EMPLOYMENT TRIBUNALS

Claimants: Mr P Cronin (1)
Miss C Brewer (2)

Respondents: The Secretary of State for Business & Trade (1)
All Singing All Dancing (Agency) Limited (in liquidation) (2)

Heard at: **London South Employment Tribunal by video (CVP)**

On: **3 November 2023**

Before: Employment Judge Macey

Representation
Claimants: In person
First Respondent: Mr P Soni Second
Respondent: No attendance

RESERVED JUDGMENT

1. The first claimant's and second claimant's complaints of unauthorised deductions from wages, breach of contract and failure to pay in lieu holiday accrued but untaken on termination against the second respondent are dismissed for want of jurisdiction.

2. The first claimant's and second claimant's complaints of unauthorised deductions from wages, breach of contract, failure to pay statutory redundancy payment and failure to pay in lieu holiday accrued but untaken on termination against the first respondent are not well-founded.

3. The first claimant's and second claimant's complaints of failure to pay statutory redundancy payment against the second respondent are not well-founded.

REASONS

THE CLAIMS AND ISSUES

1. The claimants have brought complaints of unauthorised deductions from wages, failure to pay accrued but untaken holiday in lieu on termination, breach of contract (for failure to pay notice pay) and failure to pay statutory redundancy payment against both the first respondent and the second respondent.

2. The issues the Tribunal need to decide are set out below and were agreed at the hearing.

Employment Status

2.1 Were the two claimants employees of the second respondent within the meaning of section 230 of the Employment Rights Act 1996?
2.2 Were the two claimants workers of the second respondent within the meaning of section 230 of the Employment Rights Act 1996 (for the purposes of their complaints for unauthorised deductions from wages and failure to pay accrued holiday pay in lieu on termination against the second respondent only if those complaints have been brought within the respective time limits)?

Time Limits

2.3 Were the authorised deductions from wages complaints against the second respondent made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:
2.3.1 Were the claims made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
2.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
2.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
2.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2.4 Were the breach of contract (for failure to pay notice pay) complaints against the second respondent made within the time limit in Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994? The Tribunal will decide:

2.4.1 Were the claims made to the Tribunal within three months of either the effective date of termination or where there is no effective date of termination the last day upon which the employee worked in the employment which was terminated?

2.4.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.4.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2.5 Were the failure to pay accrued holiday pay in lieu on termination complaints against the second respondent made to the Tribunal within the time limit in regulation 30 Working Time Regulations 1998? The Tribunal will decide:

2.5.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of when payment should have been made of the accrued but untaken holiday pay in lieu on termination?

2.5.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.5.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

3. Mr Cronin and Miss Brewer did not provide written witness statements in advance of the hearing to either the Tribunal or the first respondent. It was agreed that their claim forms and attachments to their claim forms would be their written witness statements. They also applied to adduce further written evidence of one and a half A4 pages for each of them. The first respondent did not object to this, and this extra written witness evidence was allowed to form their written witness evidence in addition to their claim forms and attachments to their claim forms. The Tribunal heard evidence from Mr Cronin and Miss Brewer.

4. There was a hearing bundle comprising 226 pages. Where I refer to a document that is in the hearing bundle its page number will follow in square brackets.

5. At the start of the hearing the first respondent applied to add documentary evidence of four pages that had not been provided to the Tribunal in full or to Mr Cronin and Miss Brewer at all before the hearing. I gave Mr Cronin and Miss Brewer 15 minutes to read these four pages. Mr Cronin and Miss Brewer did object to this additional document being adduced. I allowed this extra document of four pages because it was relevant to the facts in dispute and the balance of prejudice in not allowing it against the first respondent outweighed the balance of prejudice to the claimants in allowing it to be added to the documents in front of the Tribunal. I allowed supplemental evidence to be given by Mr Cronin and Miss Brewer about this additional four-page document.

