EMPLOYMENT TRIBUNALS

Claimant: Mr D Nokes

Respondent: (1) D Nokes Engineering Limited
(2) Secretary of State for Business and Trade

Heard at: Birmingham (by CVP video) **On:** 16 April 2024

Before: Employment Judge Edmonds

Representation
Claimant: In person
Respondent: Mr P Soni, lay representative

RESERVED JUDGMENT

1. The complaint of unauthorized deductions from wages is not well-founded and is dismissed.

2. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

3. The complaint in respect of holiday pay is not well-founded and is dismissed.

4. The complaint that the claimant was not paid a redundancy payment is not well-founded and is dismissed.

REASONS

Introduction

1. This is a claim for a redundancy payment, notice pay, unpaid wages and a payment in respect of accrued but unpaid annual leave on termination of employment. The claimant says that he was employed by the first respondent from 5 October 2012 until 30 September 2021, at which time his employment

ended by reason of redundancy. ACAS early conciliation commenced on 24 November 2022 and ended on 28 November 2022, with the claim being issued on 1 December 2022.

2. The claimant was the sole director / shareholder of the first respondent. His claim was also brought against the Secretary of State for Business and Trade (then named the Secretary of State for Business, Energy and Industrial Strategy) **("the Secretary of State")** on the basis that the first respondent was at that time in voluntary liquidation.

3. Since the claimant's claim was submitted, the first respondent has been dissolved and therefore no claim can proceed against that respondent. No application had been made to restore the first respondent to the register at the time of this hearing. Therefore, this hearing was to consider the claim against the Secretary of State alone.

4. The claimant's claim is essentially that no redundancy payment was made to him, and that at the time of his dismissal there were outstanding wages which were not paid to him, along with a failure to pay him accrued but untaken holiday. The Secretary of State submits that the claimant was not in fact an employee of the first respondent and therefore the Secretary of State can have no liability for redundancy pay, unpaid wages or holiday pay. Following the issue being raised during the course of this hearing (see below), the Secretary of State also asserted that the claim is out of time.

Claims and Issues

5. As there was no pre-agreed list of issues in this case, before witness evidence was heard we agreed the issues to be determined in the case, as set out below. Although it had not been identified by the Secretary of State in their Grounds of Resistance, I identified that based on the dates of employment provided by the claimant in his claim form, there appeared to be an issue as to whether the claimant's claim had been brought within the required time limit. The agreed issues were as follows:

    a. Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996? In accordance with section 182 of the Employment Rights Act 1996, the Secretary of State would only be liable to pay the claimant out of the National Insurance Fund in the event that the claimant was an employee (and not only a worker).

    b. In relation to wages:
        i. Were the wages paid to the claimant less than the wages they should have been paid? If so, by how much and on what date?
        ii. Was any deduction required or authorised by statute or a written term of the contract, and did the claimant agree in writing to the deduction before it was made?
        iii. How much is the claimant owed?

    c. In relation to holiday pay:

i. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
ii. If so, by how many days and what is the daily rate of pay?

d. In relation to redundancy pay:
   i. Was the reason for dismissal redundancy?
   ii. Did the claimant, before the end of the period of six months beginning with the relevant date –
      1. Make a claim for the payment by notice in writing given to the employer; or
      2. Refer a question as to his right to or the amount of the redundancy payment to an employment tribunal; or
      3. Present a complaint relating to his dismissal to the employment tribunal.
   iii. If not, is it just and equitable for the claimant to receive a redundancy payment?
   iv. What is the amount of any redundancy payment?

e. Given the date the claim form was presented and the dates of early conciliation, any complaint for unpaid wages and/or holiday pay before 25 August 2022 may not have been brought in time. Were the wages/holiday pay claims made within the time limits in section 23 the Employment Rights Act 1996 (including consideration of whether, if it was not reasonably practicable for the claim to be made within the time limit, was it made within a reasonable period thereafter)?

