EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102079/2023

Held in Glasgow via Cloud Video Platform (CVP) on 7 February 2024

Employment Judge Campbell

Mr R Mackie & others	**Claimant** **Represented by:** **Mr P Kissen - Solicitor**
Glasvegan Limited	**Respondent** **Represented by:** **Ms A Bereza - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that Ms Arita Bereza was not an employee of the respondent.

REASONS

Background

1. This is a consolidated set of 19 claims, each by a former employee of the respondent who was dismissed by reason of redundancy on 27 November 2022. By the time of this hearing the parties agreed that there were 19 such claimants and that an employee Kieran Coles, previously included in the multiple, had not been dismissed by reason of redundancy and so was not part of the group.

2. The claimants argue that 20 employees of the respondent were proposed to be dismissed within a period of 90 days, thus triggering obligations on the part of the respondent to appoint representatives of the affected group and to consult collectively for a minimum period (discussed below under 'Relevant law').

3. The twentieth alleged employee in the affected group is Ms Arita Bereza, the owner of the respondent's shares. The claimants argue that she was an employee and that she was proposed to be dismissed also within the same 90-day period. The respondent argued that Ms Bereza was not an employee of the business.

4. A substantive preliminary hearing was therefore listed to determine whether Ms Bereza was an employee of the respondent at the material time, namely when the respondent was proposing to dismiss the other 19 employees as redundant.

5. If it were found that the claimant was such an employee, the claimant's complaints would proceed to a full hearing. If she was not, their claims would be unfounded in law and require to be dismissed.

6. At this hearing the claimants were represented by Mr Kissen, solicitor. Ms Bereza represented the respondent. She gave evidence and was cross-examined. The parties wished to provide closing submissions in writing, and did so after the hearing.

Legal Issues/preliminary issue

1. Given the nature of the proceedings there was a single issue to be decided, namely was Ms Arita Bereza one of a group of at least 20 employees whom the respondent proposed to dismiss by reason of redundancy within a 90-day period.

Applicable law

1. The relevant statutory law is found in the Trade Union and Labour Relations (Consolidation) Act 1992 (the 'Act''). Chapter II of the Act sets out procedures to be followed when implementing redundancies.

2. Section 188 of the Act states as follows:

188 Duty of employer to consult representatives.

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are–

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

3. Section 188 also sets out what consultation should cover, its purpose, and certain key pieces of information which should be provided to the representatives. It also, in subsection (7), provides for situations where it was not reasonably practicable to follow the requirements of collective consultation. In such 'special circumstances' an employer should take all such steps as they reasonably can. If an employer wishes to rely on this concession, the onus will be on it to prove that special circumstances existed which prevented if from consulting collectively as prescribed, and that it nevertheless took all steps it reasonably could towards meeting its obligations.

4. Section 189 of the Act says:

189 Complaint and protective award.

(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground–

(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

(1A) If on a complaint under subsection (1) a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 188, it shall be for the employer to show

that the employee representative had the authority to represent the affected employees.

(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied.

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(3) A protective award is an award in respect of one or more descriptions of employees—

(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188, ordering the employer to pay remuneration for the protected period.

(4) The protected period—

(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and

(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188; but shall not exceed 90 days.

5. Sections 190 and 192 explain who may claim a protective award, the process for doing so and how such awards will be calculated.

6. The term 'employee' is defined in the Act. Section 295 sets out:

295 Meaning of employee and related expressions.

(1) In this Act—

contract of employment means a contract of service or of apprenticeship,

employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, and

employer, in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed.

7. Beyond that definition, the question of whether an individual connected with a particular business is an employee is largely dealt with under common law. The relevant principles are discussed further in this judgment under the headings 'Submissions of the parties' and 'Discussion and decision'.

Findings of fact

1. The respondent is a company which operated a vegan café in the centre of Glasgow. It offered food and drinks for consumption on the premises and to take away. It was incorporated on 15 February 2018 and at all material times Ms Arita Bereza was its sole director. She is also its sole shareholder. It began as a take-away only operation before expanding.

