EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		**Respondent**
(1) Mr N Harris	**AND**	**(1) Barnes Dry Lining Limited (in Liquidation)**
(2) Mr C Barnes		**(2) The Secretary of State for Business and Trade**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video ON 23 February 2024

EMPLOYMENT JUDGE Bax

Representation

For the Claimants: **Ms A Kendrick (lay representative)**
For the First Respondent: **Did not attend**
For the Second Respondent: **Mr P Soni (lay representative)**

JUDGMENT

1. The First Claimant's claims against the First Respondent are dismissed upon their withdrawal.

2. The Second Claimant's claims against the First Respondent are dismissed upon their withdrawal.

3. The First Claimant's claims against the Second Respondent are dismissed, it being found that he was not an employee of the First Respondent.

4. The Second Claimant's claims against the Second Respondent are dismissed, it being found that he was not an employee of the First Respondent.

REASONS

1. In this case the Claimants, brought monetary claims of unpaid wages, accrued but unpaid holiday, breach of contract in relation to notice and for redundancy payments against their former company and the Secretary State, under sections 166 and 182 of the Employment Rights Act 1996.

2. The Claimants had notified ACAS of the dispute with the Secretary of state on 6 October 2023 and the certificates were issued on 9 October 2023. The claims were presented on 10 and 11 August 2023, respectively.

3. At the start of the hearing the issues were discussed. It was confirmed by the Claimants that they were no longer pursuing their claims against the Company on the basis that there were no funds and those claims were withdrawn.

4. It was agreed with the parties that, as a preliminary issue, it would be determined whether or not the Claimants were employees of the Company, on the basis that if they were not the Secretary of State had no liability to them.

The evidence

5. I heard from both Claimants and I was provided with a bundle of documents.

The facts

6. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

7. The First Respondent business was originally operated by Mr R Barnes and Mrs P Barnes as directors. Mrs P Barnes ceased being a director on 24 April 2008 and Mr R Barnes ceased being a director on 20 December 2009, when he retired.

Mr Harris

8. Mr Harris started working for the First Respondent on 6 February 2000 as an accounts manager. On 15 January 2005, he signed a contract of employment, under which he was to be paid at the rate of £15.86 per hour.

9. His role at the start of the relationship included: (1) developing and maintaining relationships with suppliers and negotiating with them, (2)

evaluating and selecting chosen suppliers, (3) placing orders with suppliers for materials, (4) preparing a final accounts of works, (5) credit control and banking, (6) administering employee PAYE and VAT returns, and (7) maintaining ledgers and profit and management account reporting. He worked 36 hours a week.

10. On 18 August 2006, Mr Harris became a director of the First Respondent.

11. Mr Harris acquired a 50% shareholding in the First Respondent, when Mr R Barnes retired and ceased to be a director. No new contract was issued. Mr Harris carried on undertaking the Accounts Manager role.

12. Until the financial year 2009 to 2010, Mr Harris was paid via PAYE. His annual pay from 2003 was always in excess of £30,000, on which he paid tax and national insurance.

13. In 2010 to 2011 his earnings reduced to £4,980 on which he paid £98.20 tax and no national insurance. In the following two years he paid approximately £450 a year in tax and no national insurance. For the tax years 2013 to 2014 until 2019 to 2020, he was paid £6,180 per year and did not pay tax or national insurance contributions. In 2020 to 2021 he was paid £7,080 and paid no tax or national insurance. In 2021 to 2022 he was paid £7,380 and paid no tax or national insurance contributions. In the years in which no tax or national insurance was paid the Claimant was being paid less than the minimum wage. Any dividend received was due to his shareholder status and not due to any status as an employee. During these years Mr Harris was paid significantly less than the rate of pay in the 2005 contract. He and Mr Barnes decided to be paid in this way following a recommendation from the company accountant.

14. The Directors Questionnaire detailed that in 2020 to 2021 he received a dividend of £30,200. In 2021 to 2022 he received a dividend of £2,600 and in 2022 to 2023 he received no dividend.

