



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr Peter Dewbery

v

(1) Secretary of State for Business  
and Trade (the "SOS");  
(2) Fitness In Time (in liquidation)

**Heard at:** Bury St Edmunds (by CVP)

**On:** 13 October 2023

**Before:** Employment Judge Z Islam

## Appearances

**For the Claimant:** In person

**For the First Respondent:** Mr Soni

**For the Second Respondent:** Did not attend and was not represented

## RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was an employee for the purposes of the claims brought under s.166 and s.182 of the Employment Rights Act 1996.
2. Under s.163 Employment Rights Act 1996, it is determined that the Claimant is entitled to a redundancy payment of: £ 4,750.
3. The complaint in relation to notice pay is well founded. The Respondent shall pay the Claimant: £ 4,750. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay Tax on it as Post Employment notice Pay.
4. The complaint in respect of holiday pay is well founded. In accordance with Regulation 14(2) Working Time Regulations 1998 the Claimant is entitled to: £ 135.71 holiday pay.
5. The complaint in relation to arrears of wages is well founded. The Respondent shall pay the Claimant: £ 3,800. The Claimant is responsible for the payment of any Tax and / or National Insurance.
6. Total amount payable by the Respondent to the Claimant: **£ 13,435.71**

## REASONS

### Background

1. The Claimant presented a claim to the Tribunal on 24 March 2023 [page 5] (following ACAS Early Conciliation between 21 February 2023 and 23 February 2023) and claims were brought under §.166 and 182 of the Employment Rights Act 1996 (“ERA”), for redundancy pay, compensatory notice pay, holiday pay and arrears of wages.
2. The First Respondent (“the SOS”) has defended these claims on the basis that the Claimant was not an employee of Fitness In Time Limited.
3. The Second Respondent, Fitness In Time Limited entered voluntary liquidation on 15 September 2022 and is now dissolved. It has not entered a Response to the claim, and has taken no part in proceedings.

### The Issues

4. At the beginning of the Hearing, I sought clarification from the parties as to whether there were any issues with time limits. Both parties said that there were no issues and having reminded myself of the relevant provisions in §.166 and 182 of the ERA 1996, I am satisfied that the claims were brought within time. As such, the sole issue to be determined by the Tribunal and as agreed at the outset of the Hearing was whether the Claimant was an employee of Fitness In Time Limited, and as such, entitled to the payments being claimed.

### The Hearing

5. At the Hearing on 13 October 2023, the Claimant represented himself and the SOS was represented by Mr Soni.
6. There was an agreed Hearing Bundle of 190 pages (page references below are to this bundle), a Witness Statement from the Claimant and two further HMRC documents provided by the Claimant on the morning of the Hearing. I heard evidence from the Claimant who was cross-examined by Mr Soni. I also asked questions of the Claimant. I heard submissions from both parties and had the benefit of a Bundle of relevant Case Law provided by Mr Soni.

### Findings of Fact

7. Having heard the evidence, I make the following findings of fact, and any that appear in the ‘Discussion and Decision’ section on the balance of probabilities.