2. The respondent employed staff to prepare food and drinks, serve customers and carry out other activities such as cleaning. 'Staff' is used in this sense to denote employees excluding Ms Bereza herself. The number of staff increased to 19 in total, made up of a mix of students and other individuals working part-time, and some full-time employees. The café was open seven days a week.

3. The staffing structure involved a Manager, Ms Wallen, around six supervisors working under her, and then the rest of the staff generally. The Manager worked full-time but would not be present for the whole time the café was open. At such times a supervisor would step up and oversee the running of the place.

4. Ms Bereza did not as a rule carry out any of the customer-facing activities of the café. Under normal circumstances she would spend as little as one or two hours per week there. She owned two other businesses and devoted more

time to those. One was a similar café in Fort William, which she had taken over in June 2022 and demanded more of her time, and the other was a vegan catering business which provided food to weddings, festivals and conferences. Occasionally Ms Bereza spent more time at the Glasgow café because there was a specific reason, such as to ensure staff were adhering to their duties or on one occasion to observe staff interacting and, after an allegation of bullying, to be visible should anyone want to approach her.

5. Ms Bereza did not manage any of the staff from day to day. She relied on the Manager Ms Wallen to do that. If Ms Wallen was not available then one or more supervisors would deputise for her. Ms Wallen prepared weekly staff rotas and dealt with day-to-day staffing matters. Ms Bereza prepared rotas on one occasion when Ms Wallen was ill. If Ms Bereza planned to be at the café in a given week she would ask Ms Wallen to add her to the rota. She tended to do this to make herself more visible to staff or to check how the business was running. She did not want staff to be surprised to see her on the premises.

6. The activities which Ms Bereza undertook were overseeing payroll, placing orders of supplies and ingredients, and authorising payment of bills. When at the café, she helped prepare food on rare occasions when the staff were busy, but generally did not do so. When there she would be dealing with other matters and had apologised to staff at times for not being able to help them out.

7. Ms Bereza did not have any written terms of engagement with the respondent. The staff were given written statements of their terms and conditions of employment.

8. Ms Bereza did not consider herself an employee of the respondent, or either of her two other businesses. She did not expressly agree to become an employee. With the respondent there were no rules which dictated what she should or should not do. No person had authority over her. She had no fixed hours and came and went as she pleased. She had no day-to-day duties. She considered that any activities she carried out were in the capacity of business owner and not for immediate financial reward.

9. Initially, Ms Bereza was not paid wages or salary. After the respondent had been established for two years she took payment of dividends on her shares. She was not entitled to sick pay or holiday pay. She used her own laptop computer, mobile phone and car to carry out activities in relation to the business of the respondent and her two other businesses.

10. Around August 2019 Ms Bereza's accountant advised her to add herself to the respondent's payroll and pay herself a monthly payment of £788 so that she could take advantage of the income tax annual personal allowance. She was told that this was more tax efficient than paying herself a dividend for the year, which would be taxed. The claimant was not aware that this could suggest she was an employee. She acted on her accountant's advice. Ms Bereza received a payslip each month which describe the payment as 'personal allowance'. It was calculated at a level to make best use of the annual tax-free allowance.

11. Ms Bereza invested her own funds in the respondent and took out business loans in her own name, or guaranteed personally by her.

12. In the latter half of 2022 the business of the respondent was experiencing difficulty. By November 2022 it appeared that it was failing. On 11 November 2022 Ms Bereza had herself removed from the respondent's payroll system and stopped the payments she had been receiving. She did this because the business could no longer afford to pay her the monthly sum as well as the wages of the staff. She additionally made a payment from her own funds to the respondent so that it could fully meet its obligation to pay the staff and associated National Insurance contributions. She added herself to the payroll system of her café in Fort William and began receiving similar payments from that business.

13. On 27 November 2022 the staff were dismissed by reason of redundancy. Ms Bereza did not send any communication to herself to indicate that she was being dismissed also. She remained a director and shareholder of the respondent.

Submissions of the parties

14. Both parties provided closing submissions in writing. Those were considered in the process of deciding the preliminary issue.

15. In summary, Mr Kissen referred to the definition of 'employee' in section 295 of the Act. He also cited the Employment Appeal Tribunal ('EAT') judgment in ***Clark v Clark Construction Initiatives Limited [2008] IRLR 364*** which dealt in particular with some factors to consider when assessing whether a majority shareholder of a business is also its employee. Those were (quoting from the judgment):

(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.

