



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms N Bale

**Respondent:** Secretary of State for Business and Trade

**Heard at:** By CVP at Midlands West Employment Tribunal

**On:** 25 April 2024 at 10am

**Before:** Employment Judge Platt

## **Representation**

Claimant: in person

Respondent: Ms Ware

## **JUDGMENT**

The claimant was not an employee of Ginger the Art of Print Limited for the purposes of section 230 of the Employment Rights Act 1996.

## **REASONS**

### **Procedure**

1. The hearing took place by CVP.
2. The claimant gave evidence and called Miss Bower to give evidence on her behalf. Miss Bower did not have a written witness statement but both parties consented to her giving evidence without a statement. Both were cross examined by the Respondent.
3. There were two bundles. One which had been prepared by the Respondent comprising 118 pages and a bundle containing the claimant's witness statement and attachments referred to within it. Both were considered by the Tribunal.
4. Both parties gave short submissions to the Tribunal.

### **Issues**

5. The claimant was claiming a statutory redundancy payment from the Redundancy Payments Office after the liquidation of her company Ginger the Art of Print Limited (the "company"). In order to be entitled to a statutory redundancy payment the claimant must have been employed by the company. The Respondent's position is that she was not an employee of the company.

## Findings of fact

6. The company was incorporated on 3 September 2010. The claimant was the sole director at the time of liquidation (Michael Cunnane had also been a director but had resigned on 7 April 2023). The claimant had been the sole shareholder of the company for many years. The company appointed a liquidator on 13 July 2023.
7. The claimant made a claim to the Insolvency Service for a statutory redundancy payment on 4 August 2023 and filled in the relevant questionnaire to do so.
8. The claimant did not have a contract of employment when she first started the company. Her evidence was that she was issued with a contract of employment some years later having been advised to do so (although her claim to the Insolvency Service stated that she did not have one). The document had been backdated and the claimant confirmed that it had not been issued at the time the company was incorporated. The contract of employment referred to the claimant having attended an interview and subsequently being offered the role which the claimant stated was incorrect.
9. The contract of employment referred to a rate of pay of £11 per hour which on the claimant's evidence did not reflect the pay arrangements for the claimant. Based on the evidence put before the Tribunal in recent years (at the least) she had never received the amount that was set out in the contract of employment (which would have amounted to a salary of £21,000). The claimant accepted this. The claimant accepted that the contract of employment did not reflect the reality in a number of respects, for example she did not work the number of hours set out in the contract often working well in excess of these hours.
10. The claimant's evidence was that she essentially paid herself what the business could afford. The payslips issued in the months immediately prior to the liquidation showed an amount of £1,047.50 but this did not reflect what was actually paid to the claimant. The claimant decided to pay herself less. The claimant's earnings varied significantly as she always ensured that others in the business could be paid properly in accordance with their terms. The evidence of Miss Bower was that arrangements were put in place to ensure that the claimant got paid in the most tax efficient way in line with the permitted tax allowances and anything in excess could be paid as dividends. In recent years the claimant did not pay herself any dividends due to difficulties the business faced following the pandemic. If the claimant did not have enough money to pay herself she could credit her salary to the director's loan account.
11. During the last three years the claimant's P60s showed that her gross earnings were £11,447.50 in 2023, £10,183.67 in 2022 and £16,999.90 in 2021. The claimant therefore received less than the National Minimum Wage during these years.
12. Mr Cunnane had been a director but he never put any money into the business and was always paid in accordance with his terms of employment. The claimant had borrowed money to put into the business. Mr Cunnane had never done so.

13. The claimant's evidence was that she did not take holidays or sick pay. The company employed two other members of staff. The claimant's evidence was that they were paid in accordance with the terms of their contracts of employment (and their salaries did not vary). They were permitted to take holidays and were paid sick pay.
14. The Tribunal accepted the evidence of the claimant and Miss Bower. The claimant accepted that there were a number of inaccuracies in the claim form she submitted to the Insolvency Service and her evidence. At the time the respondent filed its response to the claim it had no knowledge of the existence of a written contract of employment.
15. Based on the claimant's evidence the Tribunal finds that the claimant was in control of the business: she made all the decisions, no-one supervised her and she treated herself differently to the other members of staff. It was her business and she was dedicated to it. It is clear that the claimant worked very hard and was devoted to the business.