8. The Second Respondent (“Fitness In Time Limited”) was incorporated on 6 November 2007 as a private limited company [page 38]. The Claimant took over the company and was appointed as a Director on 8 August 2011 [page 40]. The Claimant was the sole Director and 100% shareholder of Fitness In Time Limited. The company initially operated as a single gym in Abingdon, Oxfordshire with only the Claimant working there.
9. The Claimant drafted for himself what he considered to be an Employment Contract, titled ‘Statement of Employment Between Peter Dewberry and Fitness in Time Limited’ [pages 104-106]. In that document, the Claimant is described as an employee, working for Fitness In Time Limited, employment having commenced on 11 August 2011. The document is signed and dated 11 September 2011. The Claimant, having worked for approximately a month, decided that he needed to have an Employment Contract in place for himself. He wanted to have a clear description of duties outlining what he expected of himself in his role. The Claimant was 26 at the time and had not owned or run a business before.
10. The ‘Statement of Employment’ outlined the following of note:-
  - a. Job title: Managing Director;
  - b. Pay: £10 per hour to be paid monthly on the first working day of each calendar month;
  - c. Place of work: normal place of work is Fitness In Time, Unit A5, Barton Mill, Audlett Drive, Abingdon, Oxfordshire. You may be required to work at other locations;
  - d. Working hours: your normal working days and hours are no less than 40 hours per week between Monday to Sunday, 6am-10pm with a daily paid lunch break of 60 minutes;
  - e. Holiday entitlement: 6 weeks;
  - f. Absence and sick pay: if you are absent for any reasons, you must inform your line manager by telephone as soon as possible. For absences of 7 days or less, you can self-certify. You may be entitled to be paid if you’re not able to work due to sickness or injury (incapacity);
  - g. Other paid leave: you may be eligible for statutory paid leave, including maternity leave, adoption leave, paternity leave, shared parental leave, time off for dependents and bereavement leave. You may be eligible for additional paid leave including compassionate leave, sabbatical leave and training and study leave;
  - h. Pension arrangements will be provided at a later date;
  - i. Notice period: the notice you must give to end your employment is 8 weeks;
  - j. Grievances: if you wish to raise a grievance, you should put it in writing to your line manager. The procedure which applies to you can be found in the employee handbook;
  - k. Disciplinary rules and procedures: the disciplinary rules which apply to you are attached to this statement;
  - l. Brief description of your work is overall day to day management of Fitness in Time facilities, including but not limited to:-
    - i. Staff training, management and supervision;

- ii. Membership administration for all customers and gym members;
  - iii. Sales and marketing for the company;
  - iv. Accounting, finance and bookkeeping responsibilities - reporting and liaising with accountant;
  - v. Payroll and HR for employees and subcontractors;
  - vi. HMRC company secretary duties;
  - vii. Maintenance and cleaning responsibility for all gym equipment;
  - viii. Oversee day-to-day operations;
  - ix. Design strategy and set goals for growth;
  - x. Implementation of company growth strategy;
  - xi. Maintain budgets and optimise expenses;
  - xii. Set policies and processes;
  - xiii. Ensure employees work productively and develop professionally;
  - xiv. Oversee recruitment and training of new employees;
  - xv. Evaluate and improve operations and financial performance;
  - xvi. Ensure staff follows health and safety regulations;
  - xvii. Provide solution to issues (e.g. profit decline, employee conflicts, loss of business to competitors);
  - xviii. General management responsibilities for sublets and ancillary businesses of the facility;
  - xix. Any other requirements needed for the provision of service at Fitness In Time; and
  - xx. Your job description may be amended by us and, in addition to duties set out in the job description, you may be required to undertake additional or other reasonable duties as necessary to meet the needs of our business.
11. The Claimant's aspiration was to broaden the company's reach throughout the UK and establish multiple sites. As such, the company grew over time and opened at three further locations in Winchester, Chesterfield and Bicester between 2011 and 2022. Each site had its own operational structure. The Abingdon site opened in 2011 and closed in 2022. It consisted of one employed Gym Manager, four employed Personal Trainers, one employed Beauty Therapist and a sublet hair salon. The Winchester site opened in 2014 and closed in 2020. It consisted of one employed Gym Manager, four employed Personal Trainers and one employed Beauty Therapist. The Chesterfield site opened in 2019 and closed in 2022. It consisted of one employed Gym Manager, three employed Personal Trainers and one employed Beauty Therapist. The Bicester site opened in 2021 and closed in 2022. It consisted of one gym manager (the claimant), two self-employed part time staff and one employed part time staff.
12. The Claimant implemented a system whereby he would set up each site and himself act as the Gym Manager, until the site was established enough for him to recruit staff to run it. The role of Gym Manager included daily operations, maintaining memberships, cleaning, personal training sessions and overseeing staff amongst other roles. The Claimant's length of time as Gym Manager in each site varied. In Abingdon, the Claimant was the Gym Manager between 2011 and 2014. At Winchester, he was

the Gym Manager for approximately 18 months to 2 years. At the Chesterfield site, as there was already a competent staff member on site that just required training, he was on site for most days of the week for 6 months. The Claimant was acting as Gym Manager for the Bicester site prior to the company becoming insolvent.