15. In the year 2022 to 2023, Mr Harris was paid £38,340.68 and paid £5,425.80 tax and £3,364.88 in national insurance contributions by way of PAYE. The plans for the business had changed and they decided to adapt their salaries. There was no change in how he had worked before 2022.

16. In relation to who provided instructions to undertake work or controlled his work, Mr Harris said in his directors questionnaire that he was supported by his co-director/shareholder and by his accountant. In his witness statement he said he was subject to control by main contractors to ensure his duties were completed to fixed deadlines. Sales applications had to be agreed by the client's site team. He was supervised by the company accountants on

technical matters. Further from 2000 to 2009 he was controlled and monitored by Mr R Barnes.

17. Mr Harris discussed any holiday plans with Mr Barnes and they agreed when each other could take time off.

18. Mr Harris said that if he committed an act of misconduct, he could be disciplined by Mr Barnes. I did not accept that there was in a reality an effective disciplinary process for Mr Harris, on the basis that both men had 50% shareholdings and neither could outvote the other.

Mr Barnes

19. Mr Barnes started working for his father on 2 April 1997, when his father ran the business as a sole trader. The business was subsequently incorporated. In January 2005, Mr Barnes signed a contract of employment under which he was to be paid £126.88 per day.

20. Mr Barnes' role was initially as an estimator and quantity surveyor. His duties involved: (1) looking for upcoming developments and applying to be added to architect and main-contractor tender lists, (2) measuring working drawings and formulating tenders, (3) recruiting labour, (4) day to day organising of labour and materials, (5) signing off works undertaken by sub-contractors, (6) attending on site weekly trade meetings, and (7) chasing overdue payments. He worked 35 hours a week.

21. On 18 August 2006, Mr Barnes became a director of the First Respondent.

22. He became a 50% shareholder in the company on the retirement of his father in 2009. No new contract was issued. He continued undertaking his estimator/quantity surveyor role.

23. From the financial year 2003 to 2004 until the financial year 2009 to 2010 Mr Barnes was paid in excess of £31,000 per year. He paid tax and national insurance on those sums by way of PAYE. In the financial year 2010 to 2011 he was paid £4,980 and paid £62.20 tax and no national insurance. From the year 2012 to 2013, until the tax year ending on 5 April 2020, he was paid £6,180 and paid no tax or national insurance on those sums. In the year 2020 to 2021 he was paid £6,977 on which he did not pay tax or national insurance. In the year 2021 to 2022 he was paid £7,380 on which he did not pay tax or national insurance. In the years in which no tax or national insurance was paid the Claimant was being paid less than the minimum wage. Any dividend received was due to his shareholder status and not due to any status as an employee. During these years Mr Barnes was paid significantly less than the rate of pay in the 2005 contract. He and

Mr Harris decided to be paid in this way following a recommendation from the company accountant.

24. The directors questionnaire detailed that in 2020 to 2021 he received a dividend of £34,500. In 2021 to 2022 he received a dividend of £3,030 and in 2022 to 2023 he received no dividend.

25. In the financial year 2022 to 2023 he was paid £46,835 on which he paid £8,100.09 tax and £4,446.30 in national insurance. The plans for the business had changed and they decided to adapt their salaries. There was no change in how he had worked before 2022.

26. In relation to who provided instructions to undertake work or controlled his work, Mr Harris said in his directors questionnaire that he was supported by his co-director/shareholder and by his accountant. In his witness statement he said he was subject to supervision by main contractors and site managers on behalf of the clients involved in the projects and he was guided by Mr Harris on their financial status.

27. Mr Barnes discussed any holiday plans with Mr Harris and they agreed when each other could take time off.

28. Mr Barnes said that if he committed an act of misconduct he could be disciplined by Mr Harris. I did not accept that there was in a reality an effective disciplinary process for Mr Barnes on the basis that both men had 50% shareholdings and neither could outvote the other.