Procedure, Documents and Evidence Heard

6. I was presented with a file of 150 pages (the "Bundle"), along with a separate case law bundle of 95 pages. References in these Reasons to page numbers are to the relevant page in the Bundle.

7. At the start of the hearing it became apparent that the claimant had contacted the Tribunal the previous week, asking for advice on what he needed to do to prepare for the hearing. The claimant also explained that he had not actually fully read and digested fully the second respondent's Grounds of Resistance to the claim, as he said that he had left the matter in the hands of Redundancy Claims UK and had therefore only skimmed it.

8. Although I considered that the claimant could and should have taken steps to ensure that he had read all relevant documentation before the hearing, in the circumstances I decided that it was in the interests of justice to allow the claimant a short adjournment of just under half an hour in order to read through and digest those Grounds of Resistance, particularly given that the subject matter of them was legalistic in nature and the claimant would be significantly prejudiced if he did not have an understanding of the matters that the second respondent was raising. It was due to this adjournment that insufficient time was available for me to deliver oral judgment at the hearing, so I explained that I would provide my decision by way of this Reserved Judgment.

9. After the adjournment, and once the issues were clarified, the claimant gave oral evidence on this own behalf. He had no witness statement but we agreed to use the contents of his claim form and some neutral questioning from myself in order to extract his evidence in chief. The second respondent did not object to this. The second respondent did not call any evidence. Both parties also provided oral submissions, following a short break after evidence had been completed.

10. The parties also agreed by consent to amend the name of the second respondent to Secretary of State for Business and Trade.

Facts

11. The claimant was the sole director and shareholder of the first respondent, which was incorporated on 5 October 2012. It appears that the company structure was set up based on the advice of his accountant. The first respondent was an engineering company that provided support to third party companies that it contracted with from time to time.

12. The structure was that third party companies would instruct the first respondent to carry out services and the first respondent would use the claimant to carry out those services. There was a separate contract between the first respondent and each third party company. He was the only "employee" of the first respondent and carried out all of the services himself, and this was reflected in the contracts between the third party company and the first respondent. He would carry out one project for a third party for a defined period of time (up to 2 years) on a full time basis (although the exact number of hours per week varied slightly from project to project, as determined by the third party company), then move onto another, and so on. In the final period before the first respondent ceased trading there were multiple third party contracts running in parallel however it would still be the claimant who would provide those services. It was the claimant who had set up the first respondent and decided to offer services in this way to third party companies.

13. The first respondent used an accountant to advise on tax matters, and that accountant advised him:

    a. To set himself up as an "employee"
    b. What wages to pay himself
    c. What dividend to pay himself

14. I find that, generally, the claimant simply did as suggested by the accountant without investigating the reason why or questioning it, he trusted his accountant to tell him what to do.

15. Although his accountant suggested setting himself up as an employee, and the claimant refers to himself as an "employee", there was no written employment contract and there is no mention in any company documentation of the claimant having been hired as an employee. Although I recognise that a contract of employment can be verbally agreed and does not have to be in writing, it is of

note that there is simply no documentation which suggests an employment relationship at all or which refers to it.

16. The claimant was paid a wage, the amount of which was recommended by his accountant. His accountant reviewed his wages yearly and it was clear that the claimant did not have a great deal of insight into how the figure was calculated or how much it was (he estimated around £700 per month). The rate of pay was set considerably below the rate of National Minimum Wage given that he also says that he worked on a full time basis and it appears that the rate was determined to maximise the tax advantages of the arrangement that had been set (i.e. the wage was below the threshold for income tax).

17. The claimant also claimed expenses from the first respondent which were paid to him monthly separate to his salary: this related to matters such as hotel costs and travel costs which were itemised. In addition he was paid dividends by the first respondent on an annual basis.

18. In relation to holiday, the claimant says that he was entitled to holiday as an employee of the first respondent and that he would give notice to the third party companies of the dates he planned to take. There was nothing in writing confirming any holiday allowance.