13. The Claimant maintained a presence at all sites and remained highly involved in the day to day activities of the business. Even when there was a full complement of staff at the various sites, the Claimant worked on other aspects of the business including: marketing, administration, finance, stepping in for absent employees, maintenance issues, recruiting new customers, maintaining HR functions, engaging with customers, supervising gym managers and liaising with suppliers. He split his time with each site and on a weekly basis would spend a minimum of 4 days a week at the gyms.
14. The Claimant worked a minimum of 50 hours a week. On rare occasions, such as between Christmas and new year we would work less than 40 hours a week.
15. The Claimant received payslips that were produced via payroll software which the Claimant used to generate payslips for himself and other staff members. I had sight of payslips dated between November 2021 and July 2022 [pages 113-121]. The pay slip for November 2021 records net pay of £1812.80 recording deductions for Tax and NEST. The pay slip for December 2021 records net pay of £1692.20 with deductions for Tax and NEST. The pay slip for January 2022 records net pay of £1556.56 with deductions for Tax, National Insurance and NEST. The pay slip for February 2022 records net pay of £1575.47 including a statutory sick payment of £192.00 with deductions for Tax, National Insurance and NEST. The payslip for March 2022 records net pay of £151.60. The payslips for April, May and June 2022 record pay of £0. The pay slip for July 2022 records net pay of £1692.20 with a deduction for NEST.
16. The Claimant received P60s. I have had sight of P60s for 2018/19 recording £8947.36 pay, 2019/20 recording £2536 pay, 2020/21 recording £5400 pay and 2021/22 recording £12892.70 [pages 107-111]. In evidence, the Claimant referred to a spreadsheet he had found on his laptop and said that in 2015/16 the pay was £8490, in 2016/17 the pay was £9260.76 and in 2017/18 the pay was £9591.89. He could not remember if these were gross or net figures, but given the spreadsheet also recorded £8947.36 for the year 2018/19 which was supported by a P60 in the Bundle, I am satisfied that these are gross figures.
17. The Claimant did not take his full holiday entitlement. He did not formally record his holiday as he worked more hours than the contract outlined.

18. The Claimant entered the NEST Pension Scheme on 1 June 2017.
19. The Claimant received statutory sick pay in month 11, 2021 / 2022, [page 114]. The Claimant recorded his sick leave through the company's payroll software.
20. In his role as Director, the Claimant operated a Director's Loan Account and put money into the business. I was taken to one such example in evidence relating to the year ended March 2014 [page 61]. The Claimant received dividends and I was taken to one example of this for the year ended March 2014 [page 61]. He would take dividends based on the advice he received from his Accountant but this did not happen regularly.
21. The claimant received Furlough payments during the Coronavirus lockdowns. I was taken to one example of a Furlough payment of £450 in August 2021 in evidence [page 121]. There is a similar such payment in September 2021 [page 126].
22. On 24 June 2022 the Claimant wrote and signed a letter of authority authorising Redundancy Claims UK (RCUK) to act on his behalf in relation to his redundancy claim and other statutory entitlements. The commencement of the winding up process began on 15 September 2022, with the company due to be dissolved on 10 August 2023 [page 45].
23. A representative from RCUK submitted a claim for redundancy and insolvency payments to the Insolvency Service, on behalf of the Claimant on 7 December 2022 [pages 76-83]. The Claimant completed a 'Director Questionnaire' on 5 January 2023 [pages 86-93] as part of his claim. He did not provide a copy of his Employment Contract with this questionnaire, or set out the main terms of conditions / terms of his employment in the questionnaire as he was invited to, in Q1 of that questionnaire. The Claimant's claim for payments from the Insolvency Service was rejected on 3 February 2023 on the basis that he was not an employee [pages 95-96].
24. The Claimant wrote by email to the Insolvency Service on 9 May 2023 asking how he could appeal the rejection of the claim and how he could provide a copy of his Contract of Employment [page 97]. He sent a further email the same day, in response to the specific issues raised in the rejected claim [101-102] including:-
  - a. He explained that he did have a Contract of Employment and that it was in hard copy and not clear how this should be submitted on the online form. He asked how he could provide it.
  - b. In response to the concern that he had stated different hours of work on different documentation (claim form to the Redundancy Payments Service (25 hours), ET1 (60 hours) and RP14a form (50 hours)), he said that he was advised by the redundancy claims company he was using that he would only be eligible for redundancy payment based on a calculation of 25 hours. He