16. Mr Kissen also referred to the earlier authority of ***Lee v Lee's Air Farming Limited [1961] AC 12.*** This case dealt with the question of whether or when a governing director of a company could also be an employee. He submitted that the position of Ms Bereza was comparable to that of Mr Lee who was a governing (i.e. managing) director but, through his activities on behalf of the company and other factors, could at the same time be its employee. Ms Bereza was, he said, carrying out some activities as an agent of the respondent and they were not requirements upon an owner or director, such as helping out with the serving of customers or supervising others.

17. Finally, Mr Kissen pointed both to the fact that Ms Bereza received a taxable salary regularly, and that payment had only stopped when redundancies were made. He referred to authorities to the effect that employment can exist, or continue, in some circumstances without payment of salary, and that in particular the non-payment of salary in extreme circumstances after a settled pattern of regular payments and amounts should not detract from the overall picture.

18. Ms Bereza, in summing up the respondent's case, focussed on the various factors established at common law as being relevant to the question of employment status. The aspects she referred to, together with her submissions on how they applied to the facts of this case, were as follows:

    a. **Agreement to work personally for pay** – Ms Bereza said she had never agreed to work for pay, and any work she did was in the capacity of the owner of the business. She never expected to be paid for what she did. She recognised that in reality, at least from August 2019, she was paid, but this was to take advantage of a tax allowance on the advice of her accountant, and not related to what she did. She was new to owning a business and trusted her advisor. She did not know that being paid through payroll could make her an employee. She never intended to be an employee. At times she worked for no pay and at other times she received pay even though she was not working for the respondent at all.

    b. **Mutuality of obligation** – an employment contract involves expectations and obligations on both sides. There was no obligation on the part of Ms Bereza to do any work and she had no right to be provided with work either. She chose to work when she felt it was necessary from the perspective of the business owner.

    c. **A degree of control** – the respondent had no control over what Ms Bereza did. It was entirely up to her when she came to the café, for how long, and what she did when she was there.

d. **Lack of any written contract** – whilst not determinative, Ms Bereza was not given any contractual documents, whereas every member of staff was issued with a written statement of terms and conditions of employment.

e. **Lack of other terms or features normally present in an employment contract** – Ms Bereza specifically pointed to the fact that she had no entitlement to statutory payments such as sick pay, no procedures such as disciplinary or grievance procedures applied to her, and any equipment she used was her own and not provided for her. She was not paid a redundancy payment when her staff were.

f. **Degree of personal investment and risk** – Ms Bereza personally took on risk of failure of the business, and enjoyed the benefit of its success. She took out loans in her own name.

19. She also found it notable that the claimants did not allege she was an employee of the respondent until it became clear that there were only 19 other individuals made redundant. Initially it had been thought that Mr Coles and another employee were part of that group, but it had later been clarified that both left the respondent's service for reasons other than redundancy.

20. Both parties' submissions were helpful in focussing on the relevant matters to be considered in determining the issue of Ms Bereza's legal status.

Discussion and decision

21. Guidance has been given in many previous authorities to the effect that the terms of any contract between a putative employer and alleged employee should be reviewed, to see what they say or suggest. Similarly, the intentions of the parties can be instructive, although not necessarily decisive.

22. Here, there was no physical contract to speak of in relation to the activities that Ms Bereza occasionally undertook for the respondent. Her evidence as to the intention of the parties was that it was never intended, not even contemplated, that she would be an employee.

23. Nevertheless, it is recognised that an employment contract can exist even where there is no documentation to that effect – or what documents there are suggest something else – and neither of the parties believed that to be the case. It is necessary to look at the reality of the situation.

24. In ***Autoclenz Limited v Belcher and others [2011] UKSC 41,*** the Supreme Court reinforced principles set out on ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497*** in relation to what is required for a contract of employment. There are essentially three conditions:

a. The individual agrees that in consideration for pay they will provide their own work and skill in performance of some service;

b. They accept that the recipient of their service will have enough control that they can be described as their 'master'; and

c. The other provisions of the contract are consistent with it being a contract of service.