The law

29. Section 166 of the Employment Rights Act 1996 ("ERA") provides

> 166Applications for payments.
> (1)Where an employee claims that his employer is liable to pay to him an employer's payment and either—
> (a)that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or
> (b)that the employer is insolvent and the whole or part of the payment remains unpaid,
> the employee may apply to the Secretary of State for a payment under this section.
> (2)In this Part "employer's payment", in relation to an employee, means—
> (a)a redundancy payment which his employer is liable to pay to him under this Part,

(aa)a payment which his employer is liable to make to him under an agreement to refrain from instituting or continuing proceedings for a contravention or alleged contravention of section 135 which has effect by virtue of section 203(2)(e) or (f), or
(b)a payment which his employer is, under an agreement in respect of which an order is in force under section 157, liable to make to him on the termination of his contract of employment.

…

30. S. 182 of the ERA provides:

182Employee's rights on insolvency of employer.
If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—
(a)the employee's employer has become insolvent,
(b)the employee's employment has been terminated, and
(c)on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,
the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

31. Section 184 of the ERA applies section 182 to arrears of pay; accrued holiday pay and statutory notice pay (but subject to maximum amounts).

32. For the secretary of state to be liable the Claimants must be employees.

33. S. 230 of the Employment Rights Act 1996 provides

"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) …
(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
(5) In this Act "employment"—
(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
(b) in relation to a worker, means employment under his contract;
and "employed" shall be construed accordingly."

Employment status

34. The purpose of this definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand, and self-employed individuals, or independent contractors, on the other; between those working under a "contract of service" and those working under a "contract for services"; between those who are paid to do the job and those who are paid to get the job done. However, the statute does not set down the circumstances in which an individual may be said to work under a contract of employment.

35. In the absence of any comprehensive definition of a contract of employment, courts and tribunals have developed a number of tests over the years aimed at helping them identify such a contract. It is now accepted that no single factor will be determinative of employee status and a number of factors must be looked at.

36. There are three essential elements which must be present in every contract of employment. They are frequently referred to as the 'irreducible core' without which a contract cannot be regarded as a contract of service, taken from MacKenna's judgment in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD. They are as follows;
    a. There must have been an obligation for the Claimant to have provided the work personally;
    b. There must have been mutuality of obligation;
    c. The Claimant must have been expressly or impliedly subjected to the control of the Respondent.

Personal service

37. With regards to the first element, even if the contract contained a limited power to delegate, there may still have been the obligation present for the employee to have provided work personally, but where there was a clear express contractual term which did not impose personal obligations, that would ordinarily militate against an employment relationship unless it was a sham or had been varied (Staffordshire Sentinel-v-Potter [2004] IRLR 752).

Mutuality of obligation

38. With regards to the second element, an employer and an employee must have been under legal obligations to one another during the entire contractual period under focus. Ordinarily, the obligations will have been upon the employee to undertake work when required/asked and upon the employer to have paid for it. Casual workers ordinarily fall outside of the ambit of this principle (Carmichael-v-National Power [2000] IRLR 43).

Control

39. Finally, the employer must have had a sufficient degree of control, in terms of the general sense of authority exercised over an employee, for such a relationship to have existed. 'Control' in this sense was not to have been equated to the undertaking of work under close supervision. The source of the necessity for control derived from the well-known judgement of McKenna J in *Ready Mixed Concrete-v-Minister of Pensions* [1968] 2 QB 497 at 514 but what constituted sufficient control would vary in every case.

40. If the three essential elements were present, the relationship *can* have been one of employment, but it was also necessary to consider all of the other surrounding circumstances to finally determine its true nature. Those circumstances can include the degree of personal financial risk, the extent to which the individual provided his/her own equipment, whether the claimant was paid holiday and/or sick pay and whether he/she paid their own tax and national insurance or whether that was achieved through PAYE. There were many different factors that *could* have been relevant.

41. It was also important to remember that a situation could change over time. As Lord Clarke said in Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA paragraph 30; "*The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by*". A tribunal often has to look beyond the contract at the wider context in which it sat.