said that he was no longer using that company and that his hours of work were in accordance with his contract, “no less than 40 hours per week”.

- c. He accepted that he had been paid below the national minimum wage during the last three years and this was due to the tough economic climate as a result of the EU Exit and the Covid-19 pandemic. He did this to ensure the company survived and company staff could be supported. He said that he had received some Furlough payments during this time.
  - d. No dividends were taken in the last three years as it was a tough time for the company and income was spent in an attempt to keep the company trading during the Covid-19 pandemic.
25. He submitted the Contract via email on 22 June 2023, explaining that the delay was because the Contract was at his parents’ home, in another part of the country, and that he had only just been able to retrieve it [99]. The claim was reviewed and rejected again on 10 July 2013 [page 99]. A key factor for the rejection was whether the Claimant, as a Director, had remunerated himself as an employee or an office holder and the fact that the Claimant had paid himself below the national minimum wage.

## **Relevant Legal Framework**

### Applications for Redundancy Payments – s.166 ERA 1996

26. Section 166 provides as follows:

**166 Applications for payments.**

(1) Where an employee claims that his employer is liable to pay to him an employer’s payment and either—

(a) that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or

(b) that the employer is insolvent and the whole or part of the payment remains unpaid,

the employee may apply to the Secretary of State for a payment under this section.

(2) In this Part “employer’s payment”, in relation to an employee, means—

- (a) a redundancy payment which his employer is liable to pay to him under this Part.

Employee's Rights on Insolvency of Employer – s.182 ERA 1996

27. Section 182 provides as follows:

**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.

Employee Status

28. For a Claimant to be successful under s.166 and s.182 of the Employment Rights Act 1996 ("ERA"), they must be an employee.

29. Section 230 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.

30. The criteria for there to be a contract of service is established in the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497:



- “(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.”
31. In essence, 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: an obligation to provide work personally; mutuality of obligation; and the worker must agree to be subject to the control of the employer to a sufficient degree.
32. Where there is a dispute as to the genuineness of a written term in an employment contract, the focus 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 (Autoclenz Ltd v Belcher [2011] ICR 1157 SC).

### Company Directors

33. Company directors can be both employees and office holders (Clark 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.
34. The factors outlined in Clark to be considered are:
- a) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee. He has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.

- b) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising, and nor does the fact that he in practice is able to exercise real or sole control over what the company does.
  - c) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes.
  - d) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.
  - e) Conversely, if the conduct of the parties is either inconsistent with the contract or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.
  - f) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing. This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.
  - g) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them.
  - h) Although the courts have said that the fact of their being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a tribunal in finding that there was no contract in place.
35. The case of Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe [2009] EWCA Civ 289, set out helpful guidance to assist Tribunals in deciding cases where a shareholder and director was also an employee. Key principles are:
- a) There is no reason in principle why a shareholder, or controlling shareholder and a director of a company could not also be an employee of the company under a contract of employment;
  - b) It would be no answer to his claim to be such an employee to argue that the extent of his control of the company meant that the control condition of a contract of employment could not be satisfied. The relevant control was in

the company, Lee v Lee's Air Farming Ltd. [1961] A.C. 12, [1960] 10 WLUK 37; and

- c) It would be no answer to say that the practical control he had over his own destiny, including that he could not be dismissed from his employment except with his consent, had the effect in law that he could not be an employee, Secretary of State for Trade and Industry v Bottrill [2000] 1 All E.R. 915, [1999] 2 WLUK 255.