## Law

16. Section 230 of the Employment Rights Act 1996 sets out the following:

### ***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.*

*(3) In this Act worker (except in the phrases shop worker and betting worker ) means an individual who has entered into or works under (or, where the employment has ceased, worked under)*

*a) a contract of employment, or*

*b) any other contract, whether express or implied and (if it is express) whether oral or in writing , whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker's contract shall be construed accordingly.*

17. Whether or not an individual has employment status has been the subject of a significant volume of case law. The respondent referred to a number of relevant authorities: *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC, *Secretary of State v Neufeld and Howe* [2009] EWCA Civ 280, *Secretary of State v Knight* [2013] UKEAT/0073/13/RN, *Nethermere (St Neots) Ltd v Gardiner* [1984] I.C.R 612; *Eaton v Robert Eaton Ltd & SOS* IRLR 83 [1988]; *Fleming v SOS* [1997] IRLR 682. In essence the irreducible minimum without which there can be no contract

of employment comprises: mutuality of obligation; control; and personal service following *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC.

18. The respondent referred to case law specifically relating to the issue of the employment status of director/shareholders including *Rainforest v Dorset Aquatics Ltd* EA-2020-000123-BA, UKEAT/0126/20/BA; *Dugdale v DDE Law Limited* UKEAT/0169/16/LA; *Rajah v Secretary of State – EAT/125/95*. The authorities are clear that there is no reason in principle why a director and shareholder cannot also be an employee under a contract of employment. In *Secretary of State for Trade and Industry v Bottrill* 1999 ICR 592, CA, it was noted that being a controlling shareholding did not necessarily mean having day-to-day control over the company.
19. Following the decision in *Secretary of State v Neufeld and Howe* [2009] EWCA Civ 280 whether or not a shareholder/director is an employee of the company is ultimately a question of fact. Relevant considerations include whether there exists a genuine contract of employment and whether the contract of employment is a sham. The court stated that the fact that a controlling shareholder/director does not draw her own salary could point against the existence of a contract if remuneration had been irregular.
20. *Rajah v Secretary of State* EAT/125/95, the EAT ruled that 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 years ago, five years or ten years previously.

## **Conclusions**

21. Applying the principles set out in *Secretary of State v Neufeld and Howe* [2009] EWCA Civ 280 and other cases referred to, the Tribunal has reached the conclusions set out below.
22. The claimant was the sole director and sole shareholder of the company at the time of the liquidation. Her status as sole director and sole shareholder does not prohibit her having employment status. However, will form one of the factors that the Tribunal can take into account. The burden of proof is on the claimant to prove that she has employment status and that burden is significant where the claimant is the sole director and shareholder.
23. The respondent defended the claim originally on the basis that the claimant did not have a written contract of employment based on the details submitted to the Insolvency Service. The claimant later identified and sought to rely on a written contract of employment which was before the Tribunal. However, the claimant's evidence was clear that this written contract did not in fact reflect the reality of the arrangements between her and the company.
24. The claimant was not paid in accordance with its terms: she was not paid at the rate of pay set out and her rate of pay varied; she was not paid the National Minimum Wage; the arrangements for the claimant's pay were intended to be

tax efficient; she did not take holidays or sick pay. The Tribunal concluded that the claimant did not turn her mind to the content of the written contract and it did not reflect the terms on which she operated. Significantly others in the business did have a contract of employment which reflected key terms which applied to them, for example in relation to pay, holidays and sick pay.

25. The Tribunal concludes that written contract of employment did not reflect the terms which applied to the claimant and was, in effect, a sham. It therefore does not assist the Tribunal in determining the claimant's status.
26. The respondent contends that the basic elements of the employment relationship were not present, in particular the element of control: the claimant was in charge of her own destiny and was not subject to or subordinate to anybody else. The Tribunal is in agreement with this assessment. The control of the company was entirely with the claimant and she worked many hours in order to ensure the success of the business. Her rate of pay varied depending on what she decided the business could afford and for a number of years did not meet the requirements of the National Minimum Wage. The claimant did not operate in the same way as the other staff employed by the business, most significantly Mr Cunnane. The burden of proof is on the claimant to show that she had employment status and she has not done so. The factors before the Tribunal all point away from employment status at the time that the company became insolvent.
27. The Tribunal finds that the claimant was not an employee and therefore she is not eligible for a statutory redundancy payment.

Employment Judge Platt

Date 17 May 2024