6. During cross-examination of Mr Cronin, Mr Cronin applied to add documentary evidence from Companies House that was 14 pages long and comprised a confirmation statement dated 19 January 2017, two notices of ceasing to be a person with significant control both dated 1 July 2021 and a confirmation statement dated 24 January 2022. The first respondent did not object to it being entered as an additional document and I allowed this additional document to be added to the documents in front of the Tribunal.

7. The Tribunal had provided simple orders in respect of witness statements and documents [40]. These were not the Tribunal's full case management order that explains the importance of documents and witness statements to the parties.

FACTS

8. The second respondent was incorporated on 29 February 2012. On incorporation Mr Cronin and Miss Brewer were the only two shareholders and each held 50% of the issued shares. Mr Cronin and Miss Brewer were both appointed as directors from 29 February 2012. As of 29 February 2012 there were no other directors and so the Board of directors comprised Mr Cronin and Miss Brewer.

9. The second respondent created very unique websites particularly for boutique fashion retailers and art galleries.

10. Mr Cronin and Miss Brewer also signed employment contracts with the second respondent on 29 February 2012 [133-134] and [155-156] respectively. Mr Cronin's job title was Head of Sales and Technology and Miss Brewer's was Head of Design. Clause 2.2 of their contracts state that they reported to the Board of Directors. Clause 5.1 of their contracts in respect of hours work state, "*18 hours per week, with potential for additional hours as per business requirements*".

11. There is a contradicting document sent to the Redundancy Payments Service that was completed by the Insolvency Practitioner for the second respondent which states that Mr Cronin's and Miss Brewer's hours of work were 35 hours per week. Mr Cronin and Miss Brewer state they have never seen this document before today, that it is incorrect, and that if they had seen it before today, they would have informed the Insolvency Practitioner and the Redundancy Payments Service that it was incorrect.

12. This document has been created by someone who has not attended Tribunal today to give sworn evidence. It is second hand evidence. Moreover, Mr Cronin's and Miss Brewer's oral evidence on this point is supported by their contracts with the company. I prefer the evidence of Mr Cronin and Miss Brewer and that the hours of work were 18 hours per

week with potential for additional hours as per business requirements for the time period between 29 February 2012 and April 2020.

13. Clause 6.1 of their contracts set their initial salary at £8,105 per annum to be paid monthly and increasing annually to keep in line with inflation. Clause 6.2 confirmed the second respondent would collect employee income tax and National Insurance Contributions (NICs) at source via PAYE. Under clause 8 of their contracts any sickness absence was to be notified to the Board of directors. The contracts confirmed that Mr Cronin and Miss Brewer would be paid Statutory Sick Pay.

14. In respect of paid holidays clause 7 of their contracts stated they were entitled to 28 days' paid holiday in each holiday year.

15. No provision for pension was made in their contracts. Both Mr Cronin and Miss Brewer opted out of NEST. In the Director's questionnaires that Mr Cronin and Miss Brewer completed [114-120] and [121-127] respectively in answer to question 9 they both answered, "*I chose to opt out of this as there was not enough funds in the company to consider it*". Mr Cronin confirmed in cross-examination that Mr Cronin and Miss Brewer saw the second respondent itself as their pension, as the intention was to sell the second respondent to an investor.

16. Both operated a director's loan account

17. A third director was appointed on 17 December 2014. This third director was added as a shareholder, there were three shares, and Mr Cronin, Miss Brewer and the third director each held a share. They each held 33% of the second respondent. From 17 December 2014 the Board of directors comprised Mr Cronin, Miss Brewer and the third director. I have not seen the employment contract for the third director.

18. At some point after 17 December 2014 an Accounts Director also joined the second respondent, but she was not appointed as a director of the second respondent. I have not seen the employment contract for the Accounts Director. This Accounts Director left the second respondent sometime between April 2020 and the insolvency of the second respondent.

19. Between 29 February 2012 and March 2020 Mr Cronin and Miss Brewer always worked at least 18 hours per week. On many occasions between 29 February 2012 and March 2020 they worked more than 18 hours per week depending on the amount of work the second respondent had to fulfil. Any additional hours were paid, not unpaid.