**36. In determining whether a Shareholder and Director is also an employee, considerations include:**

- a) 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;
- b) In cases involving an alleged sham, the court's task was to decide whether a purported formal written employment contract or memorandum purporting to record or evidence the creation of such a contract amounted to a sham, particularly having regard to the circumstances of the creation of the document and the parties' conduct under the purported contract of employment, The fact that the putative employee had control over the company, and so was instrumental in the creation of the very contract that he was asserting, would be relevant to whether the contract was a sham;
- c) 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, given that the critical question was whether the putative employee was an employee at the time of the company's insolvency. In order for the employee to make good his case, it might well be insufficient merely to place reliance on a written contract made years earlier. The court would want to know that the claimed contract, perhaps as subsequently varied, was in place at the time of the insolvency;
- d) 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; and
- e) In cases where the putative employee was asserting the existence of an employment contract, it would be for him to prove it and the mere production of what purported to be a written service agreement might by itself be insufficient to prove the case sought to be made. If the putative employee's assertion was challenged the court would need to be satisfied that the document was a true reflection of the claimed employment relationship, for which purpose it would be relevant to know what the parties had done under it.

37. Additionally, in Neufeld the Court of Appeal held that an individual giving personal guarantees or loans to the company or having a controlling shareholding were irrelevant factors for the purposes of determining whether an employment contract was genuine. The Court of Appeal also held that failing to take full holiday entitlement was not a pointer against an employment contract.
38. In the case of Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605, the Employment Appeal Tribunal upheld the Tribunal's decision that the claimant was an employee. This was despite the fact that she was Managing Director and sole Shareholder, and, during the last two years, had waived her salary to allow others to be paid. The issue was the Claimant's employment status at the point when the redundancy payment fell due. The question was whether, by the time of redundancy, the Claimant's Employment Contract had been varied or discharged as a result of her waiving her salary. The Tribunal (upheld by the EAT) found that on the facts, there was no variation or discharge, but that there was simply a choice by the Claimant not to take her salary.

#### National Minimum Wage

39. Section 1 of the National Minimum Wage Act 1998 sets out the entitlement of an employee to be paid the national minimum wage. Section 17 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.
40. 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 by the ERA (Pagetti v Cobb [2002] IRLR 861 EAT). Paragraph 9.50 of the IDS Handbook confirms that the EAT's reasoning applies equally to the assessment of a week's pay for other purposes, such as calculation of redundancy or holiday pay.

#### **Submissions**

41. Mr Soni relied on the Grounds of Resistance and expanded on them in oral submissions. He clarified that at the time of drafting those Grounds, the SOS had not had sight of the purported written Contract of Employment. Nonetheless the SOS maintained its position that the Claimant was not an employee because any asserted Contract of Employment by the Claimant was not genuine, or was discharged several years prior and did not exist at the relevant insolvency date. The SOS contends that the Claimant was engaged in a contract for service, not a contract of service.