Directors and Shareholders

42. The position of shareholders and/or directors has been considered in a number of cases. The traditional view, which has been reinforced more recently, was that controlling shareholders were not under the control of the employer because they could block any attempt to dismiss. A director's level of control over the business undertaking generally led to a similar conclusion (see Buchan-v-Secretary of State for Employment [1997] IRLR 80 EAT in which the Claimant was the managing director and a 50% shareholder, but was not deemed to have been an employee).

43. In Neufeld v Secretary of State for Business Enterprise and Regulatory Reform [2009] IRLR 475, the Court of Appeal held that there was no reason in principle why someone who is a shareholder and director of company cannot also be an employee under a contract of employment, not that by virtue of the shareholding giving them control of it that they cannot be an employee. It was held:
    a. Whether or not a shareholder/director is an employee is a question of fact. There are in theory 2 issues: whether the putative contract is

genuine or a sham and secondly, where genuine, that it is a contract of employment. (para 81)

b. In cases involving a sham, the task is to decide whether such document amounts to a sham. This will usually require not just an investigation into the circumstances of the creation of the document, but also the parties purported conduct under it. The fact that the putative employee has control over the company and the board, and was instrumental in the creation of it will be a relevant matter in the consideration of whether or not it was a sham (para 82).
c. "An inquiry into what the parties have done under the purported contract may show a variety of things: (i) that they did not act in accordance with the purported contract at all, which would support the conclusion that it was a sham; or (ii) that they did act in accordance with it, which will support the opposite conclusion; or (iii) that although they acted in a way consistent with a genuine service contract arrangement, what they have done suggests the making of a variation of the terms of the original purported contract; or (iv) that there came a point when the parties ceased to conduct themselves in a way consistent with the purported contract or any variation of it, which may invite the conclusion that, although the contract was originally a genuine one, it has been impliedly discharged. There may obviously also be different outcomes of any investigation into how the parties have conducted themselves under the purported contract. It will be a question of fact as to what conclusions are to be drawn from such investigation." (para 83)
d. "In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In *Lee*'s case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually *doing,* it will also be relevant to

consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee." (para 85)

e. "We have referred in the previous paragraph to matters which will typically be directly relevant to the inquiry whether or not (there being no question of a sham) the claimed contract amounts to a contract of employment. What we have *not* included as a relevant consideration for the purposes of that inquiry is the fact that the putative employee's shareholding in the company gave him control of the company, even total control. The fact of his control will obviously form a part of the backdrop against which the assessment will be made of what has been done under the putative written or oral employment contract that is being asserted. But it will not ordinarily be of any special relevance in deciding whether or not he has a valid such contract. Nor will the fact that he will have share capital invested in the company; or that he may have made loans to it; or that he has personally guaranteed its obligations; or that his personal investment in the company will stand to prosper in line with the company's prosperity; or that he has done any of the other things that the 'owner' of a business will commonly do on its behalf. These considerations are usual features of the sort of companies giving rise to the type of issue with which these appeals are concerned but they will ordinarily be irrelevant to whether or not a valid contract of employment has been created and so they can and should be ignored. They show an 'owner' acting qua 'owner', which is inevitable in such a company. However, they do not show that the 'owner' cannot also be an employee." (para 86)

44. In Eaton v Robert Eaton Ltd v Secretary of State for Employment [1988] IRLR 83, it was ruled that normally a director of a company is normally a holder of an office and not an employee. Therefore evidence is required to establish that the director was in fact employed.

45. In Fleming v Secretary of State for Trade and Industry [1997] IRLR 682, the Court of Session held that whether or not a person is an employee is a question of fact. The fact that a person is a majority shareholder is always a relevant factor and may be decisive. However the significance of the factor will depend on the circumstances and it would not be proper to lay down any hard and fast rule. In that case the Claimant was not found to have been an employee because, amongst other things, he had personally guaranteed loans, had no written contract and had decided not to draw a salary in the hope of saving the business).