20. Mr Cronin and Miss Brewer reported to the Board of directors, which initially was Mr Cronin and Miss Brewer and then from 17 December 2014 comprised Mr Cronin, Miss Brewer and the third director.

21. After the third director joined the second respondent all three of them needed to work similar times during the week and they had to liaise with each other about their working hours to align when they would be working their 18 hours.

22. The P60 for Mr Cronin for the tax year to 5 April 2020 [135] confirms that Mr Cronin was paid £8632.00 by the second respondent for that tax year. No tax was deducted from this pay. Earnings above the Lower Earnings Limit were £2496 and earnings about the Primary Threshold were 0. No NICs were paid on behalf of Mr Cronin for the tax year to 5 April 2020.

23. The P60 for Miss Brewer for the tax year to 5 April 2020 [157] confirms that Miss Brewer was paid £8632.00 by the second respondent for that tax year. No tax was deducted from this pay. Earnings above the Lower Earnings Limit were £2496 and earnings about the Primary Threshold were 0. No NICs were paid on behalf of Miss Brewer for the tax year to 5 April 2020.

24. There are no P60s for the preceding tax years in the bundle, but Mr Cronin confirmed during cross-examination that in previous years the second respondent had deducted tax and NICs from Mr Cronin's and Miss Brewer's salary. This is supported by a screenshot of HMRC records for 2018 for Mr Cronin and Miss Brewer [151] and [168] respectively. I have no reason to doubt Mr Cronin's honesty.

25. Mr Cronin and Miss Brewer prior to 2020 took paid holidays. Mr Cronin's parents are based in the United States of America, and he would frequently visit them for two weeks in December over Christmas and New Year. This was paid holiday. Miss Brewer also took a paid holiday in September 2016.

26. Dividends were taken when profits and reserves allowed, and they were usually small No dividends were taken by either Mr Cronin or Miss Brewer in the last 3 years preceding the insolvency (answer to question 14 in their director's questionnaires)

27. In March 2020 the Covid-19 pandemic meant that many of the second respondent's clients were forced to close their premises and these clients also terminated their contracts with the second respondent.

28. The third director resigned on 16 March 2020, prior to this date he had been struggling with ill health. After 16 March 2020 the Board of directors comprised Mr Cronin and Miss Brewer. The shareholding in the second respondent also changed at this point and Mr Cronin and Miss Brewer once again held 50% of the shares each.

29. Due to the second respondent filing its payroll information on an annual basis and this annual filing having been made prior to the introduction of the coronavirus job retention scheme (CJRS) the second respondent could not furlough anyone who was on its payroll when the CJRS first started, and the second respondent only joined the CJRS eight or nine months later.

30. Instead, the second respondent unilaterally varied the hours of work for both Mr Cronin and Miss Brewer from 18 hours per week to no longer committing to a minimum number of working hours per week [152] and [169] respectively. The letters state as follows:

    "*Following the recent consultation regarding employment contract changes in response to the current economic climate and coronavirus, we are no longer committing to a minimum number of working hours per week. This will come into effect as of 1st April 2020 and affects all employees at the company.*

    Other aspects of your employment will continue as usual, including being paid at least national minimum wage for any hours worked at the company."

31. There is no evidence that Mr Cronin and Miss Brewer complained about this change to a zero hours' contract. Both Mr Cronin's and Miss Brewer's P60s for the tax year to 5 April 2021 [136] and [158] respectively state they were paid £4392.00. No tax was deducted and no NICs were paid by the second respondent. Some of the salary (approximately £3655) for this tax year was furlough pay under the CJRS.

32. The other salary was for the hours that they had in fact worked for the second respondent prior to the second respondent joining the CJRS.

33. In July 2021 the shareholding in the second respondent changed. There were 25 shares. Miss Brewer and Mr Cronin each held five shares and two other individuals with the same surname as Mr Cronin also each held 25 shares. The other two shareholders were family members of Mr Cronin. This meant that Mr Cronin and Miss Brewer each held 25% of the shareholding. This is set out in the confirmation statement dated 10 January 2022.

