EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 20 March 2024

Claimant: Mr Robin Bourke

Respondent: Internal Solutions Limited (In Liquidation)

Before: Employment Judge Fowell

Representation:

Claimant In Person

Respondent Mr Parag Soni for the Insolvency Service

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was not an employee of the first respondent at the material times.
2. Accordingly, the claim is dismissed.

REASONS

Background

1. Mr Bourke was the sole director and shareholder of the company, which went into liquidation on 6 July 2021. He submitted a claim to the Redundancy Payment Service for various payments including a statutory redundancy payment, unpaid holiday and notice pay. This claim was rejected on the basis that he was not an employee. Hence, he brings this claim to challenge the decision of the Secretary of State.

Procedure and evidence

2. The first hearing in this case was on 8 March 2023. At that hearing Employment Judge D Wright found in favour of the claimant on these three elements although he rejected a claim for arrears of pay. However, the judge was not aware that a response had been filed to the claim so he was not aware of the reasons for the claim being disputed, and so that hearing proceeded on the wrong basis. It also proceeded in the absence of the respondent. When the true position was appreciated that judgment was reconsidered and set aside.

3. It was then listed for hearing on 11 January 2024 but it appears that the case management order giving directions for the hearing was not sent to Mr Bourke. It went to his previous representatives. Accordingly, the case was adjourned until today to give him the opportunity to prepare a witness statement and provide any relevant documents.

4. That witness statement sets out some details of the history of the case and the financial circumstances which led to the closure of the business but did not dispute any of the points made in the response form, so it was not in fact necessary to refer to the documentary evidence in any detail.

5. Having considered his evidence and the submissions on each side, I make the following findings.

Findings of Fact

6. Internal Solutions Ltd was a small business working in the construction field. Mr Bourke had about five members of staff working on Construction Industry Scheme terms, and they were supplied as managers to assist on construction projects for larger organizations. Mr Bourke did not have a written contract of employment. The only employee, i.e. the only person on the payroll, was his ex-partner, who carried out administrative duties for a few months, but that had long finished when the company went into liquidation. Essentially the company was a casualty of Covid.

7. There is no doubt that Mr Bourke worked long hours attempting to keep the company afloat. He had the responsibility of managing the business. When he was approached by an external contractor he would decide whether he did the work personally or engaged others to do so. Generally, he would do it himself, hence the long working hours.

8. He ran the company from 2011 until 31 May 2021. According to his original claim, which was submitted on his behalf, he worked a 48-hour week, six days per week at £8.91 per hour, but that is at odds with the evidence he gave today, which I accept, that his working hours went up and down like a yo-yo.

9. Having submitted his claim he then completed a questionnaire, on 12 January 2022, sent by the respondent. According to this he worked 70 hours a week. Again, I accept that he did so from time to time, but this is a further indication that his working hours varied dramatically.

10. According to his P60s made the following earnings in recent years:

    a) zero for the years 2016/17 and 2017/18,

    b) £8,424 for 2018/19,

    c) £8,628 for 2019/20 and

    d) £7,909 for 2020/21.

11. Those payments are very much less than the national minimum wage for a full-time employee.

12. In his questionnaire he also stated that he received no payment at all after 3 September 2020. However, there are copies of wage slips for March, April and May 2021 detailing payments of £719 per month. There is no tax or national insurance deducted on those payment so it is difficult to reconcile those statements.

13. His bank statements show a number of withdrawals from the business but again these do not match the information provided. He accepted that sometimes he took payments out of the business and sometimes he put them in. There was no regular pattern. That is as much as I can conclude with confidence. For example, it appears that he received a dividend payment of £30,000 in the tax year to 5 April 2020, on which income tax was paid, but even then it is not reflected in his P60 for that year.

14. As to his entitlement to holiday, he said that he was entitled to 28 days per year but had in fact taken no leave since 2016. I accept that he did not.

Applicable law

15. Section 230(1) Employment Rights Act 1996 defines an employee simply as someone who works under a contract of employment". Sub-paragraph (2) defines a contract of employment as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

16. Guidance on what is a contract of service has been provided by the higher courts on a number of occasions. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433 QBD the court set out the following three questions:

    a) Did the worker agree to provide his own work and skill in return for remuneration?

    b) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of [using the language of the day] master and servant?

    c) Were the other provisions of the contract consistent with its being a contract of service?

17. Of these, the issue of control is the Further guidance was given in **Hall (Inspector of Taxes) v Lorimer 1994** ICR 218, in which the Court of Appeal upheld the view of Mr Justice Mummery in the High Court that:

> "this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail."