42. The First Respondent relies on the following factors as evidence that the Claimant was not an employee:
- a) The terms of the contract did not reflect the reality, for example the Claimant did not receive a salary in line with the contract and the Claimant did not take his full holiday entitlement;
  - b) The disparate nature of the Claimant's pay;
  - c) The Claimant paid himself less than the National Minimum Wage which suggests that he was remunerated as an office holder and not an employee;
  - d) The Claimant operated a director's loan account;
  - e) The Claimant made some investments of funds into the company and did not provide personal guarantees;
  - f) The Claimant took dividends when the company profits allowed;
  - g) The Claimant recorded different working hours in the RPS claim form, ET1 and the RP14a form; and
  - h) The "control" test is not met as the Claimant was a 'master of his own destiny'.
43. Mr Soni, also submitted that if the Tribunal determined that the Claimant was an employee, any payments should be based on the amounts contained in the P60s.
44. The Claimant relied on his Witness Statement and expanded on it in oral submissions. He said the disparate nature of some of his pay proved that he was a Director, not that he was not an employee. He accepted that being a Director afforded him certain leniencies that other employees did not have, but that this did not mean he was not an employee.
45. He relied on the following factors as evidence that he was an employee:
- a) He had a written contract of employment and any issues with the document being vague or incomplete were because he drafted this when he was 26 with no prior experience;
  - b) He undertook various roles and activities as an employee, was on site regularly and for at least four days a week. He undertook day to day operational and administrative activities (as outlined in findings of fact);
  - c) His work was not covered by anyone else and he did not delegate his roles and responsibilities;
  - d) He was paid through PAYE, as recorded on payslips with deductions for tax, national insurance and pension contributions;

- e) He received furlough payments during the Covid-19 lockdowns;
- f) He received statutory sick pay;
- g) He regarded himself and was regarded by the business and other staff members as an employee;
- h) He did not pay himself the full contractual salary due to concerns about the impact of EU exit on businesses, the impact of the Covid-19 pandemic and strategically wanting his business to grow;
- i) He made a decision not to pay himself when the company was struggling during the Covid-19 pandemic but that he expected he would be able to pay himself at some point in the future when things improved. He prioritised trying to keep the business afloat and making sure other staff and suppliers were paid; and
- j) He fulfilled the HMRC eligibility criteria for employee status.

## **Discussion and Conclusions**

- 46. The determination of the Claimant's employment status is a question of fact and all relevant factors must be considered.
- 47. In accordance with the guidance given in Neufeld, the starting point is whether the Claimant has satisfied me that he had a contract of employment, and whether that contract was genuine or a sham. Assuming it is a genuine contract, the question is whether it amounted to a true contract of employment.

### *Was the Contract genuine?*

- 48. The Claimant said that he did have a written contract of employment and a document titled '*Statement of Employment Between Peter Dewberry & Fitness In Time Limited*' was produced in evidence. It is signed and dated 11 September 2011. Although the fact that the Claimant drafted the contract himself, may be relevant to whether it was a sham, I accept the Claimant's evidence about the circumstances of him coming to draft the document in September 2011, approximately a month after he had taken over the company. I accept his evidence, that he drafted this document at the time, to have a written document recording his responsibilities and duties to the business and that he drafted the document as a new business owner, with little advice or guidance. He accepted that in some places it was vague and had not been updated.
- 49. The Claimant gave cogent evidence about the nature of his roles and responsibilities which aligned with the responsibilities outlined in the contract. He explained that procedures relating to grievances applied to him in the same way they did to other employees. He said that for

absences, there was a reporting requirement as outlined in the contract. He would let his Gym Managers know and he could not simply not turn up to work. Other terms in the contract such as his place of work and working hours, aligned with the reality of his conduct. Whilst there were aspects that had not been updated, for example, 'place of work' to include the gyms that he later opened and specifying pension arrangements, I do not consider that these factors point away from the contract being genuine, but that it had not been reviewed and updated, since it was signed in September 2011. The reality of the Claimant's conduct, differed in some respects to what was outlined in the contract, namely in relation to the rate of pay and holiday entitlement. Applying Neufeld as outlined above, not taking holiday entitlement does not necessarily point away from employment status. I will deal with the issue of pay below, however, I do not consider that these matters point towards the contract being a sham.

50. I consider the contract to be genuine and the next question to consider is whether it amounted to a true contract of employment and fulfilled the three conditions outlined in Ready Mixed Concrete: mutuality of obligation, personal service and control.
51. The SOS asserts that the control factor, in particular, is not met and so I will address this first.