34. The other two shareholders were not appointed as directors of the second respondent. The Board of directors still comprised of Mr Cronin and Miss Brewer.

35. Both Mr Cronin's and Miss Brewer's P60s for the tax year to 5 April 2022 [137] and [159] respectively state they were paid £7027.20. No tax was deducted and no NICs were paid by the second respondent. This was due to the second respondent having a bad year. Again, some of the salary (approximately £4386) for this tax year was furlough pay under the CJRS.

36. The other two shareholders ceased being shareholders in the summer of 2022. The Statement of Affairs dated 14 September 2022 [88-93] confirms that the second respondent had two issued shares, one was held by Mr Cronin and the other by Miss Brewer. Their shareholdings were again 50% each.

37. Mr Cronin and Miss Brewer did not take paid holiday in the last two years preceding the insolvency of the second respondent because they were trying to save the second respondent from failing. The second respondent recorded that these paid holidays were not taken, and Mr Cronin said the intention was to take the holidays when the second respondent became profitable again.

38. Their answers to question 14 of their director's questionnaires states, "*pay was made by bank transfer or credited to Director's loan account*". Their pay was credited to their Director's loans account between April 2022 and July 2022.

39. I have seen various payslips for Mr Cronin [138-140] and for Miss Brewer [160-162]. These payslips demonstrate that the last working day of the month was the payment date for monthly payroll.

40. I have also seen bank account statements for the second respondent over the same period [196 – 226] No bank transfers were made to Mr Cronin and Miss Brewer that matches the net salary payment on their various payslips from April 2022 onwards. Mr Cronin confirmed in crossexamination that the payment in July 2022 of £15,919.49 made to Mr Cronin and Miss Brewer was credited to their respective Director loan accounts with the second respondent and that this was on the advice of the second respondent's accountant. This was a large amount because it was arrears of pay owed to Mr Cronin and Miss Brewer by the second respondent.

41. Mr Cronin spoke to the Insolvency Practitioner on 12 August 2022.

42. Mr Cronin's and Miss Brewer's last day of work at the second respondent was 22 September 2022 (confirmed in their online applications to the Redundancy Payments Service [94-101] and [102-109] respectively). This is contradicted by both the document completed by the Insolvency Practitioner that was sent to the Redundancy Payments Service and by Mr Cronin's and Miss Brewer's claim forms. Mr Cronin and Miss Brewer state that the document completed by the Insolvency Practitioner is incorrect and that they were confused as to which date to put on their claim forms (12 August 2022). They put the date they spoke to the Insolvency Practitioner instead of the last day that they actually worked for the second respondent. I accept Mr Cronin's and Miss Brewer's evidence that the last day that they in fact worked for the second respondent was 22 September 2022.

43. Mr Cronin and Miss Brewer say they were not given notice of termination by the second respondent. This is contradicted by the document completed by the Insolvency Practitioner that was sent to the Redundancy Payments Service which states that notice was given. Again, for the reasons set out above I prefer the evidence of Mr Cronin and Miss Brewer.

44. Winding up proceedings of the second respondent commenced on 29 September 2022 as a Creditor's Voluntary Liquidation.

45. Throughout the life of the second respondent the Board of directors held regular meetings. Unfortunately, I have not had sight of any minutes for those meetings.

46. Mr Cronin and Miss Brewer did not receive any salary for the months of August 2022 and September 2022.

47. Mr Cronin and Miss Brewer notified the Redundancy Payments Service and the second respondent of their statutory redundancy payment claims on 4 November 2022.

48. Mr Cronin did speak to the Citizen's Advice Bureau (CAB) in mid-August 2022. The advisor at CAB did talk about time limits, Mr Cronin recalls six months being mentioned. Mr Cronin and Miss Brewer also did Google research about their claims and Mr Cronin thought there was just one timeline for both respondents not two timelines for the different respondents. Both Mr Cronin and Miss Brewer are on the list of creditors at the second respondent. Miss Brewer left the issue of when to claim to Mr Cronin.