18. The sort of factors considered in that case included:

    a) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;

    b) the incidence of tax and national insurance; and

    c) the structure of the trade or profession concerned and the arrangements within it.

19. The House of Lords subsequently endorsed the view in **Carmichael v National Power plc** 1999 ICR 1226 that certain elements formed part of an irreducible minimum, i.e.

    a) control,

    b) mutuality of obligation – the obligation by the employer to provide work and pay and for the employee to perform it, and

    c) that it be carried out personally by the employee.

20. Again there is no dispute about the last element, but there is a question over the degree of control and whether the company was obliged to pay Mr Bourke if there was no work available.

21. The position of such directors has been considered a number of times by the Court of Appeal. In **Secretary of State for Trade and Industry v Bottrill 1999 ICR 592, CA**, for example, the Court of Appeal upheld a tribunal's finding that Mr Bottrill was an employee of the company of which he was also managing director and sole shareholder. He had a contract of employment and was paid a salary from which tax and national insurance contributions were deducted. He was not paid any director's fees. He worked regular hours, was not employed anywhere else and was entitled to holidays and sick pay. In reaching its decision, the Court of Appeal confirmed that there was no rule of law that a person who is a sole or a majority shareholder in a company, and therefore in a position to prevent his or her own dismissal by voting to replace the board, cannot be an employee for the purposes of the employment protection legislation. It is a question of fact in each case, to be determined in accordance with the law of employment generally.

22. By way of contrast, in **Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635, EAT**, the EAT upheld a tribunal's finding that Mr Clark, the shareholder, was not also an employee. He was receiving only a minimal salary and was instead relying on loans from the company to cover his living expenses. In the EAT's view, this, coupled with the fact that an employment contract was never drawn up, pointed strongly against an employment relationship. In reaching this decision, the EAT laid down a (non-exhaustive) list of factors that a tribunal faced with deciding whether a majority shareholder has 'employee' status might find helpful. Omitting those that deal with written contracts of employment and disputes over whether they are valid, the main considerations are these:

a) 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, in practice, he or she is able to exercise real or sole control over what the company does.

b) The fact that the individual 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.

c) 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, such practices may well be necessary, and

d) Although the courts have stated that the existence of a controlling shareholding is always relevant and may be decisive, that does not mean that this alone will ever justify a tribunal in finding that there was no contract in place.

23. The issue arose again in **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor 2009 ICR 1183, CA,** where the Court of Appeal made some modifications to the factors identified by the EAT in Clark. The most significant for present purposes relates to the effect of the contract not being in writing. The EAT held that while this was an important consideration, if the parties' conduct pointed to the conclusion that there was a true contract of employment, tribunals should not seize too readily on the absence of a written agreement to justify rejecting the claim.

Conclusions

24. It is clear that the circumstances of Mr Bourke's case are much closer to that of Mr Clark than Mr Buttrill. Indeed, even in the case of Mr Clark, who was found not to be an employee, he was receiving a modest regular salary, unlike Mr Bourke.

25. In the absence of a written contract of employment I have to consider whether there was an implied contract of some sort. That has to be judged from the documentary records and the way in which Mr Bourke carried out his work. If, for example, there was a regular pattern of earnings, that is an indication that there was an implied agreement to receive a certain level of pay, which is what one would expect for an employee.

26. Or, if the salary payments vary with the number of hours worked that would be an indication that there was an agreement for a particular hourly rate. It has not been suggested that Mr Burke worked on an hourly rate basis so although there is some

evidence of hours being recorded I cannot conclude on balance that there was agreement between him and the company that he be paid on any such basis. The payment records are in fact quite chaotic. The problem from his point of view is not that he was an entrepreneur or that he was able to make a profit when conditions were better, it is that it is not possible to work out from the documentary records or his own account any terms of employment for him as an individual which can be separated from his awards as a director or shareholder. The lack of any clear accounting for tax and national insurance is also an important factor here.

27. Other essential terms of a contract of employment include arrangements for sick pay and holiday. Again, this does not need to be in writing and can be deduced from what happened in practice, but none of that is present here. There is no evidence of any sick pay and on Mr Bourke's own admission he was not taking any holiday. An employee should be able to distance himself from the company and insist, for example that he worked for a maximum number of hours each week, or that he received the national minimum wage, or that he was able to take his holiday.

28. It may seem unfair that a director of a business in Mr Bourke's shoes is in a much worse position than an employee, in circumstances where he is working long hours for little or no reward, but the legal test for an employee has to be met before any payments can be made by the respondent.

29. Accordingly, and for all of the above reasons the claim is dismissed.

Employment Judge Fowell

Date 20 March 2024