19. The first respondent entered into financial difficulties during the Covid-19 pandemic and eventually entered liquidation, following which the claimant was advised to close the company (which has since happened). The company ceased trading from 30 September 2021 and this is the date that the claimant says that his employment ended. There was, however, no dismissal letter or other formal notice of termination of employment (or anything at all referencing the termination of his employment) in the file for hearing.

20. On 25 January 2022 the claimant gave authority to Redundancy Claims Uk to conduct his redundancy claim on his behalf (page 72).

21. On 13 February 2022 the claimant sent himself an email seeking payment of redundancy pay (page 73). This email was from his email address to his own email address and simply said "*Hi, I intend to make a claim for redundancy. Regards Dave Nokes*."

22. On 18 July 2022 the claimant's claim for redundancy and insolvency payments was submitted to the Insolvency Service (page 74). This identified a rate of pay of £8.91. I find that this was not the correct rate of pay but was simply national minimum wage. Likewise, it said that he worked 45 hours per week however I find that the exact weekly hours varied according to each third party he provided services to. His actual pay was £8,040 in the tax year ending 4 April 2017, £8,163.96 in the tax year ending 5 April 2018, £8424 in the tax year ending 5 April 2019, £8631.96 in the tax year ending 5 April 2020, £8787.96 in the tax year ending 5 April 2021 and £2209 for the part of the tax year ending 5 April 2021 that he performed services. This is substantially below a rate of £8.91 per hour based on the hours he says he worked.

23. Within the file was a document dated 10 August 2022 which was a questionnaire completed by Redundancy Claims UK based on information provided by the claimant to them by telephone (page 85). Unfortunately some of the answers in that questionnaire appeared to cross reference to other questions incorrectly and therefore it was difficult to determine the answers that the claimant had intended to give.

24. I would note that some of the financial details included by Redundancy Claim UK do not appear to be correct. For example, his claim appears to be based on an assumption that he is entitled to National Minimum Wage, despite the claimant's actual wage being far lower than that (page 108).

25. The claimant's claim for payment from the National Insurance Fund was ultimately rejected by the second respondent on 5 September 2022 (page 96) on the basis that it did not consider him to be an employee, and therefore the claimant has filed this Tribunal claim. Again, the claimant had no real involvement in any of this and left the matter to Redundancy Claim UK – for example, he was unable to tell us how the figures in his claim had been calculated.

26. As to why the claimant did not file his claim form until 1 December 2022, the claimant was not really able to explain that save to say that he left everything to the redundancy claims company, who advised him that he needed to send the email to himself on 13 February 2022 which would make his claim in time.

Law

27. Section 230 of the Employment Rights Act 1996 ("ERA") defines an employee as:

> *(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.*

This definition is replicated in section 54 of the National Minimum Wage Act 1988.

28. Section 164 of the ERA provides that:

> *(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date –*
> *a. The payment has been agreed and paid,*
> *b. The employee has made a claim for the payment by notice in writing given to the employer,*
> *c. A question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal, or*
> *d. A complaint relating to his dismissal has been presented by the employee under section 111.*

(2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee –

a. Makes a claim for the payment by notice in writing given to the employer,

b. Refers to an employment tribunal a question as to his right to, or the amount of, the payment, or

c. Presents a complaint relating to his dismissal under section 111.

29. Section 23 of the ERA provides that:

(1) A worker may present a complaint to an employment tribunal –

a. That his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2),

b. ….

c. ….

d. ….

(2) 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. ….

(3) Where a complaint is brought under this section in respect of –

a. A series of deductions or payments, or

b. ….

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) 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 period as the tribunal considers reasonable.

30. Section 182 of the ERA addresses the position in an insolvency situation, as follows:

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.

31. It is possible for a director / shareholder to also be an employee of a company under a contract of employment (**Fleming v SOS [1997] IRLR 682**). This is ultimately a question of fact and, where disputed, it is for the person alleging to be an employee to show this (**Secretary of State v Neufeld and Howe [2009] EWCA Civ 280**). A director of a company is ordinarily not an employee and therefore evidence is required to establish that they were (**Eaton v Robert Eaton Ltd & SOS [1988] IRLR 83**. Whether there is an express contract, board minutes or written memorandum documenting the employment of the individual and whether the individual is under the control of a board of directors will be relevant.