49. ACAS Early Conciliation was commenced by both claimants against the first respondent on 22 March 2023 and finished on 28 March 2023. ACAS

Early Conciliation was commenced by both claimants against the second respondent on 22 March 2023 and finished on 28 March 2023.

50. Mr Cronin and Miss Brewer both presented their claims against the first respondent and the second respondent to the Tribunal on 31 March 2023. I note that on their respective claim forms the claimants' address is the same.

LAW

51. The claimants' claims for accrued but unpaid holiday pay are brought under regulation 14 and regulation 30 of the Working Time Regulations 1998 ("the Regulations") and/ or section 13 of the Employment Rights Act 1996 ("Act").

52. The claimants' claims for arrears of wages are brought under section 13 of the Act.

53. Section 13(9) of the Act provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of a deduction. The right to complain to an Employment Tribunal of an unauthorised deduction from wages is pursuant to section 23 of the Act.

54. The claimants' claims for failure to pay statutory redundancy pay are brought under section 163 of the Act.

55. This Tribunal has jurisdiction to hear breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). This jurisdiction is subject to certain preconditions, including that in article 3 (c) of the Order, namely that the claim arises or is outstanding on the termination of the employee's employment. Accordingly, the right to bring a breach of contract claim before this Tribunal is limited to employees.

Time limits

56. In respect of unauthorised deductions from wages section 23(2) of the Act states:

Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) In the case of a complaint relating to a deduction by the employer the date of payment of the wages, from which the deduction was made, or (b) ……

57. Section 23(4) states :

Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further time as the tribunal considers reasonable.

58. **Arora -v- Rockwell Automation Limited** confirmed that where there is no payment at all the time limit to bring a complaint starts from the date on which the contractual obligation to make the payment arose.

59. The effect of early conciliation by ACAS ("Early Conciliation") on this time limit is set out in Section 207(B) subsections (2) – (4) of the Act, namely,

(2) In this section-

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of Section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or the applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this section) expire during the period beginning with Day A and ending one month after Day B, the time limit expires at the end of that period.

60. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("Order") states as follows:

Subject to Article 8B an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –

(a) Within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) Where there is no effective date if termination, within three months beginning with the last day upon which the employee worked in the employment which was terminated. (ba) …..

(c) When the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

60. The effect of early conciliation by ACAS ("Early Conciliation") on this time limit is set out in Article 8B of the Order, namely,

> *(2) In this article-*
>
> *(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of Section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or the applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*
>
> *(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*
>
> *(4) If a time limit set by a relevant provision would (if not extended by this section) expire during the period beginning with Day A and ending one month after Day B, the time limit expires at the end of that period.*

61. Regulation 30 of the Regulations states as follows:

> *(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—*
>
> *(a)before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
>
> *(b)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 or, as the case may be, six months.*

62. Regulation 38 of the Regulations are provisions for members of the armed forces and is not applicable in this case.

63. The effect of Early Conciliation on the time limit under regulation 30 of the Regulations is the same as for the unauthorised deductions from wages complaints and the breach of contract complaints.

64. I referred myself to the guidance in the cases of ***Wall's Meat Co Ltd v Khan [1979] ICR 52, EWCA***, as to the Tribunal's discretion in such matters and also that as stated in ***Porter v Bandridge Ltd [1978] ICR 943, EWCA***, the burden of proof is upon the claimants and that in respect of ignorance of rights, the correct test is not whether the

claimants knew of their rights but whether they *ought to have known of them*.