#### *Control*

52. The Respondent argues that as sole Director and Shareholder, the Claimant was "*in charge of his own destiny and was no subject to or subordinate to anybody else*". Applying Neufeld, there is no reason in principle why a controlling Shareholder and Director of a company could not also be an employee. In respect of the control factor, there is no answer to the claim of employee status to argue that control of the company, meant that the control condition of a contract of employment could not be satisfied. Similarly, there is no answer to the claim of employee status, to say that the practical control he has over his own destiny, had the effect in law, that he could not be an employee. Neufeld also made it clear that loans made to the company, personal investment in the company and other actions that an owner of a business would commonly do on its behalf, are not ordinarily of any special relevance and should be ignored.
53. The Contract is prescriptive about the nature of the work to be undertaken by the Claimant, how much is to be undertaken and where it is to be undertaken. The Claimant gave examples in evidence where he was subject to the 'control' of others and accountable to them. He received advice from an accountant about some financial decisions. He explained that he was accountable to the Managers of the gym, for example if there was a maintenance issue on site, the Gym Manager would call the Claimant to come and deal with it urgently. If another staff member was sick, he would be the first person to be called in order to fill that gap. If he was unwell or could not attend, he could not simply not turn up to work, he

would have to call his Gym Managers and let them know. He said that the procedures outlined in the company and Staff Handbooks applied to him equally. He explained that he was accountable to his staff members given his responsibilities for payroll, in case there were any issues with payment. He said that he was accountable to gym members who would contact him with any issues or complaints. The existence of the business did not rely solely on him, in that there was a full complement of staff and various sites in operation.

*Personal Service*

54. I accept the Claimant's evidence that he carried out his work personally, and did not arrange for anyone to substitute for him. I was presented with no evidence that he delegated any of his roles and responsibilities. He explained that he personally undertook his roles and responsibilities as he knew the business best and it made financial sense for him to do so, rather than paying for his responsibilities to be outsourced. The Claimant provided credible evidence that he performed the roles outlined within the written agreement in addition to his responsibilities as the business owner. It is clear, in my view, that the intention when the Contract was made, that there was an obligation for the Claimant to perform the work personally, given the nature of the roles outlined in the extensive list outlined in the written agreement under '*Brief description of your work is overall day to day management of Fitness in Time facilities.*' The Claimant explained in evidence, that he continued to fulfil these duties throughout the operation of the business.

*Mutuality of Obligation*

55. I have already found that the Claimant generally worked 50 hours a week. I accept his evidence that he had a strong physical presence across the various gym sites, undertaking his various roles as outlined in the written agreement. There was no evidence that he was selective in the roles he undertook or that he only worked as and when he wanted to. He worked alongside other staff across the various gym sites undertaking his day to day work.
56. He was paid via PAYE, with deductions for Tax, National Insurance and employer and employee Pension contributions. He is described as an employee on his pay slips and he received P60s. All of these factors point towards employee status. The Claimant received Furlough payments and statutory sick pay which are also factors in support of employment status.
57. The Claimant produced two HMRC documents demonstrating his income tax history between 2018 and 2024. In addition to his role at Fitness in Time Limited, he held other roles which he said he worked for on an ad hoc basis for example weekend work for music festivals, work in the winter at Heathrow airport when there was snowfall and work for the council on polling days. The Claimant said that he did this work because he enjoyed it and because he could keep money in the company. Although it was not



expressly submitted, this may be a factor that points away from employment status. However, given the ad hoc nature of this work and the fact that the Claimant maintained his hours and days of work at Fitness in Time Limited, I do not find that to be the case. It is also not uncommon for an employee of one company to hold other roles elsewhere.