32. In **Clark v Clark Construction Limited [2008] IRLR 364,** it was held that: "*They did refer in terms of the fact that the arrangement was made with the involvement of the accountants. In truth, it makes little difference whether the accountant was the originator of the arrangement or was implementing a proposal that came from the claimant himself. Indeed, if anything the fact that it was the accountant's idea may lend support to the conclusion that from the claimant's point of view it was a contract in form but not substance*."

33. For a contract of employment to exist, there must be consideration, but this can be notional (**State v Knight [2013] UKEAT/0073/13/RN**).

34. The terms of a contract of employment can be agreed in writing or vebally, and may be express of implied. The contract of employment must not however be a sham in order for the individual to have employee status. In **Autoclenz Ltd v Belcher [2011] ICR 1157 SC**, the Supreme Court stated 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."

35. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD**, Mr Justice Mackenna said:

    "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.

36. This has been distilled down into three key elements:

    a. Mutuality of obligation: obligation on the employer to provide work, and on the employee to accept it
    b. Control: the employer has sufficient degree of control over the employee; and

c. Personal service: the employee must be required to perform the work personally (sometimes with some limited powers of derogation).

Conclusions

37. The first question is whether the claimant was an employee of the first respondent, as it is only if that is the case that the second respondent can be liable for any of the claimant's claim.

38. I recognise that it is entirely possible to be a sole director and shareholder, and also an employee, if the facts support that conclusion. However, here they do not, for the following reasons:

    a. The claimant had no written documentation whatsoever, whether by way of contract of employment or otherwise, containing any terms and conditions of employment or other suggestion that he was an employee of the first respondent. The only documentation he could point to was payslips.

    b. There are no articles of association or board meeting minutes or other documentation of the first respondent referring to employing the claimant as an employee. There was no board of directors.

    c. The claimant was not paid national minimum wage. Whilst this is not determinative in itself as some employers do fail to pay the national minimum wage to their employees, in this case I conclude it is because the arrangement was always purely for tax reasons and in reality the claimant did not consider himself an employee of the first respondent, nor did the first respondent consider itself the claimant's employer.

    d. The claimant had no involvement in determining any matters relating to his employment and relied on what his accountant told him to do.

    e. There was no specific agreement (written or verbal) between the claimant and first respondent regarding holidays.

    f. There was no documentation regarding the termination of the claimant's "employment".

39. In these circumstances I conclude that there was no mutuality of obligation. In reality the first respondent was not obliged to provide the claimant with work and in reality it was in fact down to the claimant to source any third party contracts. It was in reality the claimant on his own account deciding as to whether to accept those contracts.

40. In addition, I conclude that there was no control exercised by the first respondent over the claimant. In reality the control, if any, was exercised by the third party company directly over the claimant, and by the claimant over the first respondent. He was the key decision maker on his own account. He was, as the second respondent has submitted "*in charge of his own destiny"* and was not "*subject to or subordinate to anybody else"*.

41. I do conclude that there was personal service in that the third party contracts were for the claimant specifically to provide the services via the first respondent, however that alone is not sufficient to constitute an employment relationship.

42. I also conclude that the "employment" relationship was specifically designed for tax purposes, and the lack of any documentation to back that up indicates that this was an arrangement in words only, and not in reality.

43. I therefore conclude, taking all of the above into account that the claimant was not an employee of the first respondent and therefore his claims failed. Having decided that, it is not necessary to consider the matter of time limits.

44. As the claimant was not an employee, the claimant's claims against the second respondent are dismissed. In relation to the first respondent, that respondent has now been dissolved and no application has been made to restore it to the register (nor based on what the claimant said do I expect such an application to be made). In that circumstance the claim cannot proceed against the first respondent either. The claimant's claims are dismissed.

Employment Judge Edmonds

Date: 7 May 2024