46. In Secretary of State for Trade and Industry-v-Bottrill [1999] ICR 592, CA, (as applied in Sellars Arenascene Ltd-v-Connolly [2001] ICR 760, CA) Lord

Woolf MR suggested that Tribunal's should consider the following questions;

(a) Was there a genuine contract between the business and the shareholder? One which was not a sham?;

(b) If so, did the contract actually create an employment relationship? Of the various factors which had to be considered, the degree of control is important. It was not just a case of looking at who had the controlling shareholding. A Tribunal had to consider where the real control lay; what role did any other directors/shareholders actually take?

47. In Clark-v-Clark Construction Initiatives Ltd [2008] ICR 635, EAT, the list was broadened to include some of the further following factors; Whether the individual was an entrepreneur and/or had built the company up and/or would profit from its success. It was also held that there were three sets of circumstances where it may be legitimate to not give effect to what is alleged to be a binding contract of employment: (1) where the company is a sham, (2) where the contract is entered into for some ulterior purpose, such as to secure some statutory payment from the secretary of state, and (3) the parties had not conducted their relationship in accordance with the contract.

48. In Rajah v Secretary of State for Employment EAT/125/95, it was held that the relevant date for the purposes of who the secretary of state is liable to make payments out of the National Insurance fund is the date when the company became insolvent and not the position it was two, five or ten years previously.

The substantive claims

49. The claimants brought claims in respect of unlawful deductions from wages contrary to section 13 of the Employment Rights Act 1996, accrued but untaken holiday pay under regulations 13, 13A and 14 of the Working Time Regulations 1998, redundancy payments under s. 135 of the Employment Rights Act 1996 and for notice pay under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Conclusions on the employment status of Mr Harris and Mr Barnes

50. I have set out relevant the relevant considerations for both Claimant's individually, where they are different, however the significant issues in relation to the remuneration and control are the same and applied equally to both Claimants.

51. The relevant time of determining employment status is the date of insolvency/termination of the relationship. It is relevant that the situation could change over time. Further I also recognised that a director and/or shareholder can also be an employee.

52. When Mr Harris started working for the company, he was not a director or a shareholder. He was paid a salary and tax and national insurance was deducted by way of PAYE. He performed the role of Accounts Manager for the Respondent and was paid for that role. I was satisfied that when he started working for the First Respondent there was a mutuality of obligations. Further he was supervised and directed as to what he should do by Mr R Barnes and he had a written contract of employment and at that time he was an employee.

53. When Mr Harris became a director and shareholder he continued to undertake his 'accounts manager' work. When Mrs P and Mr R Barnes retired, he and Mr Barnes were the sole directors and the sole shareholders. I accepted he had to undertake his work personally. At that point they were the controlling mind of the company. No new contract of employment was issued, even though Mr Harris was a director. Mr Harris and Mr Barnes, as sole directors and shareholders, were able to run the company as they saw fit. They were paid minimal salary and dividends by the company.

54. Similarly in respect of Mr Barnes, when he initially started work he received a salary for the work he undertook as an estimator and quantity surveyor. I was satisfied that when he started work for the Company there was a mutuality of obligations. Further he was supervised and directed as to what he should do by the Respondent and he had a written contract of employment and at that time he was an employee.

55. When Mr Barnes became a director and shareholder he continued to undertake his 'estimator/quantity surveyor' work. When Mrs P and Mr R Barnes retired, he and Mr Harris were the sole directors and the sole shareholders. I accepted he had to undertake his work personally. At that point they were the controlling mind of the company. No new contract of employment was issued, even though Mr Barnes was a director. Mr Harris and Mr Barnes, as sole directors and shareholders, were able to run the company as they saw fit. They were paid minimal salary and dividends by the company.

56. The significant issues in this case were whether after they became shareholders, the Company had sufficient control over the activities of Mr Harris and Mr Barnes, and whether the other circumstances were consistent with employment so that it was a relationship of master and servant.

57. Mr Harris suggested that he was subject to the supervision of main contractors and sales applications had to be agreed by the client's site teams and he was advised by company accountants. None of those individuals were employees or officers of the company. They were individuals/entities with whom the company contracted to undertake work.

