



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Broadbent

**Respondents:** (1) The Secretary of State for Business, Energy and Industrial Strategy  
(2) House2Home Removals Ltd – in liquidation

**Heard via Cloud Video Platform (Watford) On:** 23 May 2023

**Before:** Employment Judge Davidson

## Representation

Claimant: in person  
First Respondent: Mr P Soni, representative  
Second Respondent: did not attend

# CORRECTED JUDGMENT

The tribunal finds that the claimant was an employee. Any entitlements arising on the termination of her employment which are owed by the first respondent are to be calculated by reference to the prevailing national minimum wage rate of £9.50 per hour. Her weekly pay is to be based on her contractual hours of 37.5 per week, making a week's pay £356.25.

# CORRECTED REASONS

## Issues

1. The issues for the hearing were as follows:

- 1.1. was the claimant an employee for the purposes of section 230 Employment Rights Act (which would give her the right to certain payments from the first respondent due to the liquidation of the second respondent)?
- 1.2. If the claimant was an employee and was entitled to such payments, what is the appropriate rate of pay to use for the calculation of her entitlement?

Evidence

2. The claimant gave evidence under oath and was cross examined by the first respondent's representative.
3. The tribunal had a bundle of documents which had been prepared by the first respondent.

Facts

4. I find the following facts based on the balance of probabilities.
5. The second respondent operated a business dealing in household removals. It was incorporated on 26 January 2006 by the claimant and her then partner, Richard Mackay, who were both directors and 50% shareholders. The company started trading in April 2006. At that time, the claimant was pregnant but she started working in the business after her maternity leave ended in October 2006.
6. She and her co-director had received advice that the most tax efficient way for them to deal with their remuneration was to be paid at the 'Directors' Optimum Level' as salary and, if the business was profitable, additional money could be paid as dividends. She was aware that she was not being paid national minimum wage but was prepared to forego this entitlement in order to build the business. Her annual pay at the time of the termination of her employment was £12,570.00.
7. Bank statements show that the claimant received her pay regularly each month, supported by payslips. She was paid under PAYE.
8. The second respondent had an HR manager and the employees of the business, including the claimant, were issued with employment contracts. The only employment contract before the tribunal was dated 26 April 2021 although the claimant told the tribunal that there had been earlier versions which she did not have to hand, as they went back over fifteen years.
9. The claimant was predominantly responsible for office based aspects of the business, reflected in her contractual hours which were normal office hours amounting to 37.5 hours per week. However, she would frequently work in the operational side of the business, for example if there were not enough staff members to cover a job.
10. In 2008, the claimant took another period of maternity leave and received statutory entitlements consistent with being an employee of the business, including Statutory Maternity Pay.
11. The claimant was entitled to statutory minimum holiday entitlement, although she often did not take her full entitlement in order to help build the business.

During the COVID pandemic, she was furloughed for a number of weeks and considered it would not be appropriate to take holiday in that year as she was needed in the business and had had time away on furlough.

12. During the business's successful times, the claimant and Richard Mackay took dividends from the profits.
13. During and after the pandemic, the business suffered and the staff, including the claimant, were dismissed with effect from 1 June 2022. The company went into liquidation on 14 July 2022.
14. The claimant had been paid up to the termination of her employment but had not received her statutory redundancy payment, notice pay or holiday pay from the second respondent. She took advice from a claims management company to assist her in bringing claims for these amounts against the first respondent.
15. At the time the company went into liquidation, the claimant's relationship with her partner was ending and she did not feel emotionally able to bring the claim without help. She was aware that the claims management company would take a percentage of what she was awarded and was happy with the arrangement.
16. The claims company assessed the claims at national minimum wage rates, rather than the claimant's actual pay rate and a claim for arrears of pay was included. The claimant confirmed she was not able to elaborate on the arrears of pay claim and agreed that it had not been her decision to claim at national minimum wage rates. She said that she did not want anything more than she was entitled to.
17. Since her employment with the second respondent was terminated, the claimant has found new employment but this did not begin until after the notice period would have expired.

*The law*

18. The respondent has provided a bundle of relevant authorities and set out the relevance of these in its grounds of resistance. The claimant relies on an employment tribunal case, which I explained to her is not a binding authority on me.
19. It is not in dispute that section 166 of the Employment Rights Act 1996 (ERA) provides that an employee can claim against the Secretary of State (first respondent) for payment of a redundancy payment where the employer is insolvent.
20. Further, section 182 ERA provides that the Secretary of State will pay to the employee of an insolvent company certain debts owed to the employee including holiday pay and notice pay.