25. Three other propositions were set out in the earlier case:

a. There must be an irreducible minimum of obligation on each side;

b. If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employment status; and

c. If a contractual right such as the right to provide a substitute exists, it does not matter that it is not used. It will still be part of the agreement.

26. On the facts of this claim it could be said that there was consideration between the respondent and Ms Bereza, at least from August 2019 onwards. She was paid a regular salary through the payroll system. However, she did not receive that in return for any identifiable work, and only worked at all sporadically. There was no connection between what she paid and the rare and limited work she carried out. That work was explained by other factors – a need to be visible to staff, or very occasionally helping out when the café was busy.

The payment arrangement was set up on the advice of the respondent's accountant and not because Ms Bereza at that time was carrying out work that required reward, or was about to do so. It was a tax-efficient step taken by a business owner.

27. Nor could it be said that there was sufficient, or essentially any, control by the respondent over Ms Bereza. She had three businesses, one of which was the respondent. She chose to allocate her time between them as she saw fit. Nobody could order her to do anything. There was no expectation of her carrying out any work at all for the respondent. The tasks she did undertake, such as overseeing payroll and dealing with suppliers, fitted just as well with her being a business owner distinct from the day to day running of the café, which had as its sole purpose the serving of customers.

28. Turning finally to the question of any other aspects of the contract, it is difficult to see that there was a contract at all. Considering the wider concept of Ms Bereza's relationship with the respondent, almost all of the evidence pointed in the direction of her not being an employee. There was no written contract, as there was for other staff who were accepted to be employees. She had no agreed hours. The work she carried out was minimal and sporadic, as and when she chose. She created a staffing structure involving supervisors and a manager so that she would not have to manage the café. She spent as much, or more time on her other businesses. She had no entitlement to take holidays, or be paid sick pay, or join an occupational pension scheme. She was not subject to a disciplinary procedure and could not raise a grievance. She did not have to give notice and was not entitled to receive it, and she was not dismissed when others were, or paid a statutory redundancy payment.

29. The factor most supportive of Ms Bereza being an employee appeared to be the regular payment of a salary for over three years. However, as discussed above, this was not linked to her working (as she barely did in the normal sense) and was implemented as a tax-efficient way of providing a return from the business.

30. Whilst, as acknowledged in ***Lee v Lee's Air Farming Limited [1961] AC 12,*** a director could well also be an employee of the relevant company, there were some notable differences between the circumstances of that case and the present claim. Mr Lee was the chief (indeed only) pilot of the business in question, and as such an active, if not the most active, person within its operations. The same could not be said of Ms Bereza. She had consciously not taken on such a role. Because Mr Lee performed such a large quantity of key work it was easy for the court to conclude that a contract must exist between him and the company. There was a lack of foundation for such a conclusion in the current claim. Mr Lee was paid wages at an agreed level and could not profit in any way beyond that. Ms Bereza took on greater risk for the opportunity of greater reward. Mr Lee worked closely with another employee. Ms Bereza did not. Mr Lee's aircraft was owned by the company and not him. Ms Bereza provided her own equipment and vehicle.

Conclusion

31. On the evidence of this claim, and applying the relevant legal principles, Ms Bereza was not an employee of the respondent at any material time, and in particular not at a time when the redundancy of the respondent's 19 employees was being 'proposed'.

32. It follows that the respondent was not proposing to dismiss 20 or more employees as redundant within a 90-day period, as the claimants allege. On the evidence, even had Ms Bereza been an employee of the respondent, there was no proposal that she would be dismissed along with the 19 claimants. Whatever connection she had with the respondent was undisturbed by the 19 redundancies. Had she been an employee, she would have remained one after 27 November 2022.

33. Given the above, it appears that the tribunal has no jurisdiction to determine these claims. That however was not a matter specifically to be decided at this hearing. The parties are therefore required to confirm to the tribunal and each other their positions in light of this judgment, no later than 21 days after the date when it is issued to them. If any further procedure is necessary, it will be determined after that point.

Employment Judge: **B Campbell**
Date of Judgment: **14 May 2024**
Entered in register: **21 May 2024**
and copied to parties