'corporate veil', the corporate personality and that of the owner of the business can be closely linked. This was a case of course where Charlie James was wholly owned by Mrs Andrew.
37. She was also a director. It is entirely possible that a company can employ shareholders with majority shareholdings in this role, although the necessary requirements of section 230 ERA and case law concerning mutuality of obligation, control and personal service must nonetheless be satisfied.
38. There was a contract of employment, or at least one which was described as such. Mrs Andrew was advised to obtain one by her accountant and she honestly confirmed that while this was something she would provide to all of her staff, she did not realise that directors would also be advised to have one. A standard form was used which identified her as a director but it is was not detailed in anyway so as to make it a bespoke document which clearly set out to whom she was responsible in terms of management and to provide a fully detailed job description.
39. He pay was a figure which was not measured against hours worked, without an hourly rate, without holiday pay and not complying with National Minimum Wage legislation. It was clearly a substantial figure, but not one measurable against satisfaction of obligations for the job so described. This is not to say that Mrs Andrew did not work hard, she clearly did, but the pay did not appear connected with the actual contract of employment.
40. The offer of employment was accepted by Mrs Andrew, but there was no notice of termination and nothing further (even allowing for the dominant position which Mrs Andrew had in the business), to suggest clear obligations to Charlie James. Nor any control over by the company over her job role and the need for personal service. It could have been clarified within the contract of employment and other documentation, but based upon the evidence before me, there was insufficient evidence to persuade me that the contract was sufficiently organised to support the substance of an employment relationship, even if the document described one as being in place.
41. I did take account of the impact of Covid and of course this affected significantly the way in which the business worked, but as a sole shareholder and for the first two years a sole director, I needed to see something more which persuaded me that the minimum requirements were present to demonstrate that a contract of employment existed between Mrs Andrew and Charlie James.
42. I appreciate that Mrs Andrew placed a great deal of reliance upon her accountant as to advice concerning the business, but I must conclude on balance that this was a business where the separation between Mrs Andrew

as sole owner and a director with clear employee duties in accordance with the irreducible minimum was not in place.

Conclusion

43. Accordingly, I must conclude Mrs Andrew was not an employee within the meaning of section 230 ERA and she is not entitled to a redundancy payment as a consequence.

Employment Judge Johnson

Date 20 October 2023

JUDGMENT SENT TO THE PARTIES ON

31 October 2023

FOR THE TRIBUNAL OFFICE