21. These obligations are only owed by the Secretary of State to those who qualify as employees, as defined in section 230 ERA as an “*individual who ... worked under a contract of employment*”.
22. The test of whether an individual is an employee was set out in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2QB 97. This provided for three conditions to be fulfilled:
- 22.1. *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;*
  - 22.2. *The servant 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; and*
  - 22.3. *The other provisions of the contract are consistent with its being a contract of service.*
23. The respondent accepts that a director and shareholder can, in principle, also be an employee but this is a question of fact in each case.
24. In *Clark v Clark Construction Initiatives Ltd and another* [2008] IRLR 364 EAT, it was held the three circumstances where it may be legitimate not to give effect to a purported binding contract of employment between a controlling shareholder and a company: where the company is a sham; where the contract is entered into for an ulterior purpose (such as claiming payments from the Secretary of State) or where the parties do not conduct themselves according to the terms of the contract. Elias J set out eight factors to be taken into account:
- (a) *Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee. He has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.*
  - (b) *The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising, and nor does the fact that he in practice is able to exercise real or sole control over what the company does.*
  - (c) *Similarly, the fact that he 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.*
  - (d) *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. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.*
  - (e) *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*

*in fact 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.*

*(f) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing. This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.*

*(g) 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 it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them.*

*(h) Although the courts have said that the fact of their being a controlling shareholding 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.*

25. In *Secretary of State for BERR v Neufeld and another* [2009] EWCA Civ 280, the Court of Appeal held that an individual giving personal guarantees or loans to the company or having a controlling shareholding were irrelevant factors for the purposes of determining whether an employment contract was genuine. The Court of Appeal also held that failing to take full holiday entitlement was not a pointer against an employment contract (although taking too much holiday might be).

26. If the claimant is entitled to any award from the first respondent, this must be calculated at prevailing national minimum wage rates.

### Submissions

27. The first respondent asserts that the third element of the *Ready Mixed Concrete* test is not satisfied and relies on the following factors as evidence that the claimant was not an employee:

- 27.1. her salary was less than the minimum wage which suggests that she was remunerated as an office holder as office holders are not entitled to national minimum wage as employees are;
- 27.2. she took less holiday than she would have been entitled to as an employee;
- 27.3. she was not under the 'control' of the second respondent as she was not 'subject to or subordinate to anybody else';
- 27.4. employment status for tax purposes is not necessarily indicative of employment status for ERA purposes;
- 27.5. the terms of her contract did not reflect her work, for example in relation to hours of work.

28. The claimant relies on the following factors as evidence that she was an employee:

- 28.1. she was paid through PAYE, monthly into her bank account and recorded on payslips;
- 28.2. the amount of her pay was as advised by her accountant on the understanding that this would preserve her employment rights;
- 28.3. she regarded herself and was regarded by the business as an employee;
- 28.4. she had a written contract of employment;
- 28.5. she took maternity leave and received Statutory Maternity Pay;
- 28.6. she was put on furlough and received payments through the Coronavirus Job Retention Scheme;
- 28.7. if she did not take all her holiday entitlement, this was due to the needs of the business.

Determination of the issues

**Employment Status**

29. The determination of the claimant's employment status is ultimately a question of fact and all relevant factors must be taken into account.
30. I find that, on balance, the indicators of the claimant having employment status outweigh the contrary indicators. There is no rule that a director or a shareholder cannot be an employee and I find that this is a situation where the claimant, although she was a director and shareholder, was also an employee.
31. I have taken into account the existence of an employment contract, payment of SMP to her during maternity leave, payment of furlough payments during the pandemic under the CJRS, her day-to-day involvement in the business. She was acting in her capacity as employee, with responsibility for crucial aspects of the operation of the business, and not just carrying out the duties of a director.
32. I find that the claimant carried out her duties in accordance with her employment contract and I do not find any suggestion that this was a sham arrangement.
33. The fact that the claimant had entitlements which she did not enforce, such as the right to national minimum wage and statutory holiday entitlement, does not, in my view, mean that she must be taken not to have had those entitlements in the first place. There are many reasons why an employee does not avail themselves of all their statutory rights and, in this case, it is clear to see that the claimant wanted to ensure the success of the business. In addition, *Neufeld* is authority for the position that failing to take one's full contractual entitlement is not a pointer against an employment contract.

**Appropriate rate of pay**

34. The claimant stated that the calculation based on national minimum wage rates was put forward by her representatives when acting for her in making the

submission to the Secretary of State. However, she conceded that she was only asking to be paid the amounts based on her actual rate of pay and she had provided an alternative calculation on this basis.

35. In the circumstances of the claimant agreeing that she was looking for payments at the rate of her actual pay rates, I have considered whether this amount should be applied to the payments.

36. The Secretary of State is obliged to ensure that calculation of a claimant's pay is in accordance with legislative requirements as set out in the Employment Rights Act 1996 so the award must be calculated at national minimum wage rates.

Conclusion

37. The claimant is entitled to receive from the first respondent:

- 37.1. a statutory redundancy payment;
- 37.2. payment in lieu of 7.6 days accrued holiday;
- 37.3. payment in lieu of statutory notice of 12 weeks,

all sums to be calculated by reference to the prevailing rate of national minimum wage at the relevant time, which was £9.50.

38. The first respondent has agreed to make the appropriate calculations to determine the claimant's entitlements.

Employment Judge Davidson  
Date 30 May 2023  
Corrected Judgment dated 14 May 2024

JUDGMENT SENT TO THE PARTIES ON  
3 June 2024

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FOR EMPLOYMENT TRIBUNALS

Notes

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

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.