*National Minimum Wage*

58. Company Directors are not entitled to receive the NMW for the work they do as an office holder, but must be paid the NMW for their work as an employee. The fact that the Claimant did not pay himself the NMW is a factor pointing away from employee status.
59. The Claimant said that he did not receive remuneration in accordance with the Contract because the company could not afford to pay him what was due and it was better for him to keep the money in the company for it to grow. He said that he expected to be able to pay himself back in the longer term. He accepted that he had not amended the Contract since it was initially drafted and reflected that he should have.
60. Although the Claimant received lower than the contractual salary, he received a roughly consistent pay, prior to the onset of the Covid-19 pandemic. He explained that he was concerned about the impact of the EU exit on his business. The performance of the business dipped after the referendum and there was a lot of media coverage about the likely impact on business, so he decided to pay himself less and keep the money in the business. The business was also impacted by the Covid-19 pandemic and the Claimant did not pay himself on some occasions as the company could not afford to pay him. I accept his explanation as to why he did not pay himself for particular periods during the pandemic in order to ensure other staff and suppliers were paid. Applying the case of Knight, I do not find that there was a variation or discharge of the Contract, but simply a choice by the Claimant not to take his salary for that period.
61. The Claimant provided an explanation as to why he paid himself lower than the contractual salary, which I accept. It did not appear to me, from the evidence, that the Claimant understood the significance of him not paying himself the NMW and therefore ignorant of the requirement to do so. For example, in email correspondence challenging the rejection of his claim to RPS, he said, *"I don't see how the fact that I was paid below NMW makes me any less of an employee?"* [page 101].
62. Balancing all these factors and after careful consideration of the submission made by the SOS, I accept the Claimant's explanation as to why he paid himself lower than the NMW. I find that he did not appreciate the legal requirement to do so, but that this does not, in the broader context of all of the other factors pointing towards employment status, which I have already outlined, mean that he was not an employee.

63. I find, on balance, that the factors pointing towards employment status outweigh the factors pointing away from employment status.

### Sums to be Paid

64. Mr Soni submitted that any calculations should be based on the figures contained within the Claimant's P60s. However, in light of the Law set out above, I am satisfied that the calculations should be based on the NMW even though the Claimant was not paid the NMW.
65. Mr Soni submitted that the Claimant's last date of employment, if deemed an employee, was 24 June 2022, the date of the Claimant's letter giving authority to RCUK. The Claimant said the last date of employment was 31 August 2022 which he said he chose as a nominal date where he would stop doing his duties. The Claimant said the gyms stopped trading and doors closed on 20 June 2022. However, his role in the company did not conclude then as there were administrative duties that he needed to complete. On balance, in light of the letter to RCUK on 24 June 2022 and the fact that the gyms stopped operating on 20 June 2022, I accept Mr Soni's submission in this regard. As such the 'relevant date' for the purposes of s.145 and the redundancy payment is 24 June 2022.
66. It is determined that the Claimant is entitled to a redundancy payment, at NMW, as it was at the date of dismissal, 24 June 2022, calculated as follows:
- a. Date of redundancy: 24 June 2022;
  - b. Date of birth: 18 December 1984;
  - c. Start date: August 2011;
  - d. Years of Service: 10;
  - e. Weekly wage at NMW: £9.50 p/h x 50 hours = £475.00
  - f. **£475 x 10 weeks = £4,750**
67. A claim for arrears of wages is made in relation to July 2022 and August 2022. In accordance with §.182-188 ERA 1996, the Claimant is entitled to arrears of wages of up to 8 weeks. The commencement of winding up was 15 September 2022 [page 45] which I take as the 'appropriate date' for the purposes of s.185. It is determined that the Claimant is entitled to arrears of wages calculated as **£475 x 8 weeks = £3800**. The Claimant is responsible for the payment of any Tax or National Insurance.
68. A claim is made for holiday pay. The commencement of winding up was 15 September 2022 [page 45] which I take as the 'appropriate date' for the purposes of s.185. The leave year started on 11 August 2022. It is determined that the Claimant is entitled to holiday pay of **£135.71**, calculated based on the pro-rata entitlement.
69. A claim for notice pay is made and based on s.86 ERA 1996, the Claimant is entitled to 10 weeks' notice pay. The Claimant is entitled to notice pay,

calculated based on **£475 x 10 weeks = £4750**. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay Tax on it as Post Employment Notice Pay.

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Employment Judge Z Islam

Date: 6 December 2023

Sent to the parties on:  
15 December 2023

For the Tribunal Office.