Employment Status

65. "*The relevant date for the purposes of deciding whether the secretary of state is liable to make payments out of the National Insurance Fund to employees of an insolvent company, is the date at which the company became insolvent, not the position as it was two year, five years or ten years previously*." As per the EAT in **Rajah -v- SOS [1995] EAT/125/95.**

66. Employees are defined in section 230 of the Act. An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

67. The National Minimum Wage Regulations 2015 ("NMW Regs") came into effect on 6 April 2015 and govern the appropriate rates and pay reference periods for the national minimum wage ("NMW"). The Regulations were introduced pursuant to the National Minimum Wage Act 1998 ("NMWA"). Section 1 of the NMWA provides that all 'workers' are entitled to be paid the NMW, provided they have ceased to be of compulsory school age and work, or ordinarily work, in the UK. The definition of 'worker' in section 54(3) of the NMWA includes someone who is working under a contract of employment.

68. For workers aged 25 and over the pay rate for the period from 1 April 2019 to 31 March 2020 was £8.21 per hour.

69. Sections 166 to 168 of the Act entitle an employee to apply to the Secretary of State for payment of various sums due to them including when the employer is insolvent and has not paid the relevant sums. This extends to the various sums claimed by the claimants in this case.

70. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in **Autoclenz Ltd v Belcher and Others** **[2010] IRLR 70 CA** and **[2011] UKSC 41** in the Supreme Court:

"*18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in* ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C*** *: "a contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the*

performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". 19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in ***Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623*** *"There must … be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status:* ***Express and Echo Publications Ltd v Tanton ([1999] ICR 693*** *per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see e.g.,* ***Tanton*** *at page 697G.*"

71. In **Autoclenz** the Supreme Court held that:

"*Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry 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.*"

72. The Supreme Court upheld the Court of Appeal in the **Autoclenz** decision, and the approach to be adopted where there is a dispute (as in this case) as to an individual's status. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?

73. The EAT in **Eaton -v- Robert Eaton Ltd & SOS [1988] IRLR 83** held that the tribunal had not erred in holding that Mr Eaton was not an employee. As a director he was a holder of office, rather than an employee, in the absence of evidence to the contrary. The nature of the evidence will vary in each case which must be decided on its own facts and the Tribunal had properly considered the relevant available evidence before reaching their finding.

74. In **Secretary of State for Trade and Industry -v- Bottrill [1999] IRLR 326** the Court of Appeal stated,

"*Whether or not an employer/ employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding, that is likely to be significant in all situations and might prove to be decisive, but it is only one of the factors which are relevant and is not to be taken as determinative."*

75. The Court of Appeal also set out a number of factors (but not a definitive checklist) which might be relevant in these types of cases:
    1. Whether or not there was a genuine contract between the company and the shareholder;
    2. How, when and for what reasons the contract came into existence;
    3. What each party did pursuant to the contract;
    4. What label the parties put on the relationship;
    5. The degree of control exercised over the company by the shareholder employee;
    6. Whether there are other directors;
    7. Whether the shareholder was in reality only answerable to himself;
    8. Whether the director shareholder was, in reality incapable of being dismissed; and
    9. If the shareholder was a director, whether he was able to vote on matters in which he was personally interested, such as the termination of his contract of employment.

76. In **Clark v Clark Construction Initiatives [2008] ICR 635** Elias P set out three circumstances in which a court would not give effect to a purported contract of employment: sham, ulterior purpose and where the parties do not conduct themselves in accordance with the contract.

77. Elias P offered some guidance, which amongst others, include:

    1. The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does.
    2. Similarly the fact that he is an entrepreneur, or has built the company up, 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.
    3. 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.
    4. 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 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.
    5. The fact that the individual takes loans from the company or guarantees its debts exceptionally could 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.

6. Although courts have said that the fact of there being a controlling shareholder 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. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.

78. In **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld (Richard) [2009] EWCA Civ 280**, the Court of Appeal considered the relevant authorities and confirmed that it is a question of fact whether or not such a shareholder/ director is an employee. In that case the Court confirmed that an individual who is a controlling shareholder and a director of a company may also be an employee of that company, provided that on a proper analysis he is a party to a genuine contract of employment, and, in the event that the company becomes insolvent, he may make a claim out of the National Insurance Fund for certain debts due.