Mr Harris was not being supervised or was under the control of the Company when such supervision or instructions were given by those people, they not being part of the company.

58. Mr Harris said he was supported by Mr Barnes, however that was not the same thing as being supervised by him. What Mr Harris did and how he did it was determined by him and no other person. He was not instructed or supervised in what he had to do by Mr Barnes.

59. Mr Barnes made the same point that he was subject to the supervision of main contractors and site managers. For the same reasons, those people were not part of the First Respondent Company and therefore the Company was not exercising control over his work by virtue of them. Similarly Mr Barnes determined what he did and how he did it, rather than being instructed or supervised by another person. He was not instructed or supervised in what he did by Mr Harris.

60. A significant factor was the pay arrangements for Mr Harris and Mr Barnes. From 2010 they were both paid a minimal amount via PAYE. From 2013 the amount both Claimants received was below the tax and national insurance threshold. They received dividends from the company by virtue of their status as shareholders. The Respondent made the powerful point in the response form that if the Claimants were working 35 or 36 hours per week they would have been earning less than the minimum wage. An employee cannot agree to be paid less than the minimum wage. The Claimants sought to explain this on the basis that they had been advised to be paid in this way for tax purposes. There was no other person, other than the two Claimants, who could agree or disagree to being paid less than the minimum wage. This was a significant change in the nature of the relationship between the Claimants and the company. The payment at a rate below the minimum wage in such circumstances was not consistent with an employer employee relationship.

61. Until the company started to experience financial difficulty the Claimants were paid significant dividends. Being paid a dividend was not due to any employment status but was due to being a shareholder.

62. In the last financial year the Claimants decided that they should be paid a salary rather than a dividend. The Company was in financial difficulty and was receiving advice from the accountants. This was something which they decided to pay themselves. It was notable that before that time the vast majority of remuneration had been by dividend. It is inconsistent with the master servant relationship for an employee to decide to forgo a dividend and be paid an increased salary instead.

63. The way in which Mr Harris and Mr Barnes undertook their work had not changed. What changed was a decision to pay themselves in excess of the minimum wage, whereas in the past they had decided to pay themselves under the minimum wage. This was inconsistent with an employer and employee relationship. The fact that the Claimants were able to alter their method of remuneration at will would not be something an employee could do. An employee would not be able to chop and change the method of remuneration and must be paid in accordance with the minimum wage.

64. It was also relevant that there was not in effect a person who could discipline either Claimant. Both were 50% shareholders and neither could outvote the other. Similarly in relation to organising leave, the Claimants would discuss plans with each other, which would be sensible business practice, but if there was a disagreement as to leave neither could outvote the other. This was something which tended to point away from an employer employee relationship with the Company.

65. I was not satisfied that the relationships between the Company and Mr Harris and Mr Barnes were ones where there was control by the company over what they did. They determined the work they would do and how to do it. They undertook the work because it was their business rather than being directed to do it by the business.

66. The remuneration arrangements were not consistent with an employer and employee relationship. For very many years both Claimants were paid at less than minimum wage, which was not reflective of the amount of work they said they had to do and strongly pointed away from there being a mutuality of obligations to do the work and be paid for it. Payment of salary with deductions for tax and national insurance might be consistent with employment, however the way in which they changed their remuneration for the final year and their ability to change it at will was not something which was consistent with the status of an employee.

67. In the circumstances I was not satisfied that either Claimant was expressly or impliedly subject to the control of the company. They were operating their own business, rather than being required to work and act in a particular way. Further the way in which they were paid and could change that method was not consistent with an employer employee relationship. Accordingly I was not satisfied that the relationships were that of employer and employee from 2010 onwards until the insolvency of the company.

68. Accordingly the Claimants were not employees at the relevant time and the claims against the Secretary of State are dismissed.

69. The Claimants confirmed that they no longer pursued their claims against the company and those claims were also dismissed.

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Employment Judge Bax
Dated 15 March 2024

Judgment sent to Parties on 02 April 2024

For the Employment Tribunal