79. In regard to directors, the 'organisation test', also known as the 'integration test' may be more appropriate than the 'control test'. This test was set out by Denning LJ in **Stevenson (or Stephenson) Jordan and Harrison Ltd v MacDonald and Evans (1952) 69 RPC 10, [1952] 1 TLR 101, CA** as follows:

"Under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is an accessory to it'."

80. Accordingly, a director who provides consultancy or advisory services to the company is likely to be an independent contractor, whereas an executive director who is engaged for the purposes of managing the business (or a part of it), and whose work forms an integral part of the business is likely to be an employee.

81. In **Crawford v Department for Employment and Learning [2014] IRLR 626**, the Northern Ireland Court of Appeal emphasised the importance of careful analysis of the contractual position. Clear written agreements may assist in clarifying the issues; however, courts are likely to look to the substance of the agreement rather than simply its form.

82. In **Secretary of State for Business, Innovation & Skills v Knight [2014] IRLR 605**, it was held that the fact that a managing director had decided not to require her salary to be paid did not necessarily mean that she was not an employee.

83. In **Rainford v Dorset Aquatics UKEATPA/0126/20** BA, the EAT upheld an employment judge's conclusion that a company director and

shareholder was neither a 'worker' nor an 'employee'. The EAT held that it does not necessarily follow from the fact that a director works for a company and receives money from it that he or she will be an employee or worker, and that the tribunal had been entitled to take the director's right to substitute another to act as site manager in his place.

CONCLUSIONS

Time limit issue for complaints against the second respondent

84. The payslips for Mr Cronin and Miss Brewer show their pay dates as being the last working day of the month. Their August 2022 pay was due to be paid on 31 August 2022 and their September 2022 pay was due to be paid on 30 September 2022. This is clearly a series of deductions, with the last date of the deduction being 30 September 2022. Early Conciliation in respect of their claims against the second respondent started with ACAS on 22 March 2023. This was not within three months of 30 September 2022.

85. Any holiday pay in lieu on termination should have been paid on 30 September 2022 which was the payment date for salary in September 2022 following their last day of working for the second respondent on 22 September 2022. ACAS Early Conciliation in respect of their claims against the second respondent was not commenced until 22 March 2022. This was not within three months of 30 September 2022.

86. Mr Cronin's and Miss Brewer's last day of working for second respondent was 22 September 2022 (the relevant date for their breach of contract claim). ACAS Early Conciliation in respect of their claims against the second respondent was not commenced within three months of 22 September 2022

87. The burden is on the claimants to prove that it was not reasonably practicable to present their claims within time.

88. Applying **Bandridge**, the claimants ought to have known of the threemonth time limits, for the following reasons:

    a. because a Google search for "unpaid wages" does indicate the time limit for the claim of unauthorised deductions from wages.
    b. because a Google search for "failure to pay notice pay" does indicate the time limit for the claim in the employment tribunal.
    c. because a Google search for "failure to pay holiday pay" does indicate the time limit for a claim for failure to pay accrued but untaken holiday in lieu on termination.
    d. Mr Cronin sought advice from the CAB in August 2022 and also did Google research. The time limits are easily identifiable from

Google even if erroneous advice of six month had been provided by CAB. He ought to have known he should have presented complaints against the second respondent within three months of the date of payment for the unauthorised deductions from wages claim and holiday pay claim and within three months of the effective date of termination for the breach of contract claim.

e. Miss Brewer relied on Mr Cronin, but Miss Brewer still ought to have known of the time limits because Miss Brewer undertook Google research too.

89. The claimants' complaints of unauthorised deductions from wages, failure to pay accrued but unpaid holiday pay in lieu on termination and failure to pay notice pay are dismissed against the second respondent for being brought out of time.

Were Mr Cronin and Miss Brewer employees of the second respondent as at the date of insolvency for the purposes of their complaints against the first respondent?

90. I begin by adopting and applying the four-part **Autoclenz** test in that order. First, the contractual terms or factors which point to employee status are as follows:
    a. there were written contracts of employment in place with no right of substitution;
    b. up until April 2022 they were paid wages by bank transfer;
    c. they were registered for PAYE;
    d. they did pay National Insurance in some of the years preceding the tax year to 2020;
    e. The claimants were integrated into the second respondent and both their work was integral to the business of the second respondent and not ancillary to it; and
    f. There is no evidence to suggest that they were not paid national minimum wage at any point. In the tax year to April 2020, they were working 18 hours per week – they were paid more than £8.21 per hour. In the tax years to April 2021 and April 2022 they no longer worked 18 hours per week due to the unilateral variation to their contracts. They were paid for hours actually worked and there is no evidence to suggest this was below national minimum wage.

91. The contractual terms or factors that oppose employee status are these:
    a. The contracts had been unilaterally varied by the second respondent to have no minimum number of hours of work in April 2020 and Mr
    Cronin and Miss Brewer did not raise a grievance about this;
    b. Both had opted out of NEST pension because they had seen the second respondent itself as their pension;
    c. Mr Cronin and Miss Brewer had not taken paid holidays for the preceding two years prior to the insolvency of the second respondent. They did not raise a grievance about the failure of the

second respondent to provide them with paid holiday in those two years;

d. Mr Cronin and Miss Brewer each held 50% of the shares. Neither one of them had a controlling shareholding by themselves, but between the two of them they had control of the second respondent.
e. Payments of their salary had been made to their director's loans accounts between April 2022 and July 2022, which was not in accordance with the terms of their contracts. This was done on the advice of the second respondent's accountant; and
f. They both reported to the Board of directors and the Board as at the date of insolvency comprised of just Mr Cronin and Miss Brewer. This meant Mr Cronin and Miss Brewer were in reality only answerable to themselves and were, in reality incapable of being dismissed while the company was solvent and operating.

92. As to the second limb of the **Autoclenz** test, I find that as at the date of insolvency there was no control or management of what Mr Cronin and Miss Brewer did. They acted as business partners.

93. As to the third and fourth limbs of the **Autoclenz** test, I find that Mr Cronin and Miss Brewer did carry out services personally for the second respondent, but the second respondent was not their client or customer.

94. The guidance in **Clark** is that 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 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. Not taking paid holiday and not receiving their pay into their bank accounts is inconsistent with their contracts. Not raising a grievance about being put onto effectively a zero hours' contract from April 2020 and not being able to take paid holiday is also inconsistent with their contracts.

95. Based on the **Autoclenz** test and the guidance in **Clark**, the balance is against the claimants being employees.

96. Mr Cronin and Miss Brewer are not employees for the purposes of their claims against the first respondent.

97. Mr Cronin's and Miss Brewer's complaints of failure to pay statutory redundancy pay, failure to pay notice pay, unauthorised deductions from wages and failure to pay accrued holiday pay in lieu on termination against the first respondent are not well-founded and are dismissed.

Claims against the second respondent – considering their employment status from 29 February 2012 to 22 September 2022

98. As against the second respondent for the failure to pay statutory redundancy payment claims their relationship status with the second respondent was closer to an employment relationship prior to 16 March 2020, particularly in respect of the control exerted over them by the Board of directors.

99. But then after April 2020 Mr Cronin and Miss Brewer acted contradictory to the employment contract (see in paragraph 91 above) and this meant their employment contracts were discharged. In addition, the Board of directors after 16 March 2020 just comprised the two of them which meant in reality, they were only answerable to each other and in reality neither of them could be dismissed while the second respondent was operating and solvent (the additional shareholders between July 2021 and the summer of 2022 were not appointed as directors).

100. Mr Cronin and Miss Brewer are not employees for their complaints of failure to pay a statutory redundancy payment against the second respondent.

101. Mr Cronin's and Miss Brewer's complaints of failure to pay statutory redundancy pay against the second respondent are not well-founded and are dismissed.

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Employment Judge Macey

Date 16 November 2023

JUDGMENT SENT TO THE PARTIES ON
14 December 2023
.....

J Erskine-Kellie
Jocelyn Erskine-Kellie
.....
FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.